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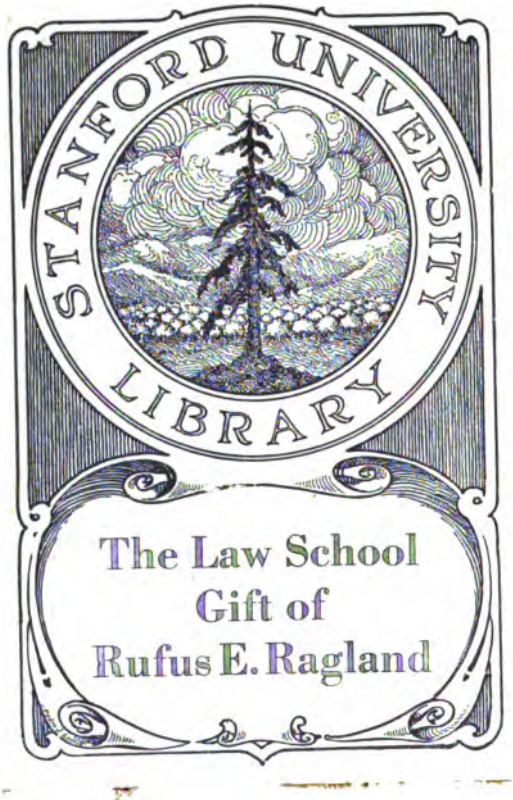
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TRIAL EVIDENCE.

THE RULES OF EVIDENCE

APPLICABLE ON THE TRIAL

OF

CIVIL ACTIONS

(INCLUDING BOTH CAUSES OF ACTION AND DEFENSES)

AT COMMON LAW, IN EQUITY,

AND

UNDER THE CODES OF PROCEDURE.

BY AUSTIN ABBOTT.
OF THE NEW YORK BAR.

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Third Impression.

PREFACE.

In this volume I assume that the reader is familiar with the general principles of the Law of Evidence, and is concerned with their proper application in actual practice. I have accordingly sought to state the most useful, convenient, and trustworthy rules as to the mode of proof of each material fact in all the great classes of actions and defenses; and to illustrate and support these rules by a selection of authorities drawn from the decisions of all the American and English courts, and from the works of the best text-writers.

Recent changes in procedure, accompanying or resulting from the Code practice, have had far-reaching consequences in respect to the mode of dealing with the subject of evidence. The abolition of formal distinctions affecting actions and suits, the new methods of pleading, the abrogation of former disqualifications of witnesses, and the advance in assimilating the practice in the United States courts to that in the State courts, have silently effected many radical changes in the mode of proof, and have had a wide and powerful influence upon the practical application of the general principles of evidence. In consequence of these modifications of the law, most of the questions as to competency of witnesses and the effect of the pleadings, which formerly occupied so much attention, have dropped out of notice, and questions of the relevancy and competency of particular facts relating more or less directly to the issue, and of the weight and cogency of evidence, have been brought into new importance. Since the law has given to the trial courts increased freedom in the admission of evidence, the appellate courts justly use increased care in scrutinizing questions of evidence, that they may relieve against all substantial errors which transcend the limits of that freedom. And there has also been a general advance in the development of the rules by which appellate courts (in proper cases) reweigh the evidence on which facts have been found in the trial courts.

Hence discussions on questions of evidence, in our appellate courts, are now more important and more frequent than ever before; and

careful practitioners are more than ever accustomed to include in their preparation for trial, an examination of the authorities as to the mode in which, in the present condition of the law, the cause of action or defense should be proven.

Each class of actions has its peculiar rules of proof. These are the result of experience, adapting the general principles discussed in the text-books to the exigencies of justice in each kind of litigation. It is not enough to know the general principles which are to be applied. It is necessary to know also how they are to be applied and limited in the particular action on trial. Such special rules, though less artificial and technical than formerly, have become, under the new procedure, more numerous and important than ever. On questions of evidence the conflict apparent among text-writers and decisions, often arises from supposing that general principles have similar application and effect in all classes of cases. The method here pursued aims to give, in successive chapters, under the title of each principal cause of action and defense, the characteristic rules now applied by our courts in that class of cases, together with an indication of the general principles on which these special rules rest, and by which they are to be extended or limited, in new instances.

The method chosen for the statement of these rules is that which seemed to promise the best practical assistance to counsel and to the court, in the trial of issues; to the practitioner generally in preparing for trial and selecting witnesses; and also to the pleader in framing issues.

The order of topics pursued first disposes of questions connected with the character of Particular Classes of Parties, as likely to arise in actions of almost any kind, and then proceeds with Particular Causes of Action, taking first those in which the main proof is usually of facts raising an implied contract or legal duty; followed by those involving writings unsealed, sealed, or of record; then those turning on negligence or tort; then those seeking specific relief, founded on either of these kinds of transactions; and finally those which, in a greater degree, depend on statutes, &c. Defenses which are common to several classes of actions are not treated in connection with each cause of action, but in the third and last part of the volume.

The arrangement under each subject requires the reader to analyze closely his cause of action or defense; and thus warns him, in preparing his proofs, not to overlook any element which the case may involve. He should remember that he is necessarily assumed to have already decided that his action will lie or his defense avail, and that whatever may here be said upon that point is subordinate and incidental to the

main object, viz., to aid him in proving or disproving whatever allegations in the pleading before him may be material, and to indicate the various phases of the subject under which the evidence adduced may or may not be admissible. The practitioner will find that such a close analysis of the probative facts of a cause of action or defense, is of the utmost value in giving him a mastery of the details of the case; and the student will find it equally useful in leading him to an understanding of the law.

If the rules I lay down are stated with somewhat more conciseness and certainty than is usual in law treatises, it is not because I have consciously deferred too much to the authority of reported cases, but because I believe that the main rules of proof now administered by our courts, are capable of clear and precise statement, upon authority which will usually be controlling at *nisi prius*. I have endeavored to present them thus in the text: rules that are doubtful or of secondary value, I have sought to indicate suitably in the notes.

Discussion of the cases cited, and their relative authority, has therefore been omitted; my purpose being to cite those of importance and value, and to state concisely and with certainty the resulting rules; and to cite cases of minor authority so far as they justly serve to extend, qualify, or apply the doctrine of the leading authorities: otherwise to omit them or refer to them as *contra* to the rule stated. In a work covering so extended a field, it would be impracticable to cite all the cases examined, and I have not sought to multiply but rather to sift and select authorities.

Upon those questions on which the adjudications or statutes of different States are at variance, I have stated the rule which I understand to prevail in New York, calling attention, however, to questions on which there is a serious general difference of opinion; such, for instance, as the burden of proof as to contributory negligence,[1] the competency of admissions and declarations of an assignor to impair the claim of his assignee,[2] the effect of irregular indorsement,[3] and the like. In cases of minor importance it is generally assumed that the reader will notice any peculiar rule prevailing in his own jurisdiction.

Discussion of general principles has been out of place, except rarely and in a limited degree, where it has seemed necessary, either to show how those principles are now administered in the American courts

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[1] Pages 594–96. [2] Pages 12, 13. [3] Pages 436–40.

somewhat differently than indicated in the books, or to aid the reader to meet vexed and unsettled questions.

In reviewing the work on which I have been so long engaged, and the preparation for which has so constantly connected itself with professional practice, I am not unconscious of imperfections and inequalities in its execution; but to the kindly consideration of the profession I submit it, in the hope that it may often aid and seldom mislead.

AUSTIN ABBOTT.

TIMES BUILDING, NEW YORK, May, 1880.

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31. — if made during his ownership.
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33. Distinction between declarations and transactions.
34. Declarations admitted in case of conspiracy.
35. Receipt of the assignor.
36. Notice to produce.

1. *Rules applicable to Assignees.*]—To avoid repetition when discussing rules applicable to particular classes of actions, we will first consider certain rules which are common to many classes of actions, because applicable generally to peculiar classes of parties.

The rules thus applicable to assignees are not limited to transferees by formal deed, but, with qualifications to be indicated as we proceed, apply generally to all transferees of non-negotiable things in action.

2. *Allegation of Assignment Material.*]—If plaintiff seeks to recover upon a cause of action which accrued to another person, and became the plaintiff's by assignment, the allegation of assignment is essential. Under an allegation of a cause of action accruing to the plaintiff, proof of a cause accruing to his assignor is not admissible;[1] and under an allegation of an assignment, proof

[1] O'Neil v. N. Y. Central R. R. Co. 60 N. Y. 142. But the court have power to allow an amendment at the trial. Ib. 143. Where the cause of action originally accrued to plaintiff, and has been assigned and reassigned, proof of the assignment and reassignment is not necessary to sustain the action. Washoe v. Hibernia Fire Ins. Co. 7 Hun, 75. And where the plaintiff was entitled, both as the real party in interest, and as assignee of his trustee, he may recover on proof of either title. Pitney v. Glen's Falls Ins. Co. 65 N. Y. 6, 18.

of an assignment after suit is brought is insufficient.[1] If a written assignment produced bear date before the commencement of the action, the date is presumptive evidence that it was then made; but if it bear no date, some evidence should be given indicating that it was in fact made before the action was commenced.[2]

3. *Requisite Proof of Assignment.*]—If no writing passed, the assignment of a debt may be proved by parol,[3] even though there was an agreement unperformed to give a written transfer.[4] It is sufficient proof of a parol assignment that some evidence of the debt—such as a bond or mortgage,[5] or a transcript of judgment,[6] or a note held for the debt, or part of it,[7]—was delivered to the assignee by the assignor, with intent to transfer the title to the demand; and the declarations of the assignor accompanying the delivery may be proved by a witness as part of the *res gestæ*. It is not essential to call the assignor. But, on the other hand, neither the mere production of a non-negotiable security,[8] nor proof of mere words of intention on the part of the alleged assignor, are enough. Nor can plaintiff prove his title by mere evidence of oral declarations of the assignor, that he had at a previous time assigned the demand to plaintiff,[9] unless such declarations were made in defendant's presence, in which case they may be proved as laying a foundation for his admission of an assignment, or for a presumption thereof from his silence.

4. *Implied Assignment.*]—In some cases where there was no express assignment, the court will, upon equitable grounds, presume an assignment from the fact that the plaintiff, being entitled to relief, and with intent to enforce the claim for his own reimbursement, paid the one who was legally entitled.[10] And in case of negotiable paper "taken up," even by a stranger, at maturity, on dishonor, an assignment has been implied from its delivery to him uncancelled. In this class of cases, the question whether paying the creditor was a satisfaction of the demand or a purchase, is ordinarily a question of intention of the parties, which may be proved by parol.[11] But the plaintiff should be pre-

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[1] Garrigue v. Loescher, 3 Bosw. 578. But variance in the mode of assignment is disregarded, if not prejudicial. Bowman v. Keleman, 65 N. Y. 598.

[2] Barrick v. Austin, 21 Barb. 241. Compare paragraph 35 below.

[3] Hooker v. Eagle Bank, 30 N. Y. 83.

[4] Doremus v. Williams, 4 Hun, 458.

[5] Runyan v. Mersereau, 11 Johns. 534; and see 17 Id. 284; Kamend v. Huelig, 12 Am. Law Reg. N. S. 61.

[6] Mack v. Mack, 3 Hun, 323.

[7] Armstrong v. Cushney, 43 Barb. 340; Billings v. Jane, 11 Id. 620. For the more strict common-law rule see Palmer v. Merrill, 6 Cush. 282.

[8] Barrick v. Austin, 21 Barb. 241.

[9] Worrall v. Parmelee, 1 N. Y. 521.

[10] See O'Neil v. N. Y. Central R. R. Co. above; Smith v. Miller, 25 N. Y. 619; Vail v. Tuthill, 10 Hun, 31.

[11] Compare Champney v. Coope, 32 N. Y. 543; Sheldon v. Edwards, 35 Id. 279, and cases cited; Edgerly v. Emerson, 23 N. H. 555, 565, 570; and chapter on *Actions for Money Paid.*

pared not only to show that it was his intent to acquire the right of action, but to give some evidence that it was the intent of the creditor to transfer it to him. The creditor's delivery to him of the evidence of debt, uncancelled, is ordinarily sufficient to sustain a finding on this point, as against the debtor.[1] But where the payer was bound under seal or by judgment to pay the debt, his action must ordinarily be for money paid.[2]

5. *Statute of Frauds.*]—When no consideration for the assignment is shown, and no delivery, the assignment, if for the price of $50, or more,[3] or when no price was fixed, if of a chose in action clearly proven to be worth that sum,[4] must have been evidenced by a note or memorandum in writing. But a written assignment, unless involving an interest in land,[5] need not be under seal, even though the thing assigned be a specialty.[6]

6. *Presumptive Evidence.*]—Direct proof of an assignment is not always essential. The title to an incidental or collateral security which is exclusively applicable to the principal debt or obligation, is presumed to have been assigned with the principal debt or obligation, unless the contrary is shown; hence an assignment of the collateral may be presumptively shown by proof of an assignment of the principal obligation.[7] But an assignment of the principal obligation cannot be inferred from the mere fact of an assignment of a collateral security or other incident.[8] Since the change in the law allowing assignees to sue in their own names, it has been much questioned whether an assignment of property or things in action will carry, by implication, incidental causes of action for fraud, mistake, and the like, which cannot subsist independent of the principal right. At first these were thought not to pass unless expressly included; but the better opinion is that the question is usually one of intent, and that an assignment of a thing in action may carry the right to those reme-

[1] Compare Freedman's Savings, &c. Co. v. Dodge, 93 U. S. 382; Union Trust Co. v. Monticello, 63 N. Y. 314; Lancey v. Clark, 64 Id. 209; Shumway v. Cooley, 9 Hun, 131.

[2] Champney v. Coope, Sheldon v. Edwards, above.

[3] 2 R. S. 136; People v. Beebe, 1 Barb. 379.

[4] Buskirk v. Cleveland, 41 Barb. 610; Crookshank v. Burrell, 18 Johns. 58. *Contra*, 12 Sim. 189; 1 Ohio St. 350.

[5] Other than a lease not exceeding one year. 2 R. S. 134, §§ 6, 7; Bissell v. Morgan, 56 Barb. 369.

[6] *E. g.* a judgment. Ford v. Stuart, 19 Johns. 342; or a bond or covenant. Morange v. Edwards, 1 E. D. Smith, 414; Dawson v. Coles, 16 Johns. 51.

[7] Thus an assignment of the mortgage may be presumed from proof of an assignment of the bond or note. Jackson v. Blodgett, 5 Cow. 202; Green v. Hart, 1 Johns. 580; and assignment of a guaranty of a bond and mortgage may be presumed from the assignment of the bond and mortgage by the guarantee. Cady v. Sheldon, 38 Barb. 103; and see 40 N. Y. 181. So the assignment of a judgment carries the right to any further remedy subsisting for the debt on which the judgment was recovered. Pattison v. Hull, 9 Cow. 747; Bowdoin v. Coleman, 3 Abb. Pr. 431; s. c. 6 Duer, 182.

[8] Thus intent to transfer the bond cannot be inferred from an assignment of the mortgage alone. Merritt v. Bartholick, 36 N. Y. 44, aff'g 47 Barb. 253; s. p. 26 N. Y. 404.

dies inseparable from it which might have been expressly assigned.[1]

7. *Consideration.*]—For the purpose of enabling the assignee to maintain an action against the debtor, proof of a consideration for the assignment is not essential (unless the statute of frauds requires it), for an absolute assignment transfers the legal title.[2] The consideration, however, may be material in respect to defenses. If a consideration is not expressed, where the assignment is in writing, it will be presumed.[3] Indeed, it is no longer necessary in all cases to prove such an assignment as passes the legal title, in order to enable the assignee to sue in his own name. Whether his title be legal or equitable, if he have the whole interest he may maintain the action.[4] But the defendant may prove that the assignee paid and took assignment as trustee or agent for one who has no right to enforce the claim—for instance, a principal debtor or a joint debtor.[5] The defendant cannot be allowed to prove that the consideration was inadequate,[6] or even that there was none.[7] Even proof that a stranger paid the consideration for the assignment is not enough to defeat the action. If the plaintiff is a mere trustee for a third person, the burden is on the defendant to show it,[8] and then it must be shown that he is not the trustee of an express trust within the statute.[9] It is enough, in the first instance, for plaintiff to prove either that he is the real party in interest, or that he is the trustee of an express trust, sufficiently to show that his recovery will bar the right of the assignor.[10]

8. *Gift.*]—If plaintiff claims under an oral gift, there must

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[1] Bentley v. Smith, 1 Abb. Ct. App. Dec. 126; Bolen v. Crosby, 49 N. Y. 183. Thus it has been held that where a right arising out of contract involves a remedy for fraud or deceit, the right to prove the tort follows the original cause of action, and vests in the assignee. Westcott v. Keeler, 4 Bosw. 564. *Contra*, Bliss' Code of N. Y. 434; and see 53 N. Y. 298. So the right of a *cestui que trust* to enforce a power has been held, on a view of the design and intent, to pass by his deed of the title. Clark v. Crego, 47 Barb. 599. So the assignment of a usurious security carries the right of action on the original valid consideration. Gerwig v. Sitterly, 56 N. Y. 214; affi'g in effect 64 Barb. 620. So of the right to have a contract reformed for mistake. Bentley v. Smith, above. As to new promise, compare Stearns v. Tappin, 5 Duer, 294; Hoyt v. Dusenbury, 53 N. Y. 521.

[2] Cummings v. Morris, 25 N. Y. 625. Whether the action is on contract; St. John v. Mutual Life Ins. Co. 13 N. Y. 31; or for a wrong. Merrick v. Brainard, 38 Barb. 574; 34 N. Y. 208.

[3] Eno v. Crook, 10 N. Y. 60; Richardson v. Mead, 27 Barb. 178. Where the extinguishment of a precedent debt was relied on, it was held that there must be evidence of actual extinguishment. 34 Barb. 629. But doubted; compare 56 Id. 362.

[4] Thus the holder of a non-negotiable note indorsed in blank may recover on it. Hastings v. McKinley, 1 E. D. Smith, 273; affi'd in Seld. Notes, No. 4, 19.

[5] Ten Eyck v. Craig, 62 N. Y. 416, affi'g 2 Hun, 452; Arnott v. Webb, 1 Dill. C. Ct. 362.

[6] Mills v. Fox, 4 E. D. Smith, 220.

[7] Daby v. Ericsson, 45 N. Y. 786; Stone v. Frost, 61 Id. 614, affi'g 6 Lans. 440.

[8] Eno v. Crooke, 10 N. Y. 60.

[9] Code of Pro. § 111.

[10] See Gardner v. Barden, 34 N. Y. 433, and cases cited; Allen v. Brown, 51 Barb. 86; 44 N. Y. 228.

be proof not only of words of gift, but of delivery of the evidences of the thing in action sufficient to transfer the dominion to the plaintiff;[1] and this rule is equally applicable whether the gift was in view of death or not.[2] According to some authorities, there must be a written transfer,[3] but while there may be reason for this rule when the gift is set up against the alleged donor, or his successors or representatives, the better opinion is that a gift by delivery is sufficient to enable the donee to enforce the chose in action against the debtor.[4] But bare possession of the evidences of debt is not ordinarily enough to raise a presumption of a gift.[5] Where the party claims title to the cause of action by such a disposition, he is not required to show affirmatively, and with minuteness, the circumstances under which the alleged gift was made; nor that the donor was of sound disposing mind and memory when he made the gift, and that delivery of the subject was his free and voluntary act. These are matters of defense, equally in cases of gifts *inter vivos* and gifts *causa mortis*.[6]

9. *Object, when Material.*]—If the transfer was valid as between the parties to it, the defendant cannot question it by proof that it was made for the purpose of enabling the suit to be brought, because the assignor could not bring it,[7] or for the purpose of enabling the assignor to be a witness.[8] And even proof of fraud on the part of the parties to the assignment, such as would enable creditors to avoid it, will not avail the debtor.[9] But evidence that the assignment was positively illegal, as, for example, that it was made to an attorney for the purpose of his bringing an action, is competent.[10] In other words, it is enough for plaintiff to show an assignment which bound the assignor, but defendant may show that it was illegal on the part of the plaintiff to receive it.

10. *Best and Secondary Evidence.*]—If it appears that the assignment of the cause of action was made by a written instrument, the writing is the best evidence, and must be produced or accounted for.[11] And in general, wherever the nature or extent

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[1] Johnson v. Spies, 5 Hun, 471. An indorsement of intent to give, without proof of delivery, is not enough. Zimmerman v. Streeper, 75 Pa. 147.

[2] Bedell v. Carll, 33 N. Y. 581.

[3] Johnson v. Spies, above; Gray v. Barton, 55 N. Y. 73; 2 Kent's Com. 439.

[4] Mack v. Mack, 3 Hun, 323. See page 155 of this vol.

[5] Grey v. Grey, 47 N. Y. 552, rev'g 2 Lans. 173; Bedell v. Carll, 33 N. Y. 581.

[6] Bedell v. Carll, above.

[7] As where the assignor and debtor were both foreign corporations. McBride v. Farmers' Bank, 26 N. Y. 450; affi'g 25 Barb. 657; or the assignor was a foreign executor or administrator. Petersen v. Chemical Bank, 32 N. Y. 21.

[8] Gardner v. Barden, above; and see Westervelt v. Allcock, 3 E. D. Smith, 243.

[9] Osborne v. Moss, 7 Johns. 161; Waterbury v. Westervelt, 9 N. Y. 598.

[10] 2 R. S. 288, § 71; Mann v. Fairchild, 3 Abb. Ct. App. Dec. 152; Moses v. McDivitt, 2 Abb. New Cas. 47. Formerly the mere purchase was evidence of intent. 3 Wend. 120. It is now only a necessary circumstance with others to show intent. See Bristol v. Dann, 12 Wend. 142; Williams v. Mathews, 3 Cow. 252.

[11] Gilmore v. Bangs, 55 Ga. 403.

of plaintiff's interest in property is material under the issue, the written instrument of transfer under which he claims may be called for as the best evidence.[1] But a distinction is made in this rule, between a writing which is the vital instrument of transfer, such as a bill of sale, and a writing which is merely an incidental or collateral memorandum of a transfer made verbally, such as a bill of parcels stating price, and receipted. Where the former is shown to exist it must be produced; but the latter is not primary evidence, and need not be produced.[2]

11. *Proof of Execution.*]—The execution of a written assignment may be proved by having it acknowledged by the assignor, or proved by a subscribing witness, before an officer authorized to take acknowledgment and proof of deeds;[3] and this may be done even after the action has been commenced, and at any time before the actual offer of the document in evidence.[4] Unless this is done, the assignment, whether under seal or not,[5] if attested by subscribing witness, must be proved by the witness or his handwriting.[6]

12. *Delivery and Acceptance.*]—Delivery of a written assignment is presumed when the instrument is proved to have been executed by the assignor, and is actually produced by the plaintiff at the trial;[7] and affirmative proof of the acceptance of an assignment which appears to be beneficial to the assignee, is not required from the party propounding it, but the party impeaching it must disprove acceptance.[8]

13. *Assignment with Schedules.*]—If plaintiff claims under a general assignment with a schedule of the articles transferred, general words in the assignment, with nothing in it to indicate that the schedule is to control, will pass the right of action, though it be omitted from the schedule; and parol evidence that it was not intended to pass it, has been held incompetent as varying the assignment.[9] But evidence that it was in fact inserted in the schedule by a designation partially false or inapplicable is competent.[10]

14. *Assignment by Corporation.*]—If plaintiff claims as assignee of a corporation, evidence of the existence of the corporation is admissible without any allegation of that fact other than such as is implied in the mention of the corporate name in the

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[1] Epping v. Mockler, 55 Ga. 376.
[2] Dunn v. Hewitt, 2 Den. 638.
[3] N. Y. L. 1833, p. 396, c. 271, § 9. Add county clerk's certificate where required.
[4] Holbrook v. N. J. Zinc Co. 57 N. Y. 616.
[5] 1 Greenl. Ev. § 569; King v. Smith, 21 Barb. 158.
[6] Page 505 of this vol., where the practice is stated. 1 Greenl. Ev. § 569; Jones v. Underwood, 28 Barb. 481.
[7] Story v. Bishop, 4 E. D. Smith, 423; North v. Turner, 9 Serg. & R. 244.
[8] Van Buskirk v. Warren, 4 Abb. Ct. App. Dec. 457.
[9] Cram v. Union Bank, 1 Abb. Ct. App. Dec. 461. *Contra*, Platt v. Thorn, 8 Bosw. 574. Compare Nims v. Armstrong, 31 Md. 87; 2 Whart. Ev. § 944.
[10] Commercial Bank v. Clapier, 3 Rawle, 335, 339.

complaint.[1] The plaintiff is not held to make, as against the debtor, so clear proof of a valid assignment by the corporation as he might be required to in a contest with the creditors or stockholders of the corporation. As against the debtor, an assignment of the cause of action is presumed valid, although, having been made by a moneyed corporation, a vote of the board was necessary to its legality, and there is no evidence thereof.[2] But where there is evidence that the transfer was made without a vote of the board, the burden is on the assignee to show that he took it for value, and without notice.[3] This he may always show in support of his title, whether he took directly from the corporation or through a third person.[4] The fact that plaintiff himself,[5] or even one of several plaintiffs,[6] was a director at the time of such an illegal transfer, is sufficient evidence of notice to defeat the action.

15. *Authority of Officer or Agent.*]—To show the authority of the officers of the corporation to make the transfer, their official character may be proved either by the corporate minutes, or by witnesses testifying to the fact of their habitually acting as such, and without producing the books,[7] and the jury may infer the authority of the officer to do the particular act from evidence of the exercise by him of the same general power, with the knowledge and acquiescence of the directors.[8]

16. *Parol Evidence to Vary a Writing.*]—The rule excluding parol evidence, when offered to vary a contract, has often been applied against assignees of a contract, and against a debtor seeking to explain or vary an assignment of his debt. But the later authorities recognize the qualification that in actions between a stranger to the instrument and a party to it, as well as between strangers, either may give parol evidence to vary it.[9] Hence the rule, as now understood, forbids neither the assignee nor the debtor to give parol evidence to vary either the contract sued on or the assignment, unless they are both parties to the same instrument, or have come under the obligations of parties, or the agreement is one which the law requires to be in writing.[10] Thus a person not a party to a policy of insurance, but holding it by

[1] Kennedy v. Cotton, 28 Barb. 9.

[2] Belden v. Meeker, 47 N. Y. 307, aff'g 2 Lans. 470; 9 Moak's Eng. 255, n. Compare to the contrary, Houghton v. McAuliffe, 2 Abb. Ct. App. Dec. 409.

[3] Houghton v. McAuliffe, above. *Contra*, Caryl v. McElrath, 3 Sandf. 176.

[4] Curtis v. Leavitt, 15 N. Y. 9. Proof of payment of value raises a presumption, according to Warner v. Chappel, 32 Barb. 309, that plaintiff took without notice.

[5] Gillet v. Phillips, 13 N. Y. (3 Kern.) 114.

[6] Smith v. Hall, 5 Bosw. 319.

[7] Partridge v. Badger, 25 Barb. 146.

[8] Merchants' Bank v. State Bank, 10 Wall. 604; compare Jackson v. Campbell, 5 Wend. 572; Hoyt v. Thompson, 5 N. Y. 320.

[9] McMaster v. President, &c. of Ins. Co. of N. A. 55 N. Y. 222; Coleman v. First Nat. Bk. 53 N. Y. 388; Badger v. Jones, 12 Pick. 321; Railroad Co. v. Trimble, 10 Wall. 367.

[10] Furbush v. Goodwin, 25 N. H. 425, 446; Dempsey v. Kipp, 61 N. Y. 462, and cases cited. But see paragraph 20 below.

assignment, or as one to whom, in case of loss, it is payable, may adduce evidence to explain it, in his action against the company.[1]

17. *Equities against the Assignee.*]—The assignee of a non-negotiable chose in action, as distinguished from the *bona fide* transferee of negotiable paper, takes it subject to all equities, whether known or unknown to the assignee,[2] existing against the assignor at the time of the assignment, in favor either of the debtor,[3] or of any person who had succeeded to his right at the time of the assignment,[4] and even latent equities in favor of third persons.[5]

18. *Bona Fide Purchaser.*]—But the doctrine of equitable estoppel supports the title of a *bona fide* purchaser for value, of a non-negotiable cause of action, from one upon whom the owner has conferred the apparent absolute ownership, when the purchase is made upon the faith of such appearance.[6] Yet evidence showing circumstances sufficient to have put the purchaser upon inquiry, will charge him with the same notice that is chargeable to his assignor in respect to the same matters.[7]

19. *Notice to Debtor.*]—If the cause of action was complete against the debtor before the assignment was made, notice to the debtor, of the assignment, need not be proved,[8] except for the purpose of shutting out evidence of subsequent dealings by the debtor with the assignor in reduction of the liability. If the assignee proves such notice, subsequent dealings between the original parties are not relevant against him,[9] but the burden of proving such notice is upon the assignee who seeks to avail himself of it.[10]

20. *Assignment for Purpose of Suit.*]—If plaintiff proves a written assignment absolute on its face, defendant cannot successfully impeach plaintiff's title, by adducing parol evidence to show that it was made upon condition that part of the claim assigned should, when collected, be paid to the assignor.[11]

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[1] McMaster v. President, &c. of Ins. Co. of N. A. 55 N. Y. 222, 234.

[2] Evertson v. Evertson, 5 Paige, 644.

[3] Murray v. Gouverneur, 2 Johns. Cas. 438; Clute v. Robinson, 2 Johns. 595, and cases cited in 1 Abb. N. Y. Dig. 2d ed. 805.

[4] Hartley v. Tatham, 2 Abb. Ct. App. Dec. 333.

[5] Green v. Warnick, 64 N. Y. 224, and cases cited; overruling Murray v. Lylburn, 2 Johns. Ch. 441, and other cases to the contrary.

[6] Moore v. Metrop. Bank, 55 N. Y. 41; Green v. Warnick, 64 Id. 224.

[7] Commercial Bank v. Colt, 15 Barb. 506; and see Evans v. Ellis, 5 Den. 640, affi'g Ellis v. Messervie, 11 Paige, 467. The purchaser of a bond and mortgage who fails to require the production of the bond, is chargeable with notice of any defect in the assignor's title thereto. Kellogg v. Smith. 26 N. Y. 18. As to appearances of alterations, see Birdsall v. Russell, 29 N. Y. 220.

[8] Muir v. Schenck, 3 Hill, 228.

[9] Myers v. Davis, 22 N. Y. 489, rev'g 26 Barb. 367.

[10] Hermans v. Ellsworth, 64 N. Y. 161; 3 Hun, 473, and cases cited. As to the necessity of notice as against third persons, see Thayer v. Daniels, 113 Mass. 129.

[11] Durgin v. Ireland, 14 N. Y. (4 Kern.) 322. But he may, for the purpose of showing the bias of the assignor, if the assignor has testified for plaintiff. Moore v. Viele, 4 Wend. 420.

21. — *or as Collateral Security.*]—Where the plaintiff holds the cause of action as collateral security for a debt due him from a third person, the burden is upon the defendant of proving any defense arising out of the state of dealings between the plaintiff and his principal debtor—as for instance that the principal debt has been paid,[1] or is not equitably enforceable as against the defendant.[2]

22. *Assignees in Insolvency.*]—In an action by an assignee in insolvency, as such, on a cause of action which he acquired by the assignment, the plaintiff is bound to prove that he is such assignee, even though the defendant only pleads the general issue.[3] For this purpose an insolvent assignment, in the form of a deed by the insolvent to his assignee, expressing a pecuniary consideration, is admissible in evidence without proving the insolvency proceedings, although it recites their existence and purports to be made pursuant to a judge's order.[4]

23. —*in Bankruptcy.*]—The title of an assignee in bankruptcy is conclusively proved, alike in a State court as in a court of the United States,[5] by a copy of the assignment, duly certified by the clerk of the court under its seal.[6] But unless he produces such copy, or the original, or accounts for its absence, parol evidence of his title is not admissible.[7] It is not necessary for him to show the steps in the proceedings, nor the jurisdiction of the court over the proceedings or the person of the insolvent,[8] nor a record of the assignment as a deed of lands,[9] nor can the existence or sufficiency of the debt of the petitioning creditor be collaterally drawn in question.[10] The entire proceedings in a bankruptcy case are not regarded as constituting an integral record; but copies of such papers as in any way relate to the matter in question, certified to be such, are admissible without other parts of the proceedings.[11]

24. *Purchaser from Official Assignee.*]—One claiming as a purchaser from an assignee in bankruptcy should be prepared to prove the assignee's title, by producing the assignment or a duly certified copy, and to prove his own title by producing the writ-

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[1] Sheldon v. Wood, 2 Bosw. 267.

[2] Hogarty v. Lynch, 6 Bosw. 138. Parol evidence as to the agreed mode of payment of the debt, admissible. Hildebrandt v. Crawford, 6 Lans. 502, 507. For the peculiar application of the rules as to collaterals, in case of negotiable paper, see chapter on *Actions on Bills, Notes and Checks.*

[3] Best v. Strong, 2 Wend. 319.

[4] Rockwell v. Brown, 54 N. Y. 210, rev'g 33 Super. Ct. (1 J. & S.) 380.

[5] Cone v. Purcell, 56 N. Y. 649. The State courts will take judicial notice of the U. S. Bankrupt Act. Wheelock v. Lee, 15 Abb. Pr. N. S. 24.

[6] Bump on Bankr. 139; Blumenstiel on Bankr. 228; U. S. R. S. § 5048.

[7] Burk v. Winters, 28 Ark. 6, and cases cited; s. c. 15 Bankr. R. 140.

[8] Bump on Bankr. 139.

[9] Phillips v. Hembold, 26 N. J. Eq. 202.

[10] Sloan v. Lewis, 22 Wall. 150.

[11] Michener v. Payson, 13 Bankr. R. 50; s. p. Ransom v. Wheeler, 12 Abb. Pr. 139.

ten assignment from the assignee, if any, or to account for their absence.[1] A copy of the bankrupt's schedule is held not by itself sufficient evidence to prove the bankrupt's admission of the debt mentioned therein, because but part of the record.[2]

25. *Assignees for Benefit of Creditors.*]—The assignee's title is to be proved by producing the assignment, or a certified copy of it. This evidence is admissible under an allegation of an assignment to plaintiff, without stating that it was in trust for creditors, unless defendant shows that he has been misled to his prejudice.[3] The assent of the *cestuis que trustent* to a valid assignment for their benefit is presumed as matter of law, unless there is evidence to the contrary.[4] And where, as in some States, assent is not presumed, it is not necessary to prove that all assented, unless the assent of all is expressly required by the contract or by local law. The assent of a creditor may be proved by the act of his attorney, and that of a firm by the act of a partner.[5] If the plaintiff's right depends on the power of the assignee to convert or apply the assets to the purposes of the trust, he should also prove the filing of the bond and other steps which the statute makes a condition to the exercise of that power.[6]

26. *Testimony of Assignor.*]—The testimony of the assignor of the cause of action, when offered by the assignee, is justly regarded by the law as liable to scrutiny, and is to be received with something of the same caution as that of a party testifying in his own behalf;[7] and where the adverse party is an executor, administrator, or other representative of one deceased or otherwise incompetent to testify, the assignor, equally with the assignee, is excluded from testifying to personal transactions or communications had by him with the person deceased or otherwise incapacitated.[8] But an assignor's testimony, unlike that of a party testifying in his own behalf, may be sufficient, without corroboration, to justify the court in taking the case from the jury.

The bias of the assignor may be shown by proof of a remaining or contingent interest,[9] but not by inquiring merely into the amount of the consideration. The comparatively trifling character of the consideration is not evidence of bias or interest, and cross-examination for this purpose is in the discretion of the court.[10]

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[1] Files v. Harrison, 29 Ark. 307, 316.

[2] Wilson v. Harper, 5 So. Car. 294. But see paragraph 23.

[3] Hoogland v. Trask, 6 Robt. 540; Lauve's Case, 6 La. Ann. 530.

[4] Burrill on Assignments, 3d ed. 381; Van Buskirk v. Warren, 4 Abb. Ct. App. Dec. 458.

[5] Burrill on Assignments, 392.

[6] Thrasher v. Bentley, 1 Abb. New Cas. 39.

[7] Watkins v. Cousall, 1 E. D. Smith, 65; Kenney v. Public Admr. 2 Bradf. 319; Smith v. Leland, 2 Duer, 497.

[8] See chapter on *Actions by and against Executors and Administrators.*

[9] Moore v. Viele, 4 Wend. 420.

[10] Arend v. Liverpool, N. Y. & Phila. Steamship Co. 6 Lans. 457; Chapin v. Hollister, 7 Id. 456.

27. *Assignor's Declarations not competent in Favor of Assignee.*]—Admissions and declarations of the assignor are not competent evidence *in favor* of the assignee,[1] unless part of the *res gestæ* of an act properly in evidence,[2] or communicated to the debtor or otherwise brought home to him; and they are not made competent by being declarations against interest, offered after the assignor is dead.[3] Some qualifications of this rule will be noticed in considering the competency of evidence of good faith in a transfer impeached as fraudulent.

28. *Their Competency against Assignee.*]—To determine their competency when offered *against* the assignee, we must consider, 1. the time when they were made; 2. the character of the assignment; and, 3. the nature of the act or declaration offered in evidence.

29. — *if made before Assignor was Owner.*]—Admissions and declarations made by the assignor before he became owner are wholly incompetent against the assignee,[4] except, perhaps, that when it is relevant to prove that as owner of the claim he had notice of any fact, declarations made previous to ownership, showing a then present knowledge of the fact may be, within reasonable limits, evidence to go to the jury tending to show notice at the time when he dealt with or possessed the thing assigned.

30. — *if made after he Ceased to be Owner.*]—The assignor's admissions and declarations, and even his formal written acknowledgment, made after he ceased to be owner,[5] are equally incompetent against the assignee, unless the evidence connects the assignee with them; and it makes no difference that that the assignment is only as collateral,[6] or good only in equity.[7] But if the assignee is merely a nominal party, suing for the assignor's

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[1] Rosc. N. P. 57.

[2] According to Howard v. Upton, 9 Hun, 434, the act must not only be properly in evidence, but in issue, or relevant to the issue.

[3] Outram v. Morewood, 5 T. R. 123.

[4] Bond v. Fitzpatrick, 4 Gray (Mass.) 89. So declarations made by one who afterwards became an assignee in bankruptcy, or a trustee, are not admissible against him in that capacity. Legge v. Edmonds, 25 L. J. Ch. 125; Metters v. Brown, 32 L. J. Ex. 140.

[5] Eby v. Eby, 5 Pa. St. 435; Kinna v. Smith, 3 N. J. Eq. (2 Green), 14; Woodruff v. Cook, 25 Barb. 505; Pringle v. Pringle, 59 Pa. St. 289; Morton v. Morton, 13 Serg. & R. 108; s. p. 4 Pa. St. 439. Greenleaf says, after he ceased to be *sole* owner. 1 Greenl. Ev. § 190. Taylor omits this qualification. 1 Tayl. Ev. § 713. And in Bond v. Fitzpatrick, 4 Gray (Mass.) 89, it was held that if the recovery is severable, the declarations of an assignor of a part interest may be competent against the assignee to the extent of that interest.

[6] Wheeler v. Wheeler, 9 Cow. 34; Dazey v. Mills, 10 Ill. (5 Gilm.) 70. In Miller v. Bingham, 29 Vt. 82, the fact that the declarations were made while the chose in action was held by a temporary assignee as collateral security, was held not to render them incompetent against one to whom the declarant subsequently assigned it, after having redeemed it.

[7] Mandeville v. Welch, 5 Wheat. 277.

benefit, they are competent;[1] while, on the other hand, if the assignee is the real party in interest, the fact that the action is in the assignor's name does not render competent his declarations, made subsequent to the transfer.[2]

31. — *if made during his Ownership.*]—Three rules have contended for control in respect to admission of evidence of the assignor's acts and declarations against his own interest, made during his ownership. One rule[3] declares them universally competent against all assignees, except transferees of negotiable paper after dishonor. This rule, which is a departure from the principle forbidding hearsay, and securing the sanction of an oath and the right of cross-examination as to all testimony,[4] is founded on the doctrine that, as every assignee stands in the shoes of his assignor, he must take title subject to whatever disparagement the latter may have put upon it. It has been followed in many States, particularly where commercial transfers of things in action are less common than in New York.

A stricter rule, stated by Greenleaf and followed by Taylor, requires evidence of an identity of interest between assignor and assignee to admit these declarations, such identity being recognized in three cases: 1. Where the assignee is the mere agent and representative of the assignor. 2. Where he took title with actual notice of the true state of that of the assignor, as qualified by the admissions in question. 3. Where he purchased the demand already stale, or otherwise infected with circumstances of suspicion.[5]

The New York rule, now recognized also in the Supreme Court of the United States,[6] is still more strict in the protection of the right of assignees.[7] This rule is, that the oral admissions or declarations, as distinguished from the transactions, of the former holder of any chose in action or personal property,[8] even if made before his transfer, are not competent evidence against

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[1] Eaton v. Corson, 59 Me. 510. Admissions, even by the nominal plaintiff, made after he parted with his interest in the cause of action, are not competent against the beneficial assignee suing in the name of the former. Wing v. Bishop, 3 Allen (Mass.) 456.

[2] Frear v. Evertson, 20 Johns. 142. So an assignor's acquiring possession again does not let in declarations made during the renewed possession, and relating to the former period. Cornett v. Fain, 33 Geo. 219; Tilson v. Terwilliger, 56 N. Y. 273. The rule of exclusion applies not only to matters in avoidance and discharge, but also to those which go to the maintenance of the action and the inception of the contract. Wing v. Bishop, 3 Allen (Mass.) 456.

[3] Which is best represented in Cowen & Hill's Notes to Phillips on Evidence (1 Phil. Ev.), where cases are collected.

[4] Bond v. Fitzpatrick, 4 Gray (Mass.) 89, 92; Bullis v. Montgomery, 50 N. Y. 358, rev'g 3 Lans. 258.

[5] 1 Greenl. Ev. § 190; 1 Tayl. § 713.

[6] Paige v. Cagwin, 7 Hill, 361; Freeman's Sav. &c. Co. v. Dodge, 93 U. S. 379.

[7] Jones v. East Society, &c. 21 Barb. 174.

[8] Smith v. Webb, 1 Barb. 234; Beach v. Wise, 1 Hill, 612; Freedmen's Sav. &c. Co. v. Dodge, 93 U. S. 379.

the transferee,[1] unless there is a present identity of interest between them.[2] And even the fact of the assignor having died before the trial does not allow the declarations to be admitted under the familiar rule that declarations against interest, by a person since deceased, are competent.[3]

32. *Preliminary Question.*]—An offer to give the acts and declarations of an assignor in evidence against his assignee, should be so framed as to show that they were made before the transfer,[4] and are admissible as having been made against interest at the time when they were made; and the judge must determine the question of their admissibility, and not leave it to the jury to determine when they were made.[5] If, on the evidence, it be left in doubt whether the declarations were made before or after the transfer, they must be excluded.[6]

33. *Distinction between Declarations and Transactions.*]—The rule of exclusion is aimed at loose oral declarations and conduct having not the quality of contract or estoppel. It excludes, therefore, not only evidence of words, but evidence of acts offered as merely in the nature of admissions, such as the assignor's discontinuing an action brought for the same cause, and suffering judgment for costs;[7] but it does not exclude evidence of effective transactions, such as a message sent by the assignor while owner, to the debtor, on which the latter acted or gave assent, so as to constitute an agreement;[8] or such as the act of a bank, the assignor, in crediting a payment in its pass-book delivered to its debtor. The rule cannot apply against written evidence put into the debtor's hands by the assignor before the assignment.[9] To

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[1] The language of the court in Paige v. Cagwin, applies the rule only to purchasers in good faith and for value, but subsequent cases have extended it to one holding a sealed assignment, without other proof of consideration; Prouty v. Eaton, 41 Barb. 416; s. p. Pringle v. Pringle, 59 Pa. St. 289; to a legatee, Smith v. Webb, 1 Barb. 230 (but see Smith v. Sergent, 2 Hun, 107); and to a voluntary assignee in trust for creditors; Bullis v. Montgomery, 50 N. Y. 358, and cases cited; 40 Id. 226. The rule of exclusion is available only for the protection of a subsequent purchaser or assignee. A stranger who does not claim under the declarant, but only proves the declarant's claim by way of defeating plaintiff's title, cannot object to the declarations, if admissible as declarations against interest by a person since deceased. Schenck v. Warner, 37 Barb. 258.

[2] Cases cited in Paige v. Cagwin, 7 Hill, 361. The true criterion of identity of interest is whether the action is for the immediate benefit of the assignor. Jones v. East Society, 21 Barb. 175.

[3] Nelson, Ch. J., Stark v. Boswell, 6 Hill, 405; s. p. 1 Barb. 234; and see 37 Id. 321.

[4] Jermain v. Denniston, 6 N. Y. 276; Ball v. Loomis, 29 Id. 416. This is the N. Y. rule. To the contrary, Magee v. Raiguel, 64 Pa. St. 110, rev'g 7 Phil. 231.

[5] Vrooman v. King, 36 N. Y. 477, 484; s. p. Jones v. Hurlbut, 39 Barb. 403. If the plaintiff maintains that the assignor had an interest, defendant is not precluded from offering the assignor's admission by the fact that he denies the assignor had any interest. Eaton v. Corson, 59 Me. 512.

[6] Vrooman v. King, 36 N. Y. 477.

[7] Tousley v. Barry, 16 N. Y. 497.

[8] Smith v. Schanck, 18 Barb. 344.

[9] Jermain v. Denniston, 6 N. Y. 276.

illustrate the distinction in another form, an unrecorded mortgage cannot be given priority over a recorded mortgage by mere evidence that the assignor of the latter declared or admitted, while he held it, that he took it with notice of the former; but this may be done by offering a written stipulation given by him to the owner of the former, defining their relative precedence. His admissions are not competent against his assignee; his agreement is.[1]

34. *Declarations Admitted in case of Conspiracy.*]—Where a combination is shown to have existed between the assignor and the assignee, by preliminary evidence independent of the declarations of either, then the declarations of each, made while acting in furtherance of the wrongful scheme, and during the existence of the combination, are competent against the other, upon the familiar rule applicable to the declarations of co-conspirators,[2] and it need not be shown that such other had any knowledge of the declarations.[3]

35. *Receipt, &c. of the Assignor.*]—A formal release or receipt, given by the assignor to the debtor, *before* the transfer, is competent[4] against the assignee; but the date of the paper is not even presumptive evidence against the assignee that it was then given.[5] There must be extrinsic evidence that it was given before the assignor parted or assumed to part with the chose in action, in order to render it competent. If, on the evidence adduced, it be left in doubt whether the discharge was given before or after the transfer, it must be excluded.[6]

36. *Notice to Produce.*]—To lay the foundation for secondary evidence of the contents of a paper in the hands of the assignor, notice to the plaintiff to produce it is not sufficient. The assignor should be subpœnaed to produce it.[7]

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[1] Fort v. Burch, 6 Barb. 60, 77; Beers v. Hawley, 2 Conn. 467.

[2] See Cuyler v. McCartney, 40 N. Y. 226, rev'g 33 Barb. 165; and cases cited; Lee v. Huntoon, Hoffm. 453; Adams v. Davidson, 10 N. Y. 309.

[3] Nudd v. Burrows, 91 U. S. 438.

[4] Jermain v. Denniston, 6 N. Y. 276.

[5] Foster v. Beals, 21 Id. 250; Smiths v. Shoemaker, 17 Wall. 637. The contrary has been ruled; Rosc. N. P. 38; 59 Pa. St. 289; and correctly so in the case of entries made in the usual course of business. Jermain v. Denniston, above; and see 56 N. Y. 507.

[6] Foster v. Beals, 21 N. Y. 250; s. p. 36 Id. 477.

[7] Chaffee v. Cox, 1 Hilt. 78.

CHAPTER II.

ACTIONS BY AND AGAINST ASSOCIATIONS.

1. Voluntary associations. 2. Joint stock companies.

1. *Voluntary Associations.*]—A voluntary association is a body who form their organization, conduct affairs, and settle accounts as if they were a corporation; but, not having the legal immunities of a corporation, are liable individually if at all to outsiders. Hence in actions between the members, the law, giving effect to their agreement, applies rules of evidence which are applied to corporations,[1] while in actions between them and strangers, the principles applicable in cases of agency or partnership prevail.[2] A stranger may prove the existence of the association and the membership of the defendants by parol, without accounting for the written articles,[3] unless the contents of the articles are necessary to establish the scope of the agency by which the contract was made. Even where the action is on a contract of the body, plaintiff is not bound to prove that he has joined all the associates, unless non-joinder is pleaded with names, &c.;[4] but if any of the defendants denies the alleged joint contract, plaintiff must prove the joint liability of all the defendants named on the record. It is not enough to show a several contract by that part of the defendants who appear. Where, however, the liability of the association is proved, it is enough for plaintiff to show that the litigating defendant was a member of the association, and so jointly liable with those whose membership is proved or admitted.[5] Membership may be proved by any evidence which sufficiently identifies the member with the association to show that he allowed it to be his agent for the purpose of the transaction;[6] for instance the fact that he subscribed unconditionally, though he never took any stock;[7] or that he paid up a subscription made in his name.[8] And actual membership having

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[1] Tyrrell v. Washburn, 6 Allen, 472.

[2] Abb. Dig. Corp. 47, note; Park v. Spaulding, 10 Hun, 128; Bullard v. Kinney, 10 Cal. 60; Ebbinghousen v. Worth, 4 Abb. New Cas. 300, note.

[3] Cutler v. Thomas, 25 Vt. 73; though otherwise in an action between the members.

[4] Fowler v. Kennedy, 2 Abb. Pr. 347.

[5] Downing v. Mann, 3 E. D. Smith, 36. Compare Mott v. Petrie, 15 Wend. 317.

[6] Taft v. Warde, 111 Mass. 522.

[7] Spear v. Crawford, 14 Wend. 20; Bodwell v. Eastman, 106 Mass. 526.

[8] Frost v. Walker, 60 Me. 470.

been shown, it is not necessary that the plaintiff should have known of or relied on it in giving credit.[1] Defendant is exonerated by proof of a termination of membership before the debt was contracted, unless the plaintiff dealt with the association knowing of and relying on defendant's membership, in which case defendant must prove notice of his withdrawal, as in case of a partnership.[2] All the members are presumably cognizant of the rules contained in their records openly kept within access of the members.[3]

2. *Joint Stock Companies, &c.*]—Joint stock companies and some other associations are organized under laws giving to members of voluntary associations without full incorporation some of the immunities of corporations, principally in three ways: 1. Allowing suits to be in the name of an officer, instead of joining the members; 2. allowing withdrawal, by transfer of shares, without dissolution of the organization; and, 3. requiring judgment to be had and enforced against the associate property, before action can be brought against a member. Under these statutes the association is deemed the party, although an officer be named on the record; and the question whether rules of evidence drawn from the law of partnership or from the law of corporations, should control, depends upon the same tests as in case of a mere voluntary association. The better opinion is that a foreign joint stock company formed under such laws, is to be treated, as far as may be, as a corporation, not a mere partnership.[4]

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[1] Bodwell v. Eastman, 106 Mass. 526.
[2] Park v. Spaulding, 10 Hun. 128.
[3] Rosc. N. P. 38; 1 Phill. Ev. 447.
[4] Westcott v. Fargo, 61 N. Y. 542; Liverpool Ins. Co. v. Massachusetts, 10 Wall. 566. *Contra*, Gott v. Dinsmore, 111 Mass. 51; Taft v. Ward, 106 Id. 518.

CHAPTER III.

ACTIONS BY AND AGAINST CORPORATIONS.

I. Proving corporate existence.
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I. Proving Corporate Existence.

1. *Pleading as to corporate existence.*]—It is now the general rule that a corporation, whether domestic[1] or foreign,[2] suing in a name appropriate to a corporate body, may prove its incorporation when necessary, even though not alleged in its pleading.[3] At common law, proof of corporate existence was essential under the general issue,[4] as well as under a special plea of "*nul tiel* corporation." This is still the rule in New York and some other States as to all other than "domestic" corporations,[5] or corporations created by or under the laws of the State in whose courts the action is brought.[6] In respect to domestic corporations (and in some States, in respect to all corporations)[7] the rule has been modified by dispensing with proof of incorporation unless incorporation is specially denied in pleading. Where the plaintiffs expressly allege incorporation, an answer denying each and every allegation of the complaint is a sufficient denial.[8] The New York statute[9] provides that in suits by or against domestic corporations, the incorporation need not be proved, unless denied by a verified allegation in the answer. If so denied, it must be proved as at common law,[10] and under this act it is the better practice to insert an express allegation that there is no such incorporation.[11]

2. *Strict proof not Usually Required.*]—When evidence of incorporation becomes necessary, it is enough, in ordinary actions, to prove the existence of a corporation *de facto*, without proving formal compliance with the requirements of the law or charter in respect to the perfecting of the organization. In other words, it

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[1] Phœnix Bank of New York v. Donnell, 40 N. Y. 410, affi'g 41 Barb. 571, and cases cited.

[2] Camden & Amboy R. R. Co. v. Remer, 4 Barb. 127, and cases cited; Paine v. Lake Erie, &c. Co. 31 Ind. 310, 354, s. c. 1 Withr. Corp. Cas. 386, 408.

[3] Marine, &c. Ins. Bank v. Jauncey, 1 Barb. 486. But where the provisions of a private or foreign charter are material to the cause of action, they should be pleaded. Hahnemannian Life Ins. Co. v. Beebe, 48 Ill. 87, s. c. 1 Withr. Corp. Cas. 420.

[4] Jackson v. Plumbe, 8 Johns. 295, and cases cited; Williams v. Bank of Michigan, 7 Wend. 539, affi'g 5 Id. 478.

[5] Waterville Manufacturing Co. v. Bryan, 14 Barb. 182.

[6] A corporation is none the less a domestic corporation, because having a charter from another State. Muller v. Dows, 94 U. S. 444; also Ang. & A. § 643, 7, a.

[7] Star Brick Co. v. Ridsdale, 36 N. J. L. 229.

[8] Gott v. Adams Express Co. 100 Mass. 320, s. c. 1 Withr. Corp. Cas. 623; Chance v. Indianapolis R. R. Co. 32 Ind. 422, s. c. 1 Withr. Corp. Cas. 385.

[9] L. 1875, p. 588, c. 508, am'd'g L. 1864, p. 1006, c. 422; 2 R. S. 458. § 8. The original statute applied only to suits at law. See 13 N. Y. 309. Whether such special denial is a mere denial or "new matter," see 12 Barb. 573; 40 N. Y. 410. The rules as to pleading and the necessity or burden of proof of incorporation are much modified by local statutes relaxing the common-law requirements.

[10] The short method of pleading incorporation, given by 2 R. S. of N. Y. 459, § 13, in actions by or against corporations created under a law of the State, by reciting the title of the act, and date of its passage, without reciting the act or proceedings of incorporation, or setting forth the substance thereof, does not relieve corporations from proving their existence. Onondaga County Bank v. Carr, 17 Wend. 443. In several States statutes exist still further reducing the common-law requirement of proof.

[11] Moak's Van Santv. Pl. 519.

is enough to prove existence under color of law, without proving a regular origin of existence in conformity to law. If the company had, in form, a charter authorizing it to act as a body corporate, or acted under color of a general law sanctioning its purposes, and if it was, in fact, in the exercise of corporate powers at the time of the dealings in question, and at the time of litigation, then it was and is, as to all except the State, a corporation *de facto*.[1] This rule applies alike to actions brought by corporations as plaintiffs, whether upon contracts[2] or against wrong-doers, and to actions brought against corporations, whether upon contracts made or wrongs committed by them.[4]

The three elements of *strict* proof of incorporation are: 1. Legislative sanction; 2. Existence under color of such sanction; 3. Regularity of origin conforming to the sanction. The first may now be generally supplied, in the case of domestic corporations, by the doctrine of judicial notice, and, in the case of foreign corporations, by the statute book; the second and third are often dispensed with by an estoppel; the third is not required save where the nature of the action demands strict proof.

3. *Exceptional Cases.*]—The cases in which it is necessary to give strict proof of incorporation, that is, to prove not only the being, but the right to be, are: 1. Actions by the State to ascertain, or to put an end to corporate existence;[5] 2. Proceedings by a private corporation, in the exercise of a franchise in derogation of common right; for instance, to divest title to private property;[6] 3. Proceedings of a penal character by a private corporation;[7] 4. Actions on contracts like subscriptions for stock, if the very consideration is the legal organization of a corporation having a right to existence.[8] In such cases the inquiry may extend to the due compliance with all the requirements of the law; but often, even in these cases, it is narrowed or precluded by estoppel or admission. 5. Where the question is whether there is corporate power to take by will, sufficient regularity of origin to show an attempt in good faith to comply with the law may be required.

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[1] Jones v. Dana, 24 Barb. 399, ALLEN, J.

[2] In Methodist Ep. Ch. v. Pickett, 19 N. Y. 482, and Slocum v. Warren, 10 R. I. 124, this rule is laid down in terms applicable only to actions on contracts made by the other party with the supposed corporation; but the reasons of the rule (which are explained in those cases, and in Narragansett Bank v. Atlantic Silk Co., cited below), are equally applicable, and in practice the rule is actually applied, to all actions in the nature of private remedies, with the exceptions indicated in paragraph 3.

[3] Searsburgh Turnpike Co. v. Cutler, 6 Vt. 315.

[4] Narragansett Bank v. Atlantic Silk Co. 3 Metc. 288, SHAW, Ch. J. Whatever the alleged corporation would have to prove in an action brought by it, on an issue of "no such corporation," may be controverted in an action against the supposed corporation, for relief based on the corresponding allegation that no such corporation ever existed; but beyond this the party contesting the claim of corporate existence cannot go. ALLEN, J., Jones v. Dana, 24 Barb. 398.

[5] Ang. & A. § 94; N. Y. Code of Pro. §§ 430, 432.

[6] See Searsburgh Turnpike Co. v. Cutler, 6 Vt. 314. *Contra*, Matter of N. Y. Elevated Rw. Co., 3 Abb. New Cases.

[7] Commonwealth v. U. S. Bank, 2 Ashm. 349.

[8] See Railw. Co. v. Allerton, 18 Wall. 233.

4. *Incorporation Incidentally in Issue.*]—If the corporation is not a party, and its existence is only collaterally in question, as for instance, on indictment for counterfeiting bank notes, or in an action on a stockholder's contract for sale of stock in a reputed corporation, where fraud is not alleged, less proof suffices than in actions by or against the corporation; but, if its existence is directly in issue, even where it is not a party, as, for instance, where an individual defends on the ground that a private corporation was the real party in interest, and liable in his stead,[1] the rules stated in this chapter will apply. In proceedings to enforce ordinances of a municipal corporation, the illegality of the corporate organization cannot be shown to defeat a recovery; in such a collateral proceeding, evidence that the corporation is acting as such is all that is required.[2]

5. *Legislative Sanction Necessary.*]—By the American law, evidence of mere user, however long continued, is not enough to prove the existence of a private corporation.[3] There must be legislative sanction,[4] usually to be shown only by the existence of a charter,[5] or some statute under which the supposed corporation might lawfully be created; and the better opinion is (although many of the cases fail to indicate the distinction), that the familiar rule forbidding one who has dealt with a body as incorporated, to question its corporate character, does not apply to the question of legislative sanction. The estoppel serves only in place of evidence of the existence and regularity of organization, it does not preclude denying the existence or validity of a law affording the necessary sanction.[6] Otherwise corporations could be formed by contract. But a legislative recognition of the existence of a corporation—as, for instance, by a statute even modifying its name—is, if coupled with some evidence of user, or admission, conclusive evidence of its existence, as against every one but the State.[7]

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[1] Williams v. Sherman, 7 Wend. 109.

[2] 1 Dill. Mun. C. 440, § 351.

[3] Per SELDEN, J., Methodist Ep. Ch. v. Pickett (above). Especially if the acts are such as an unincorporated body might perform. Greene v. Dennis, 6 Conn. 292. For statutory exception in the case of Plank Road Companies, see L. of N. Y. 1855, c. 546, § 1; Belfast, &c. Plank Road Co. v. Chamberlain, 32 N. Y. 651. That a charter was once granted to a municipal corporation may be presumed from very long user. 1 Dill. M. C. 168; Robie v. Sedgwick, 35 Barb. 327.

[4] Such, for instance, as that it claimed to be and acted as a town with the knowledge and assent of the legislature. Bow v. Allenstown, 34 N. H. 365, and cases cited; but see Welch v. Ste. Genevieve, 1 Dill. C. Ct. 136. But the recognition must be legislative. Recognition by the executive is not enough. People v. Phœnix Bank, 24 Wend. 431.

[5] Proof of the destruction of public records in the same repository as the charter is admissible to explain the omission to produce a charter. Bow v. Allenstown, 34 N. H. 351; and, in such a case, evidence of reputation and forty years' user, may be sufficient. Dillingham v. Snow, 5 Mass. 547.

[6] Heaston v. Cincin. R. R. Co. 16 Ind. 275. There can be no estoppel in the way of ascertaining the existence of a law. Town of South Ottawa v. Perkins, 94 U. S. 267; Snyder v. Studebaker, 19 Ind. 462. Compare Phœnix Warehousing Co. v. Badger, 6 Hun, 293, where the estoppel was extended to the question whether the corporate object was within the scope of the statute.

[7] Green's Brice's Ultra V. 21, n. †, and cases cited.

6. *Domestic Corporation—General Law or Charter.*]—The courts[1] take judicial notice, not only of the general laws under which corporations are now usually formed,[2] but also of the existence and contents of special charters of municipal corporations. They may do so respecting other *public* corporations, but the line of distinction between public and private corporations is ill-defined, and, in practice, a special charter, or so much of it as is material, should be put in evidence. It may be read from the volumes printed by authority of the government,[3] or (as is more convenient for inserting the charter in the record as an exhibit), by producing a certified copy.[4]

7. *Evidence of Authenticity of Statute.*]—The presumption is that a statute published by authority of the government was correctly passed in respect to form. The objection that the requisite forms were not observed—*e. g.*, that three-fifths were not present, &c.,—must be pleaded, where the course of pleading requires the statute to be pleaded, and must be affirmatively proved.[7] The court may, and should,[8] if necessary, look beyond the printed statute book and examine the original engrossed bill on file in the office of the Secretary of State, to ascertain if a bill had a constitutional vote.[9] Whenever the existence of a statute, or the time when a statute took effect, or the precise terms of a statute, are in question, the judges have a right, unless a different rule has been enacted, to resort to any source of information which, in its nature, is capable of conveying to the judicial mind a clear and satisfactory answer to such questions; always seeking first for that which, in its nature, is most appropriate.[10] Hence they may look to other connected records to ascertain the date of enactment, if no date appears in the official certificate.[11] So they may look beyond the authentication of the act, to the journal of either branch, to see if the bill passed by the constitutional vote.[12] But the better

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[1] Including courts of United States held within the State. Covington Drawbridge v. Shepherd, 20 How. U. S. 227.

[2] But not of the organization of the company under it. Danville, &c. Co. v. State, 16 Ind. 456.

[3] Prell v. McDonald, 7 Kans. 426, s. c. 12 Am. R. 423, and cases cited; and see 25 Ind. 512.

[4] See Abb. Dig. Corp. tit. Pub. C. Priv. C.; 1 Whart. Ev. § 294.

[5] Wood v. Jefferson County Bank, 9 Cow. 194; People v. Supervisors of Chenango, 8 N. Y. 317; Howell v. Ruggles, 5 Id. 444; N. Y. L. of 1843, p. 80, c. 98, § 2; N. Y. Code of Civ. Pro. § 932, or within six months after the close of the session at which it was passed, it may be read from a newspaper officially designated to publish the laws.

[6] Duncan v. Duboys, 3 Johns. Cas. 125.

[7] People v. Supervisors of Chenango, 8 N. Y. 317.

[8] But see 4 Centr. Law J. 132.

[9] Purdy v. People, 4 Hill, 384, rev'g 2 Id. 31.

[10] Gardner v. The Collector, 6 Wall. 511.

[11] Id. 509.

[12] Osburn v. Staley, 5 W. Va. 85, s. c. 13 Am. R. 640, and cases cited; Skinner v. Deming, 2 Ind. 558; Purdy v. People (above). *Contra*, Grob v. Cushman, 45 Ill. 119; Louisiana State Lottery Co. v. Richoux, 23 La. An. 743, s. c. 8 Am. R. 602; Sherman v. Story, 30 Cal. 253; State ex rel. Pangborn v. Young, 3 Vroom (N. J.) 29.

opinion is that this inquiry for more cogent evidence than the promulgated form of the law can go no further than to ascertain the facts of enactment and taking effect. If the act is found to have been passed by a constitutional vote, the legislative journals, or other sources of information, are not competent to impeach it on the ground of irregularity or departure from parliamentary usage in the proceedings of the legislature,[1] nor to show that the contents of the act had been changed by a mistake of the engrossing clerk.[2] For qualifications of these rules the local statutes should be consulted.[3]

8. *National Bank.*]—The existence and organization of a national bank may be proved by producing the certificate of the comptroller of the currency, under his hand and seal, reciting that it had been made to appear that the bank had been duly organized, and certifying that it was duly authorized to commence business (without producing the record of organization), together with testimony to user by a witness cognizant of the fact of their carrying on business.[4]

9. *Corporation of Sister State.*]—To prove the general law of incorporation, or the charter of a corporation of another State or territory of the Union, the practitioner may either pursue the mode provided by the law of the forum, which usually permits the law[5] of a sister State or territory to be proved by producing a book or publication, purporting or proved to have been published by its authority, or proved to be commonly admitted as evidence of the existing law, in the tribunals thereof (and such evidence may be admitted on general principles without an enabling statute);[6] or he may pursue the mode prescribed by the act of Congress,[7] and produce a copy certified to by the Secretary of such State, under the seal of the State;[8] and in strictness a copy

[1] People v. Devlin, 33 N. Y. 269; Elevated R. R. cas. 3 Abb. New Cas. 301, 372, n.

[2] Mayor, &c. of Annapolis v. Harwood, 32 Md. 471, s. c. 3 Am. R. 161.

[3] By the N. Y. law, the Secretary of State's certificate upon the original bill of the date of passage is conclusive. 1 R. S. 157, § 11; People v. Devlin (above). No bill can be deemed passed by two-thirds vote (1 R. S. 157, § 3), nor when three-fifths were present (L. 1847, c. 253), unless so certified by the presiding officers of both houses; but the Secretary of State's statement, in the title of the published law, that it was passed in either way, is presumptive evidence that the bill was certified by the presiding officers as so passed, and his omission to insert such statement is presumptive evidence that it was not so passed. L. 1847 (above); L. 1842, c. 306. § 3; and by L. 1837, c. 140, certified copies of petitions and papers presented to the legislature, are *prima facie* evidence.

[4] Merchants' Bank v. Glendon Co. 120 Mass. 97.

[5] Persse & Brooks Paper Works v. Willett, 1 Robt. 131, s. c. 19 Abb. Pr. 416; Barrett v. Mead, 10 Allen, 339; Paine v. Lake Erie, &c. Co. 81 Ind. 310, 354, s. c. 1 Withr. Corp. Cas. 386, 408.

[6] See People v. Calder, 30 Mich. 85, and cases cited. But a statute book of another State, not purporting nor proved to be published by authority, nor proved to be commonly admitted and read as evidence in the courts of that State, is not admissible. Matter of Belt, 1 Park. Cr. 169.

[7] U. S. R. S. 170, § 905.

[8] Grant v. Henry Clay Co. 80 Pa. St. 208.

under the seal of the State whose law it is, is competent in the courts of another State[1] and in the courts of the United States,[2] without any certificate that it is a copy, and without proof of the seal, or of the official character of the secretary.[3] Or in the case of a special charter, he may produce a copy, with proof by a witness who has examined and compared the copy with the original in its proper place of custody;[4] and if proof by an authenticated copy fails, from a defect in the authentication, he may fall back upon this mode.[5]

10. *Corporation of Foreign State.*]—In the case of a corporation of a foreign nation or country, an exemplified copy may be produced, certified in the manner prescribed by the law of the forum;[6] or the statute or charter may be read from the officially promulgated publication of the laws or edicts of the foreign State containing the charter;[7] or a copy may be proved by a witness as stated in the last paragraph.[8]

11. *Modes of Proving De Facto Existence.*]—Legislative sanction having been shown, there are four principal ways in which the practical existence of the corporation on that foundation is shown: 1. By evidence of the formal acceptance of the charter, or the organization of the incorporators under the statute; 2. By evidence that the executive officers of the State have authorized the company to proceed with corporate business, upon the assumption that they were duly organized and entitled to act; 3. By evidence that they have actually proceeded to exercise corporate franchises; 4. By evidence that the very dealings between them and the adverse party, which gave rise to the action, were had on the basis of a supposed incorporation, and amount to an admission which ought to conclude the question.

It is best to be prepared with some evidence both of organization and of user, but the requisite cogency of proof, and the

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[1] Coit v. Millikin, 1 Den. 376; State v. Carr, 5 N. H. 369.

[2] Id.; U. S. v. Johns, 1 Wash. C. 369.

[3] See Dorsey Harvester Rake Co. v. Marsh, 6 Fish. Pat. Cas. 387. In the absence of evidence to the contrary, the letters patent issued by the executive of another State, reciting the passage of the charter, and certifying the performance of its conditions, have been held sufficient evidence of the existence of a charter. Wellersburgh, &c. Co. v. Young, 12 Md. 476. The seal is judicially noticed; but if it is not a common-law seal, be prepared to prove the foreign law as to seal. Courts requiring a common-law seal have refused to take notice of foreign statutes allowing public seals to be a mere impression on paper. Coit v. Millikin, 1 Den. 376.

[4] For objections which may perhaps be raised, unless there are two witnesses, one of whom has read one, while the other read the other, &c., see 1 Whart. Ev. § 94.

[5] Soc. for Prop. of the Gospel v. Young, 2 N. H. 312. The testimony of an attorney at law of a sister State is not legal evidence of the statute law of that State where it affects the merits of the case; but the statute being proved, an attorney may testify as to its interpretation by the law of the State. 1 Greenl. Ev. 13th ed. 535, § 486, &c., and cases cited.

[6] N. Y. Code of Pro. § 426; Code of Civ. Pro. §§ 956–8.

[7] N. Y. Code of Pro. § 426; Code of Civ. Pro. § 942.

[8] National Bank v. De Bernales, 1 Car. & P. 569.

question how far proof of either of these facts is enough without the others, depends on some considerations which have given rise to much apparent diversity in reported cases,[1] and attention to which is necessary to guide in the application of established principles. 1. If the record of the organization is put in evidence, in proportion as it is full and regular, the necessity of proving user is reduced. 2. He who has participated in acts of user must yield to much slighter evidence of organization than he who is a stranger to the corporation. 3. He who has participated in the steps of organization cannot usually avoid responsibility by objecting to the regularity of those steps, and must yield to slighter evidence of user than a stranger. 4. He who has received and enjoyed a consideration from the company cannot require further proof of its corporate power to contract, or to require him to respond. 5. One who has in any way dealt with the company as a corporation is taken to have admitted its existence, and this admission, though alone slight evidence, comes in aid of other proof. 6. A mere trespasser, claiming no title, cannot require evidence of regular organization.[2]

12. *Acceptance of Charter.*]—Acceptance of a special charter may be proved by producing the corporate minutes,[3] duly authenticated,[4] containing a vote of acceptance; and the notice of the first meeting need not be proved in the first instance, but may be presumed after a lapse of time,[5] or after user.[6] Or the acceptance may be shown by indirect evidence, such as official notice of acceptance given to the State officers,[7] or a notice calling a meeting to organize, signed by the defendant as a corporator.[8] In general, evidence that the body in its organic capacity (as distinguished from the individual conduct of the corporators), acted under the charter, is sufficient evidence of acceptance, unless the charter prescribes a different method.[9] Any unequivocal or decisive corporate act[10] is competent evidence of acceptance.[11] And

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[1] Soon after the introduction of the method of incorporation by general law, moreover, the courts relaxed the stricter rules of proving regular incorporation, which were often formerly applied.

[2] But this consideration does not apply in ejectment by a corporation, so as to make an exception to the rule that the plaintiff must recover on the strength of his own title. Goulding v. Clark, 34 N. H. 148.

It is the varying effect of such considerations as these which explains the want of any well defined line as to the requisite cogency of proof of user referred to in De Witt v. Hastings, 40 Super. Ct. (J. & S.) 463.

[3] Middlesex Husbandmen, &c. v. Davis, 3 Metc. 133.

[4] See paragraphs 56–59, below.

[5] Grays v. Turnpike Co. 4 Rand. 578.

[6] Middlesex Husbandmen v. Davis, 3 Metc. 133.

[7] Philadelphia Bank v. Lambeth, 4 Rob. (La.) 463.

[8] Gleaves v. Brick Church Turnpike Co., 1 Sneed, 491.

[9] Bangor, &c. R. R. Co. v. Smith, 47 Me. 34; Taylor v. Commrs. of Newberne, 2 Jones Eq. 141.

[10] Thus acceptance of an act allowing a resurvey and alteration of route, is not proved by evidence of resurvey, without alteration. Pingry v. Washburn, 1 Aik. 264.

[11] Abb. Dig. Corp. 147.

acceptance may be presumed from the fact that the corporators applied for the charter,[1] unless it appears that no proceedings were ever taken under it.[2] The rule requiring some evidence of the acceptance of a charter does not apply to municipal corporations,[3] nor to any charters which are so expressed as to take effect in creating the body corporate independently of any acts on the part of the corporators;[4] but if a charter of even a municipal corporation be made expressly to depend on acceptance, there must, when incorporation is properly in issue, be some evidence of acceptance.[5] Acceptance may be disproved by evidence of proceedings of the body declining the charter, and resisting a *quo warranto* on the ground that they had never accepted it.[6]

13. *Organization under General Law.*]—If the legislative sanction relied on is a general law, the existence of the corporation under it may be proved, unless the law otherwise provides, by producing the certificate of organization which the law required to be filed,[7] with proof of its filing.[8] Where strict proof is not required, parol evidence of filing has been received in lieu of official certificate.[9] The statutes now in force usually make the record of the certificate, or a certified copy, evidence equally with the original; but in the absence of such a provision the original is the best evidence,[10] but a certified copy is admissible against the company, if, on notice, they fail to produce the original.[11] If the statute requires filing a duplicate in another office, it is the better practice to prove both;[12] but in all the

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[1] Middlesex, &c. Soc. v. Davis, 3 Metc. 133; State v. Dawson, 22 Ind. 272.

[2] Newton v. Carberry, 5 Cranch C. Ct. 632.

[3] Gorham v. Springfield, 21 Me. 58; Berlin v. Gorham, 34 N. H. 266; Mining, &c. Co. v. Windham Co. Bk. 44 Vt. 497.

[4] Some authorities treat the question as if it depended on whether the act was to take effect immediately or not; but the true test is, Is its language alone enough to constitute the body a corporation (either immediately or at a subsequent day), or is it such as to require the performance of a condition to effect the creation?

[5] See City of Paterson v. Society, 4 Zabr. 385.

[6] Thompson v. Harlem R. R. Co. 3 Sandf. Ch. 625.

[7] Chamberlin v. Huguenot Manuf. Co. 118 Mass. 532; Fortin v. U. S. Wind Engine, &c. Co. 48 Ill. 451. s. c. 1 Withr. Corp. Cas. 437.

[8] Meriden Tool Co. v. Morgan, 1 Abb. New Cas. 125. The duplicate filed in the Secretary of State's office need not be proved where strict proof is not required. Id.; s. p. 25 N. Y. 574; 14 Cal. 424. Proof of filing after suit brought has been held enough in an action on a contract with the corporation. Augur, &c. Co. v. Whittier, 117 Mass. 451; and see 20 N. Y. 157. Otherwise in an action to enforce an assessment on lands. New Eel River Draining Assoc. v. Durbin, 80 Ind. 173, s. c. 1 Withr. Corp. Cas. 353. As to the cases in which failure to prove filing may be fatal, see Hawes v. Anglo-Saxon Petroleum Co. 101 Mass. 385, and cases cited. In what case the certificate is conclusive, see Priest v. Essex Hat Co. 115 Id. 380. For an opinion insisting on the proof of performance of the statute conditions, in case of organization under a general law, see Mokelumne, &c. Co. v. Woodbury, 14 Cal. 424.

[9] Miller v. Wild Cat, &c. Co. 52 Ind. 51.

[10] Jackson v. Leggett, 7 Wend. 377; Evans v. Southern, &c. Co. 18 Ind. 101.

[11] Chamberlin v. Huguenot Mfg. Co. 118 Mass. 532.

[12] A sworn copy of the original, with proof of filing in the county clerk's office,

classes of cases where strict proof of incorporation is not requisite, evidence of the filing of either is enough to go to the jury, whether in favor of or against the company, if there is evidence either of user or that the defendant has admitted the fact of organization.[1] If the certificate states all that the statute requires it to state, other facts, though made by the statute conditions precedent to its validity, may be presumed.[2] In the case of a corporation of a sister State, formed under its general statute, the evidence of incorporation which such statute declares shall be deemed sufficient to prove the fact of such incorporation, should be deemed sufficient in the courts of the State where the case arises, provided that due proof of the existence and contents of such statute is also given.[3]

14. *Official Permission to do Corporate Business.*]—If the statute requires an official certificate by supervising State officers to authorize a corporation to commence business, a certificate that it is so authorized, founded on a professed compliance with the law and accompanied with proof of user, is sufficient, but not exclusive[4] evidence of its corporate existence,[5] at[6] and after the time when it was given,[7] without further proof of organization.[8] Where the adverse party has dealt with the company as a corporation—for instance as its collecting agent,—its existence is sufficiently proved by the general law and the certificate of organization, without the certificate that it was authorized to commence business.[9] But in an action for tolls, the official certificate is the only and conclusive evidence of the condition of the way.[10]

15. *Disregard of Statute Conditions.*]—Where the question is not raised by or against the State, nor upon a subscription contract such as requires for its consideration a legal organization, the

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and loss of the original, and production of a certified copy of the duplicate filed in the Secretary of State's office, is sufficient. N. Y. Car Oil Co. v. Richmond, 6 Bosw. 213, s. c. 10 Abb. Pr. 185.

[1] Leonardsville Bank v. Willard, 25 N. Y. 574; Bank of Toledo v. International Bank, 21 Id. 542; De Witt v. Hastings, 40 Super. Ct. (J. & S.) 475.

[2] All Saints' Ch. v. Lovett, 1 Hall, 191.

[3] Eagle Works v. Churchill, 2 Bosw. 166; Ang. & A. on Corp. § 635. Produce an exemplified copy of the papers on file, with authentication of the certifying officer's act and power, either according to R. S. U. S. § 906, or according to the law of the forum. And by a recent statute of New York, if the certificate of organization of incorporation in any other State or territory, or in Canada, is by the local laws *prima facie* evidence of its existence, the certificate duly exemplified, or an exemplified copy, is equally evidence in the New York courts. L. 1877, p. 333, c. 311; see N. Y. Code of Civ. Pro. §§ 957, 958.

[4] Duke v. Cahawba Nav. Co. 10 Ala. N. S. 87, 91.

[5] Jones v. Dana, 24 Barb. 402, ALLEN, J. At least to go to the jury.

[6] Hyatt v. Esmond, 37 Id. 601.

[7] Williams v. Babcock, 25 Barb. 109.

[8] Grubb v. Mahoning Nav. Co. 14 Pa. St. 302. In Pill v. Great W. Turnpike Co. 14 Johns. 416, it was held that, as against a subscriber for stock, the executive certificate of authority to commence business was not sufficient evidence of organization. The records should be produced.

[9] So held in case of a foreign corporation. Bank of Toledo v. International Bank, 21 N. Y. 542.

[10] Duke v. Cahawba Nav. Co. 10 Ala. N. S. 87, 91.

fact that the steps of organizing, and proceeding to business, did not comply with express conditions of the charter or general law, does not necessarily affect the case, if there is color of organization and proof of user.[1] Compliance is presumed in the absence of evidence to the contrary;[2] and so long as the State does not interfere, the question cannot be raised by an individual, unless the statute makes it a peremptory condition precedent, plainly intended as such.[3]

16. *Effect of Proof of User.*]—As a general rule, alike in actions by and against corporations, the other party sufficiently supports his allegation of incorporation by showing the charter, or the general law and certificate filed, together with actual use of the powers and privileges of an incorporated company under the name designated in the charter or certificate.[4] User duly thus proved is enough, without proving a formal acceptance of the charter;[5] and where there is proof of user, the certificate is admissible, though defective;[6] and if the steps taken for organization are so defective as to be merely colorable, the corporate existence may still be shown by proof of user.[7] If performance of conditions be necessary, proof of user raises a presumption of performance.[8] One who participated in the acts of user cannot object that there was no due incorporation.[9]

17. *Mode of Proving User.*]—A single act may not be sufficient to establish user,[10] but any evidence is competent showing the repeated performance of characteristically corporate acts; that is to say, acts which involve franchises which partnerships and associations have no right to assume,—for instance, presuming to sue by a name of incorporation; or to have and use a common seal; or, without any joint stock company law, to claim a perpetual succession by which to hold lands, or permit shares to be transferable; or the acquisition and enjoyment of the necessary property for a corporate use;[11] expending money and incurring liabilities in preparation for corporate transactions;[12] main-

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[1] Gaines v. Bank of Miss. 12 Ark. (Eng.) 769; Bank of Manchester v. Allen, 11 Vt. 302; Leonardsville Bank v. Willard, 25 N. Y. 574.

[2] Williams v. Cheney, 3 Gray, 220; and see 17 Metc. 592, and cases cited; Colonial Bank of Australasia v. Willan, L. R. 5 P. C. 417, s. c. 9 Moak's Eng. 225.

[3] Union Horse Shoe Works v. Lewis, 1 Abb. U. S. 518, s. c. 1 Withr. Corp. Cas. 73.

[4] Narragansett Bank v. Atlantic Silk Co. 3 Metc. 282, 288.

[5] Trott v. Warner, 11 Me. 227; Came v. Brigham, 39 Id. 35.

[6] Danneborge Mining Co. v. Barrett, 26 Cal. 286.

[7] Even in an action on a subscription for stock. Buffalo, &c. R. R. Co. v. Cary, 26 N. Y. 75.

[8] Williams v. Union Bank, 2 Humph. 339.

[9] Aspinwall v. Sacchi, 57 N. Y. 338, and cases cited.

[10] Per ALLEN, J., Buffalo, &c. R. R. Co. v. Cary, 26 N. Y. 79.

[11] Buffalo, &c. R. R. Co. v. Cary, 26 N. Y. 76; All Saints' Church v. Lovett, 1 Hall, 191.

[12] Buffalo, &c. R. R. Co. v. Cary, above; but compare De Witt v. Hastings, 40 Super. Ct. (J. & S.) 463, 475.

taining a place of business where the company continually carried on the corporate business specified;[1] and the fact that their business was managed by directors chosen from time to time;[2] the fact that they issued or received, and acted on documents such as insurance policies, bonds for fidelity of officers;[3] and the like.

18. *Admission of Incorporation.*]—A mere parol admission that the body was incorporated is competent evidence, against the party who made it, of the fact of acceptance of the charter or of organization under a general law,[4] but is never conclusive unless connected with circumstances raising an equitable estoppel against him.[5] To give cogency to such an admission or estoppel it should clearly import corporate as distinguished from associate character.[6] The estoppel does not conclude the party as to the existence of legislative sanction, but only as to matters of fact, such as organization and user.[7] And when the estoppel exists, it need not be pleaded, but is to be given in evidence in aid, or instead, of direct proof.[8]

19. *Estoppel against the Company.*]—It is a general principle that at least where there is an act or charter in existence under which a company by taking the proper steps can become a corporation, if a company does *de facto* organize and hold itself out as a corporation, contracting obligations as such, it cannot, when sued upon such obligations by persons who have dealt with it as such, in good faith, be permitted to avoid a corporate liability thereon, by setting up that it has not taken all the steps pre-

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[1] U. S. Bank v. Stearns, 15 Wend. 314; Commonro v. Bakeman, 105 Mass. 56, 60.

[2] Utica Ins. Co. v. Tillman, 1 Wend. 556; Wilmington, &c. R. R. Co. v. Saunders, 3 Jones L. R. 126.

[3] Cahill v. Kalamazoo Ins. Co. 2 Dougl. 124.

[4] Thus defendant's letters, admitting that he held the money of the bank, plaintiff, were admitted in evidence by Abbott, C. J., in connection with a charter raising a question of misnomer, and it was left to the jury to say that the bank was the same. Nat. Bk. v. De Bernales, 1 Car. & P. 569.

[5] Welland Canal Co. v. Hathaway, 8 Wend. 480. This case is sound in its conclusion; although some of the reasons assigned—as that a corporation could not be estopped, and that an ambiguous admission would not be competent,—are not now safe guides. The fact that the note in suit was made payable at a specified national bank, who are plaintiffs, does not raise a presumption of law that they are a corporation, but is only evidence for the jury. Hungerford Nat. Bk. v. Van Nostrand, 106 Mass. 559. So defendant's correspondence with a bank as its collecting agent is competent, together with user of corporate franchises, under color of an act authorizing the incorporation. Bank of Toledo v. International Bank, 21 N. Y. 542.

Contra, 1 Greenl. Ev. 13th ed. 240, § 203. Many cases in the books lay down the rule in unrestrained language to the effect that he who deals with a corporation cannot deny its character when sued on the contract, but the rule depends on the existence of facts constituting an equitable estoppel. In the leading case, Henriquez v. Dutch West India Co. 2 Ld. Raym. 1535, the cause of action was a bail bond given by defendants to the company, plaintiff, in a name explicitly importing incorporation, and in an action in which the incorporation was proved.

[6] Id. *Contra*, McBroon v. Lebanon, 31 Ind. 268, a. c. 1 Withr. Corp. Cas. 373.

[7] See paragraph 5, above.

[8] Nelson, J., Welland Canal Co. v. Hathaway, 8 Wend. 482.

scribed as conditions precedent to its legal existence.[1] When such a defense is set up, it is for those who rely on it to show that they acted under an honest mistake, and that the other party was not misled to his prejudice thereby.[2] And upon the same ground a corporation which has dealt in excess of its powers, and retains the fruit of its dealing, cannot, nor can any one in its place, refuse to pay the consideration to one who acted in good faith.[3]

20. *Estoppel against those Dealing with the Company.*]—Upon the same principle one who has contracted with a *de facto* corporation, either directly or through an agent designated as such in an obligation naming the corporation,[4] and who retains or has applied the fruits of his dealings with it,[5] or who has accepted from the company a corporate office and so received its property,[6] cannot contest his liability in respect to such dealings on the ground of any defect in its organization,[7] nor on the ground that the dealings in question were *ultra vires*,[8] or even forbidden by the charter.[9] This estoppel, it is true, is conclusive only as to the existence and power at the time the transactions were had, but the existence is presumed to continue so that corporate power to sue and be sued is conclusively implied, unless dissolution by the State is shown.

21. *Estoppel against Members and Subscribers.*]—It is often said that one who subscribes for stock in a company cannot, when sued on his subscription, or on the corporator's individual liability for the debts of a corporation, question the corporate character and power to contract which he has thus admitted;[10] but the true rule in regard to members and subscribers is the same that has already been stated in respect to other persons, that the admission is not conclusive unless there is ground for an equitable estoppel—as, for instance, where one becomes a member of a mutual insurance company, and, on giving a premium note, receives a policy,[11] or where one not only receives certificates for shares,[12]

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[1] Slocum v. Warren, 10 R. I. 124, and cases cited.
[2] Callender v. Painesville, &c. R. R. Co. 11 Ohio St. 516, 526.
[3] Parish v. Wheeler, 22 N. Y. 494.
[4] Vater v. Lewis, 36 Ind. 288, s. c. 10 Am. R. 29.
[5] Palmer v. Lawrence, 3 Sandf. 161, and cases cited.
[6] All Saints Ch. v. Lovett, 1 Hall, 197.
[7] Palmer v. Lawrence, above.
[8] Parish v. Wheeler, 22 N. Y. 494.
[9] Steam Nav. Co. v. Weed, 17 Barb. 378, A. J. Parker, J.
[10] So held on demurrer in a frequently cited case. Dutchess Cotton Manuf. v. Davis, 14 Johns. 238; and see Chubb v. Upton, Sup. Ct. U. S. Oct. 1877; 17 Alb. L. J. 77.
[11] White v. Ross, 4 Abb. Ct. App. Dec. 590; Trumbull Co. Mut. F. Ins. Co. v. Horner, 17 Ohio, 407.
[12] De Witt v. Hastings, 40 Super. Ct. (J. & S.) 475. The bare receipt of a certificate does not prove membership, much less corporate existence, 2 Whart. Ev. § 1152, citing Challis' Case, L. R. 6 Ch. 266; but an acknowledgment of receiving or holding them may. Id.; Chubb v. Upton, above cited.

but holds or appropriates the stock;[1] or where he participates in acts of user, thus aiding to hold out the company to the world as a corporation.

22. *The Estoppel Liberally Applied.*]—This rule of equitable estoppel is freely applied in furtherance of justice, both against companies and in their favor, and in favor of their receivers or others claiming under them.[2] The same general principles of estoppel which preclude contesting corporate existence, preclude contesting the fact of acceptance of a new power, though conferred by law upon condition.[3] The equitable estoppel, if raised by an undisputed state of facts, is for the court to pass on, and submission to the jury is not necessary.[4] Where there are several parties contesting the question, and some are estopped, a want of proof that the others participated personally in the dealings with the corporation as such, must be objected to at the trial.[5]

23. *The General Principle as to Proof of Incorporation.*]—In conclusion, the rule of requisite proof of incorporation which I deduce from the best considered cases, is, that where the issue of corporation or no corporation arises only on the question of power to make the particular contract, or appear as a party in the particular action in controversy, it is necessary, and unless interference by the State is shown, it is sufficient to show a charter, and, under that charter, user of corporate powers, on other occasions reasonably contemporaneous with the one in suit; or to show a general law, and user, by a professed organization under the law,[6] of corporate powers, on other occasions reasonably contemporaneous with those in suit; and, in either class of cases, proof of user is aided by an admission of the fact of incorporation, and is dispensed with by circumstances which equitably estop the party from denying what he has admitted.

24. *Materiality of Date.*]—The evidence should be viewed not merely with reference to the time of commencement of suit, in which regard it only affects the power to appear as a party on the record, but also with reference to the time when the corporate power is alleged to have been exercised, in which regard it may affect the substance of the cause of action. For either pur-

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[1] See Palmer v. Lawrence, 3 Sandf. 161; Parish v. Wheeler, 22 N. Y. 494.

[2] In an action by the company's indorsee of premium notes made by defendant, expressed to be payable to the insurance company, the production of the notes is *prima facie* evidence against him that the corporation was duly organized and competent to transact the business in question. Nor need the indorsee show, in the first instance, that the corporation had complied with the law of its own State, or that of the State where the contract was made. Williams v. Cheney, 3 Gray, 220; Topping v. Bickford, 4 Allen, 120.

[3] Zabriskie v. Cleveland, &c. R. R. Co. 23 How. U. S. 397, and cases cited.

[4] Graff v. Pittsburgh, &c. R. R. Co. 31 Pa. St. 496.

[5] Leonardsville Bank v. Willard, 25 N. Y. 574, affi'g 16 Abb. Pr. 111.

[6] The same principle applies in case of consolidation of corporations, as in original creation. Mitchell v. Deeds, 49 Ill. 416, 464, s. c. 1 Withr. Corp. Cas. 460.

pose the mode of proof is the same. If the existence of incorporation before the exercise of corporate power is shown, there is a presumption of law that the incorporation continued, unless evidence tending to show the contrary is given; but if existence at a later period only is shown, there is no presumption, without other evidence, that incorporation was had before the exercise of the power.[1] In ordinary cases, it is well to present testimony to user covering, in a general way, the whole period involved.

25. *Misnomer.*]—An error in the corporate name used on the record, goes only in abatement,[2] and in modern practice is freely amendable in furtherance of justice, on proof of the true name;[3] and where there is an error in the name used in a deed or will, the corporation should appear in its true name and aver that the instrument intended them by using the wrong name.[4] And the instrument produced by the corporation, with *prima facie* evidence of delivery to them, is competent evidence against the grantor and those claiming under him, that the corporation were known and intended by the name used.[5]

26. *Fraud, Forfeiture or Non-user.*]—Upon the mere question of corporate existence it is not competent (except in some cases where strict proof is required) to give evidence that the charter was obtained by a fraud, not infecting the very cause of action itself, nor that by misuser or non-user the corporation have become amenable to a forfeiture of their franchises,[6] nor even that there has been such a cessation of business as had been previously declared by statute should have the effect to terminate the corporate powers, nor that there has been a voluntary dissolution without judicial proceedings.[7]

II.—Corporate Powers in General.

27. *New Powers.*]—The acceptance of an apparently beneficial grant of additional power, subsequent to the charter, may be inferred as against the body as a whole, and equally in its favor where strict proof is not required, from slight evidence of ac-

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[1] In the case of a municipality. If the date of first incorporation is material, the mere fact that a charter is put in evidence does not raise a presumption of law that there was no prior incorporation. It is at most a question for the jury. Bow v. Allenstown, 34 N. H. 351.

[2] 2 N. Y. R. S. 549, § 14; Christian Soc. in Plymouth v. Macomber, 3 Metc. (Mass.) 235.

[3] Bank of Havana v. Magee, 20 N. Y. 355, aff'g Bank of Havana v. Wickham, 7 Abb. Pr. 134. Compare Hallett v. Harrower, 33 Barb. 537. For a strict rule against misnomer, where a corporation proceeds under statute adversely to common right, see Glass v. Tipton, &c. Co. 1 Withr. Corp. Cas. 377, s. c. 32 Ind. 376. Compare Bank of Commerce v. Mudd, 32 Mo. 218.

[4] See will cases in chapter on *Actions by and against Heirs*, &c.

[5] Mayor, &c. v. Blamire, 8 East, 493.

[6] Nor even that the corporation were not organized within the time limited by the charter. County of Macon v. Shores, 97 U. S. (7 Otto) 272.

[7] 2 Abb. N. Y. Dig. 339–341; Ang. & A. on Corp. § 636, and cases cited. Receivership does not necessarily bar suit. Willitts v. Waite, 25 N. Y. 577; and see 20 Wall. 1.

ceptance or acquiescence by a majority of the corporators or of the directors, as the case may require; in some form such evidence is requisite; and even then it does not necessarily prove the act to be binding on a particular associate.[1]

28. *Distinction between Original Powers of Corporation and Delegated Powers of Officers.*]—The rules of pleading and evidence both recognize the distinction between the original powers of a corporation, which are such as are expressly conferred or reasonably implied in the statute, viewed in relation to the requirements and usages of the business for which incorporation was granted, and the authority to act in the exercise of such powers which is conferred by the corporation or managing board on its officers and agents. Under an allegation merely of want of corporate power to do the act, evidence that an act the corporation had power to do, was done by officers whom the board had not authorized, is inadmissible,[2] except by amendment; and under an allegation merely that the officer was not authorized by the corporation, evidence merely that the act was not within the corporate power would be equally objectionable. But the variance must be substantial and misleading to have the effect to exclude the evidence. The proper authority to the officer or agent by whose hand the act is shown to have been done, may be proved under a general allegation that the corporation did the act,[3] and under an allegation of authority in the agent, evidence of subsequent ratification equivalent in effect is admissible.[4] Where the allegation is merely general, that the corporation did the act, a denial of the act admits evidence of the want of authority.[5]

29. *Evidence of Delegation of Power.*]—To charge a corporation upon the act of an officer or agent, it must be shown directly or presumptively, either that the act was performed while in the discharge of his ordinary duty in the usual course of business, and was within the general scope and apparent sphere of such duty, or that it was expressly authorized, or that it was performed with the knowledge and implied assent of the directors or of the corporation or its authorized officers, or was subsequently ratified by them.[6]

Where there was a consideration, and not an absolute want of authority in the officers to do any act of the nature of that in question, but only a want of authority in the particular instance,

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[1] Ang. & A. 63–69, §§ 81–86; Railway Company v. Allerton, 18 Wall. 233.

[2] Ogden v. Raymond, 5 Bosw. 16; 3 Abb. Ct. App. Dec. 396.

[3] Partridge v. Badger, 25 Barb. 146; Nelson v. Eaton, 26 N. Y. 410. An allegation that a contract was made by the president and directors of the company, is equivalent to saying that it was made by the corporation. Insurance Co. of N. A. v. McDowell, 50 Ill. 120, s. c. 1 Withr. Corp. Cas. 438; Soulby v. Smith, 3 Barn. & Ad. 929. Compare 65 N. Y. 278.

[4] Hoyt v. Thompson, 19 N. Y. 207.

[5] Baleman v. Midwales Co., L. R. 1 C. P. 499. Compare p. 399 of this vol.

[6] First Nat. Bank v. Ocean Nat. Bank, 60 N. Y. 290, and cases cited.

he who would impeach the power must show, either by direct evidence or presumptively, that the want of authority was known to the other party as well as to the officers.[1]

30. *General Presumptions as to Corporate Acts.*]—The same presumptions, whether of law drawn by the court, or of fact, allowed to be drawn by a jury, arise in respect to the conduct of corporations, and their officers and agents, as in respect to that of individuals and their agents, except where statutes impose a different rule.[2] It will be presumed that they conduct their operations, as to details, substantially upon the same principles and in the same manner as individuals engaged in like business.[3] The principle is well settled that dealings which are not apparently beyond the scope of the incorporation, and are not expressly or by necessary implication forbidden by law, are presumed to be valid until the contrary is shown;[4] and the later decisions of the highest authority go far to support the rule, that any formal contract of a corporation, not expressly or by necessary implication forbidden or illegal, is valid against the corporation, when there is ground either for an equitable estoppel, or for holding that the parties are are not *in pari delicto* in exceeding the limits of the law.[5] Illegality is not presumed of the action of a corporation.[6] Acts done by them which presuppose the existence of other facts to make them legal, are presumptive proof of such other facts;[7] and the burden, both of allegation[8] and of proof,[9] is on the party

[1] See 1 Redf. on Rw. 603 (4).

[2] Bank of the U. S. v. Dandridge, 12 Wheat. 70; s. p. Union Bank v. Ridgely, 1 Har. & G. 324.

[3] Mead v. Keeler, 24 Barb. 20.

[4] Green's Brice's Ultra V. 40, n.; and see 6 Moak's Eng. 17, n.

[5] Bissell v. Mich. S. & N. I. R. R. Co. 22 N. Y. 258; Riche v. Ashbury Rw. Carr. Co. L. R. 9 Exch. 224; 7 H. of L. 653; Green's Brice's Ultra V. 879, n. A part of the apparent conflict in the hostile authorities on this subject is removed by distinguishing between cases, 1. where the objection was raised by the company to avoid its liability upon the act in question, upon the ground that the act was foreign to the scope of incorporation; and, 2. where the objection from the same source was to an act in excess of the officers' authority; and, 3. where the objection was raised by a dissenting shareholder, or by a creditor, that the company could not part with its funds for a purpose foreign to the scope of incorporation.

[6] Thus power to acquire a patent may be inferred from the descriptive title of the corporation. Dorsey Harvester Rake Co. v. Marsh, 6 Fish. Pat. Cas. 393, citing Blanchard's Gunstock Turning Factory v. Warner, 1 Blatchf. 271.

[7] Nelson v. Eaton, 26 N. Y. 410, a. c. 16 Abb. Pr. 113, rev'g 7 Abb. Pr. 305. This is a presumption of law, and may be drawn by the court without submission to the jury.

Thus if a loan by a corporation would be valid if made from one fund, but invalid if made from another, the presumption is that it was made from the former. Farmers' Loan & Trust Co. v. Clowes, 3 N. Y. 470. Or if the acquiring, holding and conveying of real property would be valid under some circumstances or for some purposes, but not otherwise, the presumption is that it was valid. Farmers' Loan & Trust Co. v. Curtis, 7 N. Y. 466; Chautauque Co. Bank v. Risley, 19 N. Y. 369; DeGroff v. Am. Linen Thread Co. 21 N. Y. 124, rev'g 24 Barb. 375.

[8] Howard v. Boorman, 17 Wisc. 459.

[9] Cases cited in last note but one. And these presumptions are applied to foreign corporations. N. Y. Floating Derrick Co. v. N. J. Oil Co. 3 Duer, 648; Star Brick Co. v. Ridsdale, 36 N. J. L. 229.

impeaching the transaction, to show that the circumstances giving validity to the exercise of the power did not exist.[1] This rule, however, relates to the legality of the power, and does not supply the want of evidence that the officer or agent who assumed to exercise the power was authorized by the corporation to do so.[2]

III.—Contracts by a Corporation.

31. *Implied Promises.*]—When a corporation acts within the scope of the legitimate objects of its institution, all parol contracts made by its authorized agents are express promises by the corporation; and upon all duties imposed upon them by law, and upon all benefits conferred at their request, the law implies the same promises of the principal as in the case of an individual.[3] To sustain an action for services, or goods sold, or the like, it is not necessary to show that the directors, at a formal meeting, authorized or ratified the employment or order. It is enough to show either, 1. that the officer or agent who made the engagement did so within the scope of his duty or authority; or, 2. that the engagement was performed with the knowledge of the directors, and they received its benefit without objection.[4] The law raises the same presumption as to assent, &c., against corporations as against natural persons; and in such a case, where the corporation have enjoyed performance, they will be presumed to have ratified the contract, and will not be permitted to deny the authority of the agent.[5]

32. *Simple Contracts in Writing.*]—The unsealed contracts of corporations are often made by the adoption of a resolution, communicated to and accepted by the other party. A contract in this form is a sufficient memorandum to satisfy the statute of frauds as against the corporation, if the minutes of the corporation, signed by the clerk, contain, either expressly or in part by reference to other documents, the terms agreed on.[6] Where the contract is made in such a mode, the writing should be deemed within the rule requiring it to be produced as the best evidence of its contents, or accounted for;[7] and the rule forbidding parol evidence to vary a writing, as between the parties to it, applies.

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[1] And the better opinion is, that if the contract is only collaterally in question, and the party impeaching it is not the one sought to be charged on it, he cannot do even that. Farmers', &c. Bank v. Detroit, &c. R. R. Co. 17 Wisc. 372, Dixon, J.

[2] See Partridge v. Badger, 25 Barb. 146.

[3] Dunn v. Rector of St Andrews, 14 Johns. 118.

[4] Hooker v. Eagle Bank, &c. 30 N. Y. 86, and cases cited.

[5] Fister v. La Rue, 15 Barb. 323.

[6] Argus v. Mayor, &c. of Albany, 55 N. Y. 495, affi'g, in effect, 7 Lans. 264; and see 22 Ohio St. 451.

[7] Whitford v. Tutin, 10 Bing. 395. *Contra*, where the proposal does not contain all the terms, and is modified on a parol acceptance. Pacific Works v. Newhall, 34 Conn. 67.

Where a formal instrument is executed without seal, such as an assignment, or a note or bill, there must be some evidence of the authority of the person executing it. To prove a sale which is not a transaction in the ordinary course of business of the corporation—*e. g.*, an executory contract to sell bonds of the company,[1] or to cancel a mortgage without consideration,[2] the authority of the officers will not be presumed. A power of attorney from the president is not enough. The president's authority must be shown. If there is a board of directors, authority from them is presumptively enough.[3] If, however, the statute provides that specified officers shall sign the contracts of the corporation, their signatures are presumptive evidence that such contract is the act of the corporation.[4]

33. *Sealed Instruments.*]—An instrument executed under the seal of a corporation may be put in evidence without further proof, if it has been proved or acknowledged as required for a deed of lands to be recorded; and if it has been also recorded, under the statute, the record or a certified copy, according to the statute, is equally admissible as the original.[5] This, as in the case of a deed of an individual, raises a legal presumption that the seal was the seal of the corporation, and that it was affixed by its authority,[6] even where the law requires express authority from the corporation or board to sanction the grant in question. But this presumption is rebutted by an admission or proof that the act was not authorized nor ratified by the board, and in such case it is void,[7] unless the use of a seal was unnecessary and superfluous. If the instrument is not thus authenticated, the seal (unless it be that of a domestic municipal corporation which the court may judicially notice)[8] must be proved to be genuine, by calling either one who saw it affixed, or equally well any one who knows the seal.[9] But the testimony of a witness that he had been told by corporate officers that it was the seal of the corporation, is not enough.[10]

The seal being thus proved, upon a corporate deed regular on its face, and apparently executed in due form, the law presumes

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[1] Ang. & A. on C. §§ 297–299; Titus v. Cairo, &c. R. R. Co. 37 N. J. L. 102.

[2] Smith v. Smith, 117 Mass. 72.

[3] See Hoyt v. Thompson, 5 N. Y. 320; 3 Bosw. 267, 285. But the power is now often presumed in favor of third persons dealing in good faith.

[4] Bronson, J., Gillett v. Campbell, 1 Den. 520.

[5] Lovett v. Steam Mill, &c. Co. 6 Paige, 60; Kelly v. Calhoun, U. S. Supm. Ct. 17 Alb. L. J. 55

[6] Id.; Chamberlain v. Bradley, 101 Mass. 188, s. c. 3 Am. R. 331; Sheehan v. Davis, 17 Ohio St. 571, 581.

[7] Hoyt v. Thompson, 5 N. Y. 335; 19 Id. 207; Eureka Co. v. Bailey, 11 Wall. 491.

[8] The court does not judicially notice the seal of a foreign corporation. Ang. & A. on Corp. 201, § 216.

[9] Jackson v. Pratt, 10 Johns. 381; Ang. & A. on Corp. 200, § 216; Moises v. Thornton, 8 T. R. 307; Brounker v. Atkyns, Skinn. 2, cited in Rosc. N. P. 146; Finch v. Gridley, 25 Wend. 469.

[10] Moises v. Thornton, above.

that the deed was executed and the seal affixed by competent authority from the corporation.[1] Hence, alike where the deed bears a due certificate of acknowledgment,[2] &c., and where the seal is proved or judicially noticed,[3] the law presumes that the deed was duly executed and the seal affixed by a competent authority in pursuance of whatever power the corporation has, or may be presumed to have,[4] to convey; and it is not necessary for the party claiming under the instrument to produce the resolution or by-law giving authority, but the burden is on the party resisting it to show that the officers signing were not authorized to convey, or that those having custody of the seal were not authorized to affix it.[5] If the seal is an ordinary one, not the distinctive seal of the particular corporation, some evidence must be adduced (if the seal is necessary to the instrument), that it was used as a corporate seal, and that the instrument was executed by the proper officers by authority from the board or corporation;[6] and this will admit the deed.[7] A corporate seal, undisputed, is *prima facie* evidence that the deed is that of the corporation.[8] The facts necessary to show authority on the part of the agent of execution, whoever he may be, may always be proved by extrinsic evidence, and always by parol, unless it appears that the best evidence is in writing, or the statute requires the corporation to give written authority. Where a conveyance is made by a corporation, the grantee's attorney usually requires a certified copy of the resolution authorizing its execution, and this, if preserved, affords convenient primary evidence as against the corporation, and secondary evidence as against others, of authority, where direct proof of authority is necessary. Proof of the seal on an instrument, produced by one claiming under it, is sufficient proof of delivery, unless it appears that affixing the seal was not intended as a complete execution.[9] The officer or agent who signs on the part of the corporation, though expressly to "attest" the instrument, is not deemed a subscribing witness who must be called, unless the

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[1] Whitney v. Union Trust Co. 60 N. Y. 576; Hoyt v. Thompson, 5 N. Y. 320; Rosc. N. P. 147, and cases cited.

[2] Johnson v. Bush, 3 Barb. Ch. 239.

[3] 2 Dill. M. C. 550, § 450.

[4] Paragraph 30, above.

[5] Same authorities. For a stricter rule, see People *ex rel.* Town of Rochester v. Deyoe, 2 Supm. Ct. (T. & C.) 142. Proof that the seal was affixed by the printer of corporate bonds, by direction of the proper officers, who afterward signed and delivered the bonds, is sufficient. Royal Bank v. Grand Junction R. R. Co. 1 Withr. Corp. Cas. 644, s. c. 100 Mass. 414.

[6] Miners' Ditch Co. v. Zellerbach, 37 Cal. 543, s. c. 1 Withr. Corp. Cas. 250, 284, and cases cited.

[7] Phillips v. Coffee, 17 Ill. 154, and cases cited; Christie v. Gage, 2 Supm. Ct. (T. & C.) 344.

[8] St. John's Church v. Steinmetz, 18 Pa. St. 273.

[9] Ang. & A. on Corp. 202, § 227.

intent is clear that he signed not on the part of the corporation, but as an indifferent witness.[1]

34. *Corporate Acceptance of Deeds, &c.*]—The acceptance of a bond or deed to a corporation may be presumed from the fact that, after it was submitted to the board for approval, it was retained by the corporation, and acted on—as, for instance, in the case of a cashier's bond, where the cashier was permitted to enter upon or continue in the discharge of his duties—and the fact that it was presented to and approved by the board may be established by parol.[2]

35. *Contract Ambiguous as to Party.*]—The act or contract of an agent of a corporation does not derive its efficacy to bind or to benefit the corporation, from professing on its face to have been done in the exercise of the agency.[3] If upon the face of the instrument there are indications suggestive of agency,—such as the addition of words of office or agency to the signature, or the imprint of the corporate title on the paper,—parol evidence is competent to show who the parties intended should be bound or benefited.[4] And even where the contract bears no such suggestion on its face, the rule as now generally received is that parol evidence is competent either in favor of or against the corporation (except, perhaps, when the instrument is a specialty); but that it is not competent for the purpose of exonerating the signer from personal liability if the other party to the instrument chooses to hold him personally liable,[5] unless there is evidence that the signer was duly authorized to contract for the corporation, and that credit was actually given to the corporation alone.[6] If a seal is not essential to the validity of the act, the authority of the agent may be proved by oral evidence,[7] or by proof of ratification, *e. g.*, the payment of an instalment pursuant to it.[8]

IV.—Torts by a Corporation.

36. *False Representations by Meeting.*]—Fraudulent representations by the corporate body may be proved by evidence that an official report, containing material misrepresentations of fact as to the affairs of the corporation, was presented to a public and general meeting of the corporators, by a board or committee acting in the course of its duty, and either that it was tacitly sanc-

[1] Compare Deffell v. White, L. R. 2 C. P. 144; Kelly v. Calhoun, U. S. Supm. Ct. 17 Alb. L. J. 55.
[2] Bank of U. S. v. Dandridge, 12 Wheat. 64; Graves v. Lebanon Nat. Bank, 10 Bush (Ky.) 23, s. c. 19 Am. R. 50, and cases cited.
[3] Mech. Bk. v. Bank of Columbia, 5 Wheat. 326.
[4] Id.; Vater v. Lewis, 36 Ind. 288, and cases cited.
[5] 2 Tayl. Ev. § 1054; Briggs v. Partridge, 64 N. Y. 357.
[6] See Ang. & A. on Corp. 299, § 294.
[7] See paragraph 29, above, and 48, below.
[8] Eureka Company v. Bailey Company, 11 Wall. 491.

tioned by the meeting and subsequently circulated by the directors for the benefit of the company,[1] or that it was expressly adopted by the meeting and put forth to the public, even although no vote to publish it were passed.[2] But the mere acceptance of a false communication from an officer or servant,[3] or a vote "accepting" a report of a committee, does not alone make the statements in it representations, or even admissions, competent against the corporation.[4]

37. *Frauds by Directors, &c.*]—It has been held that fraud by the board of directors, or by the managing agent, may be proved under an allegation of fraud committed by the corporation, if the act be such as to bind the company.[5] False representations in correspondence or otherwise by officers or agents of a corporation, if brought home to the corporation as its act, will sustain the allegation, and the large latitude given to the admission of evidence bearing on a question of fraud is allowable against a corporation as well as against individuals.[6]

38. *Liability for Wrongs by Officers or Agents.*]—To render a corporation liable for a tort committed by its officers or agents, it is not necessary to show that the corporation was authorized to do the act,[7] but it must be shown that he by whom it was done was at the time engaged in the business of his office or agency, and acting within its scope. In these respects, the evidence to charge a corporation with a fraud of its agent or officer depends on the general principles of agency.[8] If the act is such that had it been done without malice, the corporation would have been bound by it (as in case of a prosecution instituted), or would have been liable for injury resulting (as in case of a carrier's breach of duty), it is no defense for the corporation to show that it was the willful and malicious act of the agent or servant.[9]

V.—Meetings and By-laws.

39. *Evidence of Regularity of Meetings.*]—When the books are competent, an entry in the usual form, that after due notice[10]

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[1] Nat. Exch. Bk. v. Drew, 2 Macq. H. L. 103, s. c. 32 Eng. L. & Eq. 1; New Brunswick, &c. Co. 9 Ho. of L. Cas. 711.

[2] Green's Brice's Ultra V. 245, citing Re Nat. Patent Steam Fuel Co. 4 Drew. 529.

[3] Burns v. Pennell, 2 H. L. Cas. 497.

[4] 1 Dill. M. C. 357, § 242.

[5] Glamorganshire Co. v. Irvine, 4 F. & F 947; Barwick v. English Joint Stock Bank, L. R. 2 Ex. (Ch.) 259; Mackay v. Com. Bk, L. R. 5 C. P. 394, s. p. King v. Fitch, 2 Abb. Ct. App. Dec. 508; and see 21 N. Y. 238.

[6] See Butler v. Watkins, 13 Wall. 464; Marigny v. Union Bank, 5 Rob. (La.) 354; Upton v. Englehardt, 3 Biss. 343.

[7] N. Y. & New Haven R. R. Co. v. Schuyler, 34 N. Y. 30, aff'g 38 Barb. 534.

[8] Id.; Hunter v. Hudson River Iron Co. 20 Barb. 507; and see 46 N. Y. 23.

[9] Weed v. Panama R. R. Co. 17 N. Y. 362, aff'g 5 Duer, 196, and cases cited; Green's Brice's Ultra V. 266, nn. *, †. Compare Ang. & A. Corp. § 388; 1 Redf. Rw. 533, and Rounds v. Delaware, &c. Co. 64 N. Y. 133.

[10] The principle that in certain cases the proceedings of a meeting are not valid without due notice of the meeting, is confined to meetings of the corporate body, and

the members met, imports that the statutory quorum was present;[1] and from a record stating a proceeding, but silent as to the mode of it, the law presumes that the legal mode was pursued.[2] It has generally been held that to prove the action of a board or committee, there should be evidence that there was a meeting of the committee, and that those who signed the report were together when they signed it, or that the absent members had notice of the meeting, or an opportunity to be present;[3] but in the case of private corporations this rule is more or less relaxed, according to the common usages of corporate business within the jurisdiction.[4]

40. *Acts by Parol.*]—The acts of a private corporation, or of its board or committee, may generally be proved by parol testimony of a witness,[5] even where the statute requires a fair and regular record of proceedings to be kept,[6] or declares the books to be evidence, if it does not declare them to be exclusive evidence of the proceedings,[7] for acts even so formal as a by-law or regulation may be adopted without written evidence of a vote,[8] and when so adopted they may be proved by direct evidence, or inferred from circumstances, even if there be written records of other acts;[9] and the fact that no record was made of the act in question may be proved by calling the keeper of the record, without producing or accounting for the book.[10]

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does not extend to meetings of directors and committees. Samuel v. Holladay, Woolw. C. C. 400, a. c. 1 Withr. Corp. Cas. 145. And due notice of a meeting of the corporators, if not in issue, may be presumed, against the corporation and those claiming under them. Cobleigh v. Young, 15 N. H. 493. For requisites of proof of notice, where the action of the meeting is directly and not collaterally in question, see Green's Brice's Ultra V. 350–355; People v. Bacheler, 22 N. Y. 128, aff'g 28 Barb. 310; Atlantic Fire Ins. Co. v. Sanders, 36 N. H. 269; Clark v. Wardwell, 55 Me. 61.

[1] Commonwealth v. Woelper, 3 Serg. & R. 32; Grays v. Turnpike Co. 4 Rand. 578; and see 8 Allen, 217; 15 N. H. 502.

[2] Hathaway v. Addison, 48 Me. 440; and see 2 B. Monr. 177.

[3] See City of Troy v. Winters, 2 Hun, 63.

[4] See Re Bonelli's Telegraph Co., L. R. 12 Eq. 246; Bradstreet v. Bank of Royalton, 42 Vt. 128, cited in Field on Corp. 256, § 237, n.; Edgerly v. Emerson, 23 N. H. 566.

[5] Bk. of Lyons v. Demmon, Hill & D. Supp. 398; Am. Ins. Co. v. Oakley, 9 Paige, 496; Partridge v. Badger, 25 Barb. 146, and cases cited. See also on this subject, 31 How. St. Tr. 673, cited in 1 Phill. Ev. 591; R. v. Hunt, 3 B. & Ald. 566.

[6] Bank of U. S. v. Dandridge, 12 Wheat. 64, STORY, J.

[7] Inglis v. Great N. Rw. Co. 16 Eng. L. & Eq. 55, a. c. 1 McQ. H. L. 112, 119, Ld. St. LEONARDS; Magill v. Kauffman, 4 Serg. & R. 317; Ang. & A. Corp. 159, § 186; Waters v. Gilbert, 2 Cush. 31. *Contra*, in case of a municipal corporation, Gilbert v. City of New Haven, 40 Conn. 102.

[8] See paragraphs 56–58.

[9] Lockwood v. Mechanics', &c. Bk. 9 R. I. 308, a. c. 11 Am. R. 253, and cases cited; U. S. Bank v. Dandridge, 12 Wheat. 64. Where there are no books to resort to, clear and satisfactory evidence of another sort should be required. SHAW, Ch. J., Central Turnpike Corp. v. Valentine, 10 Pick. 142.

[10] Smith v. Richards, 29 Conn. 232, 243. Otherwise, perhaps, where the evidence is offered by the corporation. "We must take notice of a usage so general as that of a church to keep a record." SHAW, Ch. J., Sawyer v. Baldwin, 1 Pick. 492; and see Narragansett Bank v. Atlantic Silk Co. 3 Metc. 287.

41. *Pleading By-laws, &c.*]—The courts refuse to notice judicially the by-laws of a private corporation,[1] and under the new practice they should be pleaded, whenever directly in question, as the foundation of an action or defense.[2] Nor do the courts, unless it be those of the municipality, judicially notice the ordinances of a municipal corporation, if not directed by law to do so. Therefore, such ordinances, when sought to be enforced by action, or when set up by the defendant as a protection, should be set out in the pleading. It is not sufficient that they be referred to generally by the title or sections.[3]

42. *Proof of By-laws.*]—By-laws or ordinances of a municipal corporation will be usually proved pursuant to statute, by producing the volume in which they are officially published, or by a certified copy.[4] Where they are proved by production of the minutes of the common council, the mayor's approval must be also shown.[5] By-laws adopted by other than municipal corporations are valid, although no written record of the vote of adoption was made; and hence they may be proved by production of the original book or paper, with indirect evidence of adoption, such as that they have been handed down from officers to successors, and always acted on as the rule of the corporation.[6] When collaterally relevant, parol proof is usually allowed, without production of the written form, especially if no question is made as to the terms of the writing; and juries have been allowed to infer the existence of a supposed by-law, or the repeal of an actual one, from long usage.[7]

VI.—Authority of Officers, Agents and Members.

43. *Evidence of Appointment of Officers and Agents.*]—Where the title to office or agency is involved only as incidental to the right or liability of the corporation growing out of the acts of the officer or agent, it may be proved not only by the corporate record of election, if any, but equally well by parol testimony, either going directly to the fact of election, or showing that the person in question acted as such and was generally reputed so to be. Proof of such facts by the adverse party throws upon the corporation the burden of disproving the alleged authority.[8] General reputation is not enough alone, except perhaps

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[1] Youngs v. Ransom, 31 Barb. 49.

[2] Compare Atlantic Fire Ins. Co. v. Sanders, 36 N. H. 252.

[3] 1 Dill. M. C. 167, and cases cited; 436, § 346.

[4] N. Y. Code of Civ. Pro. § 941; Howell v. Ruggles, 5 N. Y. 444; 1 E. D. Smith, 398; Porter v. Waring, 2 Abb. New Cas. 280.

[5] Kennedy v. Newman, 1 Sandf. 187.

[6] Union Bank v. Ridgeley, 1 Har. & G. 324.

[7] Ang. & A. Corp. 353, §§ 328, 329; p. 394, § 368.

[8] Pusey v. N. J. R. R. Co. 14 Abb. Pr. N. S. 441. In the absence of any statute making record evidence, a witness having personal knowledge may testify as to who were the stockholders at a given time. Tyng v. U. S. Submarine, &c. Co. 1 Hun, 161.

in case of a public officer.[1] But with evidence that the corporation had held him out as its officer, or permitted him to assume the office without objection, or had ratified his acts as such,[2] it is sufficient *prima facie* evidence; and slight evidence is allowed in the case of subordinate officers and servants.[3]

Evidence that officers acting as such, and recognized by the corporation or board, had no regular or valid title to the office, does not avail. Even when the question is of their right to sue in the name of the corporation, defendant cannot sustain an objection to their right of recovery, on the ground that they are not such officers, *de jure*, without evidence that the State has proceeded to a judgment of ouster against them.[4]

44. *Evidence of Express Authority.*]—The power of an agent, for whatever purpose, may be proved by a vote or resolution without the seal.[5] The familiar rule by which a sealed power is required to authorize an agent to execute a sealed instrument, does not apply to a power conferred by a corporate vote.

45. *Implied scope of Authority.*]—Acts done by the directors, which required the sanction of a meeting of the corporation, may be sustained by proof of lapse of time and no dissent on the part of the corporation, or from their not producing the record of the proceedings had at the meeting where action should have been taken.[6] Upon similar principles, acts of an officer or agent may be sustained by proof that they are such as he has usually and customarily performed. It is a general principle, applicable to open and ordinary acts in the course of the corporate business,

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[1] Nelson, J., Clark v. Farmers' Woolen Manuf. Co. 15 Wend. 256; Litchfield Iron Co. v. Bennett, 7 Cow. 234. Where the authority of an officer of a public corporation comes incidentally in question in an action in which he is not a party, it is sufficient to show that he was an acting officer, and the regularity of his appointment or election cannot be made a question. Proof that he is an acting officer is *prima facie* evidence of his election or appointment, as well as of his having duly qualified. But if proof of a due election or appointment is alone relied on, such election or appointment must be legally established. 1 Dill. M. C. 295, note, and cases cited

[2] Thus the authority of an officer or agent to draw bills, may be proved by showing a report to the board, adopted by it, containing a statement of the drafts. Partridge v. Badger, 25 Barb. 173.

[3] Thus it is sufficient proof of the employment of the plaintiff as engineer of a corporation, to show that he was recognized and consulted by the officers of the company as its agent, and that his plans, &c. were accepted and acted upon. 2 Greenl. Ev. 13th ed. 87, note, citing Moline Water Power, &c. Co. v. Nichols, 26 Ill. 90.

So the presence of a servant on a steamer is some evidence of his employment there. Svenson v. Pacific Mail Steamship Co. 57 N. Y. 108. The dress of a railroad brakeman indicates his character as such. Hughes v. N. Y. & N. H. R. R. Co. 36 Super. Ct. (J. & S.) 222. Appearance of clerk behind desk is some evidence of agency. Leslie v. Knickerbocker Ins. Co. 63 N. Y. 27, affi'g 2 Hun, 616. Person at work on locomotive, with his coat off, presumed a servant of the company. McCoun v. N. Y. Central, 66 Barb. 338.

[4] Trustees of Vernon Soc. v. Hills, 6 Cow. 23; All Saints Church v. Lovett, 1 Hall, 198.

[5] Green's Brice's Ultra V. 365, n. *, and cases cited. For the rule, that one dealing with an officer may be charged with notice of limits of authority in the by-laws, &c. see Dabney v. Stevens, 10 Abb. Pr. N. S. 39, s. c. 2 Sweeny, 415.

[6] 1 Redf. on Rw. 600 (3).

that a general agency is defined, not by the authority which the agent or officer receives from his principal, but by that which the latter allows the former habitually to assume and exercise.[1] And this principle applies to the officer of a municipal corporation, whose duties are not defined by law, at least so far as to throw on the city the burden of disproving authority.[2] Hence authority from the corporation for an act of its officer may be proved by showing that he had openly exercised the power, and by showing either corporate acts from which it must be inferred that the corporation or the directors, as the case may be, must have contemplated the legal existence of the necessary delegated authority for the purpose,[3] or that, with knowledge of the act, they affirmatively ratified it or tacitly acquiesced in it. Especially in respect to such of the ordinary powers of business corporations as are by common usage, if not of necessity, exercised by means of officers and agents—such as the implied power of a trading company to make bills and notes—the law presumes, in the absence of evidence to the contrary, that general authority to do such acts, when the exigencies of the company require, has been duly vested in the person who has been held out as their agent and allowed to do such acts.[4] And the jury may presume the authority in such case, for an act done openly in the usual course of business at the office of the company, without evidence of actual knowledge on the part of the company or directors, or of express ratification;[5] or, where knowledge and acquiescence is shown, they may presume the authority from the open exercise of substantially similar powers—for example, they may presume authority to buy gold from the usual buying of exchange.[6]

46. *Authority implied in Title of Office.*]—In the absence of any other evidence of authority, the law presumes certain limits as marking the scope of the authority of various officers, varying both with the character of the corporation, and the public and general usages of corporate business within the jurisdiction. It must suffice here to say that it is now generally agreed that in the absence of any statute to the contrary, the president, together with the secretary or cashier, are presumed, in favor of third persons purchasing in good faith and for value, to have power to convey property of the corporation in its name, in the ordinary course of its business. Other officers, except the board of directors, have not this power. The president has presumable authority to direct

[1] Bridenbecker v. Lowell, 32 Barb. 9, 18, Allen, J.
[2] Hall v. City of Buffalo, 2 Abb. Ct. App. Dec. 301.
[3] Olcott v. Tioga R. R. Co. 27 N. Y. 546, 559, and cases cited.
[4] Narragansett B'k v. Atlantic Silk Co. 3 Metc. 289, Shaw, Ch J. So the authority of an agent to disseize so as to acquire an adverse possession for the corporation, and the acceptance of his act, may be proved by the acts and conduct of the corporation, whether manifested by it collectively or through its officers, agents, tenants, &c. Ang. & A. on Corp. 159, § 186.
[5] Conover v. Mut. Ins. Co. 1 N. Y. 292. *Contra*, 1 Redf. on Rw. 590.
[6] Merchants' Bank v. State Bank, 10 Wall. 104.

a suit to be brought;[1] and so has the treasurer or cashier, upon things in action standing in his name as such,[2] or intrusted to his management in the ordinary course of business.[3] The vice-president's authority needs some evidence of usage or other sanction.[4] A clerk acting as an officer, in the officer's absence, is not presumed to have any other powers than necessary for the usual and ordinary business in his temporary service.[5] The powers of superintendents and managing agents depend too much upon special usages to be here discussed.[6] A "financial agent" may be presumed empowered to negotiate a loan, but not to state an account.[7]

47. *Testimony of Officer or Agent.*]—The declarations of the officer or agent cannot suffice to show the existence or scope of his authority,[8] but he may be called as a witness to prove it. If implied authority is essential to the cause of action, he should be required to state the facts relied on as raising implied authority, and should not be asked whether or not he had authority to do the act in question, for this is asking for a conclusion.[9] But to disprove alleged express parol authority, the testimony of the president that none was given, is competent.[10]

48. *Ratification.*]—Ratification by the corporation or its officers may be proved or presumed in the same manner as in case of agencies for natural persons. It may be inferred from informal acquiescence merely, after notice of the facts.[11] Proof of actual intent to ratify is not essential.[12] And an express ratification is competent, although not communicated.[13] But the ratification may be rebutted by evidence either of actual mistake or of incomplete knowledge of the facts.[14]

VII. Admissions, Declarations, and Notice.

49. *Admissions and Declarations of Members.*]—The admissions and declarations of a member of a corporation, even if made at a corporate meeting, are not competent evidence against the

[1] American Ins. Co. v. Oakley, 9 Paige, 496; Mumford v. Hawkins, 5 Den. 355.
[2] Howard v. Hatch, 29 Barb. 297.
[3] Bridenbecker v. Lowell, 32 Id. 9. See many of the conflicting cases on the implied powers of cashiers collected in 3 Am. Law Rev. 612.
[4] Shimmel v. Erie Railw. Co. 5 Daly, 396; and see 5 Bosw. 293.
[5] Potter v. Merchants' Bank, 28 N. Y. 647.
[6] See Abb. Dig. Corp. tits. Agents, Officers, President, &c.
[7] Grant v. Franco-Egyptian Bank, Eng. Ct. of App. 1877.
[8] Stringham v. St. Nicholas Ins. Co. 4 Abb. Ct. App. Dec. 315.
[9] Prov. Tool Co. v. U. S. Manuf. Co. 120 Mass. 35; Short Mountain Coal Co. v. Hardy, 114 Id. 197.
[10] Graves v. Waite, 59 N. Y. 161.
[11] Olcott v. Tioga R. R. Co. 27 N. Y. 546, aff'g 40 Barb. 179; People ex rel. Smith v. Flagg, 17 N. Y. 584, rev'g 16 Barb. 503; Hoyt v. Thompson, 19 N. Y. 207; Abb. Dig. of Corp. tit. Ratification.
[12] Hazard v. Spears, 2 Abb. Ct. App. Dec. 353.
[13] Dent v. N. A. S. Co. 49 N. Y. 390.
[14] Owensboro Savings Bank v. Western Bank, 4 Law & Eq. 695, and cases cited; 47 N. Y. 199.

corporation, unless made concerning some transaction in which such member was the authorized agent of the corporation;[1] and in such case their competency depends on the rules applicable to the admissions of officers and agents.

50. *Admissions and Declarations of Officers and Agents authorized to speak.*]—Evidence of declarations and admissions made by officers and agents of corporations is competent against the corporation in two classes of cases. First, when the declarations were made by an officer or agent in response to timely inquiries properly addressed to him, and relating to matters under his charge, in respect to which he is authorized in the usual course of business to give information.[2] Upon this principle, what is said by the proper officer or agent to receive and act on a demand or complaint—whether it be the secretary or treasurer who signed a money obligation, and to whom it is presented for payment;[3] or the general superintendent or managing agent to whom complaint is duly made of a nuisance caused by the company's property, or of the conduct of its servants;[4] or by the proper conductor, baggage master, or station agent, on inquiries made with reasonable promptitude for lost baggage or freight;[5] or what is said upon the like inquiry by a subordinate to whom the inquirer is referred for information by the principal officer of the department,[6]—is competent against the corporation. But the officer or agent must be one having the duty to perform. A communication by an officer of what others have done, on an application he could not or would not act on, is not within the rule.[7]

51. *Admissions and Declarations made as part of the Res Gestæ.*]—Again, the declarations and admissions of officers and agents may also be proved against the corporation as part of the *res gestæ*, but only when made during the agency, and in regard to a transaction depending at the very time, so as to constitute a part of the act.[8] They cannot be admitted on this ground, if subse-

[1] 2 R. S. N. Y. 407, § 80; REDFIELD, in 1 Greenl. Ev. 13th ed. 206, § 175; 1 Phill. Ev. 487, note 134; 30 Me. 167.

[2] Thus, in a bank's action on a note held by it, an admission by the president that the note had been paid, made to the defendant, in consequence of an examination of accounts, caused by the president's asking for payment and the defendant insisting that he had already paid, is competent evidence for the defendant, as having been made while acting within the scope of a bank president's ordinary powers. Bank of Monroe v. Field, 2 Hill, 445, NELSON, Ch. J. Compare Horrigan v. First Nat. Bank, 5 Reporter, 188.

[3] Pusey v. N. J. &c. R. R. Co. 14 Abb. Pr. N. S. 441.

[4] McGenness v. Adriatic Mills, 116 Mass. 177; Malecek v. Tower Grove R. Co. 57 Mo. 17.

[5] Morse v. Conn. Riv. R. R. Co. 6 Gray, 450.

[6] Gott v. Dinsmore, 111 Mass. 51.

[7] Bank of Grafton v. Woodward, 5 N. H. 301; Soper v. Buffalo, &c. R. R. Co. 19 Barb. 310.

[8] Anderson v. Rome, &c. R. R. Co. 54 N. Y. 334, and cases cited. Compare Norwich Transp. Co. v. Flint, 13 Wall. 3; Baptist Ch. of Brooklyn v. Brooklyn Fire Ins. Co. 28 N. Y. 153; Superintendent of Cortland v. Superintendent of Herkimer, 44 N. Y. 22.

quently made, as a narrative of a past act, even though they relate to the official duty of the declarant, or were intended in the interest of the corporation.[1] Hence the declarations of members of a board or committee as to what the board or committee have done, are not competent.[2] It must affirmatively and explicitly appear that the declaration was made at the time, and not afterwards, or its reception in evidence will be error.[3]

52. *Admissions and Declarations before incorporation.*]—Where a corporation adopts and acts on the negotiations and inchoate contracts of the promoters who formed it, their acts and declarations, so far as they would have been competent against themselves, are competent against the corporation. So where a corporation is formed by the consolidation of other companies, thereby succeeding to their rights, the previous admissions and declarations of the previous corporation binding on itself in respect to such right, are competent, though slight evidence against the new corporation.[4] Such cases are not regarded as falling within the principle applicable to assignor's declarations, for there is an identity of interest.[5] The new organization is the same actual entity under a new legal form.

53. *Notice.*]—Notice to a corporation can be proved by showing notice given either, 1, to its officer or agent, who was at the time acting for the corporation in the matter in question, and within the range of his authority or supervision; or, 2, to one whose duty it was to receive and communicate such information to his principal; or, 3, to the board of directors, or a previous board;[6] but not to a single director, unless he is the one charged with the duty to be affected by the notice, or acting in the board at the time, upon the matter in question.[7] For the purpose of proving such notice, evidence of the declarations and admissions of the officer or agent in question is competent, within the limits previously stated.[8]

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[1] First Nat. Bank v. Ocean Nat. Bank, 60 N. Y. 278.

[2] Soper v. Buffalo, &c. R. R. Co. above; Jex v. Board of Education, 1 Hun. 157. Compare, however, as to fraud promoted by individual members, Marigny v. Union Bank, 5 Rob. (La.) 354.

[3] Whitaker v. 8th Ave. R. R. Co. 51 N. Y. 299, rev'g 5 Robt. 650.

[4] Phil. &c. R. R. Co. v. Howard, 13 How. U. S. 333.

[5] See ch. I, p. 12.

[6] Fulton Bank v. N. Y. & Sharon Canal Co. 4 Paige, 127, s. p. 34 N. Y. 30, 84; Whart. Ag. §§ 184. 673; Abb. Dig. of Corp. tit. Notice. Where the officers or agents of a public corporation have no power or duties with respect to a given matter, their individual knowledge or the individual knowledge of the inhabitants or voters, does not bind or affect the corporation. The mayor is chief executive officer of the city, and notice to him of a nuisance is sufficient, when it would not be to the clerk, who is only a recording officer, not authorized to act upon the notice. 1 Dill. M. C. 296, note.

[7] North Riv. Bk. v. Aymar, 3 Hill, 262; Bank of U. S. v. Davis, 2 Id. 451. Compare U. S. Ins. Co. v. Shriver, 3 Md. Ch. 381.

[8] Wilson v. McCullough, 23 Pa. St. 440; Chapman v. Erie Rw. Co. 55 N. Y. 579, rev'g 1 Supm. Ct. (T. & C.) 526; Commercial Bank v. Wood, 7 Watts & S. 89.

VIII. Books and Papers.

54. *Corporation Books and Papers as evidence.*]—The traditional statement found in many authorities,[1] that corporate books are not evidence against strangers, was not originally a sound generalization, and is no longer a safe guide in practice. Considered for purposes of evidence, the records of a corporation are chiefly of three classes:

1. Statutory records—or those required by law for the purpose of preserving exclusively written evidence of important acts—such as subscription books for stock, registers of shareholders, annual reports, &c.; and their quality as evidence depends largely upon the statutes by which they are required.

2. Minutes of deliberative proceedings—which are properly made at the meetings of the corporation and of boards and committees—and the quality of these as evidence depends on common-law rules peculiar to the records of bodies of corporate form, but modified often by the statute governing the corporation.

3. Account books and other books of entries kept by the officers or agents of the corporation, as records of transactions in the course of their agency, such as would be kept by the agents of an individual or partnership carrying on a like business; and these account books are subject to the common-law rules applicable generally to the accounts of individuals and partnerships.

55. *Statutory Records.*]—The mere fact that a statute requires a record to be made does not make the books the only evidence,[2] but where the record itself constitutes the act—as in the case of a subscription for stock in the commissioners' books, or the making an annual report, or the adoption of a municipal by-law—the fact to be proved, when directly in issue, is the existence of the statutory record; and consequently, if the act is competent to be proved, between whatever parties, production of the statutory record is a competent mode of proof.

56. *Minutes of Proceedings.*]—Whenever the action of a deliberative body—whether that of the corporation at large, its board, or a committee—is competent to be proved, either in favor of or against the corporation, its officers, members, or strangers,

[1] See 1 Greenl. Ev. 549, § 493; 2 Phill. Ev. 295, notes 4 and 843; Rose. N. P. 228, 231; 1 Whart. Ev. 626, § 662; Starkie, 412; 2 Tayl. Ev. 1519. The initial authority usually cited is Mayor of London v. Lynn, 1 H. Blacks. 214. The American, and I presume the present English law, would now admit such books as competent towards showing that the corporation made the demands of toll, but would require other evidence that the strangers had submitted to those demands, in order to prove the usage. In Owings v. Speed, 5 Whart. 420, it was settled that the books of a corporate body, established by the legislature for a *public* purpose—such as trustees of proprietary lands—are competent evidence of the proceedings of the body therein recorded, and ought to be admitted whenever those acts are to be proved (Marshall, C. J.); and the same principle is constantly applied not only to the statutory records, but also to the deliberative minutes of private corporations, within the limits indicated in the text.

[2] Inglis v. Great N. Rw. Co. 16 Eng. L. & Eq. 55, s. c. 1 McQ. H. L. 112, 119; Bank of U. S. v. Dandridge, 12 Wheat. 70

the contemporaneous corporate record of their action is competent,[1] though not always alone sufficient. Thus the act of organizing may be proved in favor of the corporation or creditors, and against members[2] and strangers,[3] by the books; and in an action between strangers, one claiming a professional degree may prove it by the books of the college that granted it,[4] and one claiming as assignee of a corporation may prove the assignment by the corporate books.[5] So where it is competent, in an action against a corporation for negligence, for it to prove its own precautions taken by the appointment of a committee, &c., the books are competent for this purpose.[6] It is very commonly the case, that the act of a private corporation is not competent unless shown to have been communicated to the other party, and in such case the books are competent to show the act, provided other evidence of communication is given to connect. The first question therefore to be determined is, whether the corporate act is competent under the issue, and between the particular parties; if so, the minutes may be resorted to as evidence of it.[7]

Of course, the books of municipal corporations are competent as evidence of the election of their officers, and of other corporate proceedings there recorded,[8] and are thus competent between strangers.[9]

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[1] This is the modern rule founded in reason, and essential to public convenience. See cases cited under this and following paragraphs of this chapter, and Smith v. Natchez Steamboat Co. 2 Miss. (1 How.) 492; Rosc. N. P. 228, 231; Bank of U. S. v. Dandridge, 12 Wheat. 64; Grant v. Henry Clay Co. 80 Pa. St. 208; Schell v. Second Nat. Bank, 14 Minn. 43; Rayburn v. Eldod, 43 Ala. N. S. 700. As previously indicated, numerous dicta, and perhaps some authority, to the contrary will be found in the reports. See for instance, Jones v. Trustees of Florence, 46 Ala. 626. The maxim that the books of a corporation are not competent in its favor against a stranger, to establish a matter of private right, is undoubtedly correct so far as it applies to the corporate accounts. That which is peculiar in the competency of statutory records and corporate minutes, may be illustrated thus: The diary of an *individual* is evidence against him, but not in his favor. He may often prove an act of his own in his own favor, but he cannot prove it by showing an entry of the fact in his own books. But *corporate minutes* of deliberative proceedings are competent, not only against the corporation, but against any person whatsoever, if the deliberative act which is the subject of the record, is competent against him. The reason of the rule is that the entry of the individual is a mere *declaration;* the vote of a corporation is an *act.* Often, however, the corporate act must be connected with other proof to complete its competency.

[2] Ryder v. Alton, &c. R. R. Co. 13 Ill. 523; Penobscot, &c. R. R. Co. v. Dunn, 39 Me. 90; Highland Turnpike Co. v. McKean, 10 Johns. 156; Coffin v. Coffin, 17 Me. 442.

[3] For instance, even in an action for tolls. Duke v. Cahawba Nav. Co. 10 Ala. N. S. 82.

[4] Moises v. Thornton, 8 T. R. 303.

[5] Edgerly v. Emerson, 23 N. H. 566. And this has been repeatedly ruled at circuit in New York, against objection, and without reversal on appeal.

[6] Weightman v. Corporation of Washington, 1 Black, 39, 46.

[7] This principle is expressly recognized by the act as to foreign corporations. N. Y. L. 1869, c. 589.

[8] But the entry relied on must be the primary one; and the record of an incidental and secondary proceeding is not the best evidence of the date and performance of the primary act which should have preceded it. See Litchfield v. Vernon, 41 N. Y. 123; Post v. Logan, 1 N. Y. Leg. Obs. 59.

[9] Deming v. Roome, 6 Wend. 651; Rosc. N. P. 231, citing Case of Thetford, 12 Vin. Ab. 90, and R. v. Mothersell, 1 Stra. 93.

57. *Against whom Evidence of Corporate Acts is competent.*]—In general, a resolution or other deliberative act of a corporation may be proved in its own favor, or in favor of a stranger, against any one who takes issue upon it—as where the existence of a corporation, depending on organization under a general law, or on acceptance of a charter, is denied, or where it is denied that the body had conferred authority on officers or agents,—and therefore in such cases the minutes are competent. So such an act is competent as between its members, in respect to all matters within the corporate tie that unites them; and as between them the corporate books are of the nature of public books.[1] Such an act is also, in general, competent against a member and in favor of the corporation or its creditors, as to matters within the same limits, as for instance where a receiver or a creditor, after judgment against the corporation, sues a member or officer upon his subscription or individual liability. But the mere fact that a person was a member—for instance a stockholder in a bank—does not make the bank accounts evidence against him of transactions wholly foreign to his membership, such as his dealings as a depositor.

58. *The Minutes not exclusively the best Evidence.*]—The records of the corporate proceedings are not generally called for or produced on the trial.[2] The principle now commonly received in those jurisdictions where the law of corporations is most developed, is that where their proceedings are collaterally or incidentally in issue, parol evidence is equally primary; but on the contrary, the record or a proper copy should be deemed the best evidence, to be produced or accounted for before parol evidence can be adduced, whenever the action or defense is founded directly on the act or proceeding in question,[3] or when a written act or resolution is pleaded and in issue, or when the contents of the record were communicated and the terms of the communication is the material fact. In other words the primariness of the minutes does not depend on their being corporate records, but on general principles applicable to other classes of papers.[4]

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[1] 1 Greenl. Ev. 548, § 493. By-laws are evidence against an agent or servant who had opportunity to know and a duty to obey them. See Ang. & A. on Corp. 347, § 324.

[2] See Partridge v. Badger, 25 Barb. 146. Chief Justice REDFIELD says: "In practice it is not one time in ten where the record books of a corporation are ever referred to in court, unless to fix a date or the precise form of a vote upon which a power is made to depend." 1 Redf. Rw. 228 (3).

[3] As in case of a prosecution on a municipal ordinance, see 1 Dill. M. C. 443, § 355; compare Woolsey v. Village of Rondout, 4 Abb. Ct. App. Dec. 639, 642, IV; or a suit for relief against fraudulent representations as to the organization or condition of the corporation. Warner v. Daniels, 1 Woodb. & M. 106; or an action on a contract made by a resolution embodying the terms of proposal, followed by assent on the part of the contracting party. Paragraph 30, above.

[4] Conflicting authorities, too numerous to be cited here, abound. The incertitude of opinion may easily be seen by comparing 1 Whart. Ev. § 77, and Id. §§ 661, 663; 1 Redf. on Rw. 228 (2), and Ang. & A. on C. 66, § 83; p. 394, § 368; Field on Corp. § 224; Partridge v. Badger, 25 Barb. 146, and Clark v. Farmers' Woolen, &c. Co. 15

59. *Authentication of Corporate Books when produced.*]—To introduce the corporate books in evidence, their character as such must be properly shown by testimony, unless conceded.[1] For this purpose, it is usual to call the secretary or other officer who made the record; but this is not essential,[2] for without him they may be admitted on their production by a witness who can testify of his own knowledge that they are the books of the corporation; that they have been regularly kept by the proper officer, or by some person in his necessary absence; that they come from the proper custody; and that he knows of his own knowledge that the entries offered are correct records of the transactions they profess to record,[3] or, in lieu of such knowledge, other competent presumptive evidence, such as—that the entries are in the handwriting of a person proved to be the proper recording officer,[4] or that the book containing them has been handed down in actual and continuous use in the corporation, as the guide and authority for its officers.[5] Such evidence being given, it is presumable that the entries were made at the dates they bear; but if grounds of suspicion appear, the party should be provided with evidence on that point.[6] An erasure will be presumed to have been made before the entry was signed.[7] The degree of this proof is a preliminary question for the court. More latitude is allowable in the proof, in proportion as the books are ancient.[8] The signature of the appropriate officers to the minutes of proceedings even of a public corporation or municipal board, though required by law, is not in the nature of an official certificate of the matters stated in the minutes: but rather an attestation of their authenticity; and

Wend. 256, and cases cited; Lumbard v. Aldrich, 8 N. H. 31, and Edgerly v. Emerson, 23 N. H. 566, and see 36 Id. 138.

[1] If produced by the corporation on notice, proof of authenticity is necessary as against a stranger; but is not necessary as against the corporation or its members, nor between it and one who is a party to the paper produced or claims under it, or the State proceeding to enforce rights under it. Commonwealth v. Woelper, 3 S. & R. 43.

[2] Hathaway v. Inhabitants of Addison, and other cases in next note. The *contrary* held where the corporation offered their own books without producing or accounting for the recording officer. Union Gold M. Co. v. Rocky M. Nat. Bank, 2 Col. Ter. 565.

[3] Highland Turnpike Co. v. McKean, 10 Johns. 154; St. Lawrence Mut. Ins. Co. v. Paige, 1 Hilt. 430; Hathaway v. Inhabitants of Addison, 48 Me. 440; 2 Phil. Ev. 442; 1 Whart. Ev. § 639; 1 Greenl. Ev. § 483, and cases cited. The minutes of the subscription commissioners may be proved by their secretary. Ryder v. Alton, &c. R. R. Co. 13 Ill. 523. The books dedicated to the use of the corporate records are competent, though the original volumes were purchased, and are claimed, as the individual property of a member. State v. Goll, 32 N. J. L. 285; and see Sawyer v. Baldwin, 11 Pick. 492. Documents may also be produced by a corporator who has custody of them. Stark. Ev. 456.

[4] If the minutes were made by a former clerk, since deceased, his handwriting, and the fact that he was the proper recording officer, must both be proved by extrinsic evidence. Highland Turnpike Co. v. McLean, 10 Johns. 153; Owings v. Speed, 5 Wheat. 427.

[5] Union Bank v. Ridgely, 1 Har. & G. 410.

[6] Haynes v. Brown, 36 N. H. 557.

[7] Rosc. N. P. 141, citing 15 Ir. Ch. R. 405. But see 1 Phil. Ev. 606; 2 Id. 458; 21 N. Y. 541.

[8] Union Canal Co. v. Lloyd, 4 Watts & S. 398; and see 1 Tayl. Ev. 105.

though they lack the required signature, their authenticity may be proved by testimony.[1] The same principle applies to the records of a private corporation.

It is competent to rebut the evidence of authenticity by any proper evidence, for instance, by producing and proving another set of records, incompatible with those first put in.[2]

60. *Rough Minutes.*]—Rough notes taken by the recording officer, at the meeting, for the purpose of being afterward extended in the books, are, until so extended, competent in place of a formal record;[3] and, if lost without being entered, parol evidence of the transactions of the meeting is competent.[4] But, after the formal record has been made out from them by the proper officer, within a reasonable time, that becomes the original record, and the rough minutes are no longer the best evidence.[5]

61. *Competency of Copies.*]—Where the entries are of a public character, so that the public generally have a right to resort to them, the court will not require their production, but allows, in lieu, the production of a copy by a witness who can swear to its accuracy,[6] or a copy certified by some officer who is made by law a certifying officer for the purpose.[7] Entries not of such a public nature cannot be proved by copy at common law,[8] unless the copy is one that has been issued or received as such by the corporation or other party against whom it is adduced.[9] By a recent statute in New York, the books of a foreign corporation are admissible in evidence to prove transactions of such corporation in *any* court of the State. And copies of such books may be proved by deposition on commission, or by any other competent evidence, on giving ten days' previous notice, except in favor of the corporation where it is a party.[10]

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[1] People v. Eureka Lake Co. 48 Cal. 143; West Springfield v. Root, 18 Pick. 318.

[2] Goodwin v. U. S. Annuity, &c. Co. 24 Conn. 600.

[3] Waters v. Gilbert, 2 Cush. 27.

[4] Wallace v. First Parish, 109 Mass. 264; Protho v. Minden Seminary, 2 La. Ann. 939.

[5] Board of Education v. Moore, 17 Minn. 422.

[6] A seal will not authenticate it. Stark. Ev. 457, n.; Whitehouse v. Bickford, 29 N. H. (9 Fost.) 471.

[7] Commonwealth v. Chase, 6 Cush. (Mass.) 248.

[8] A copy of a vote of a corporation is not competent evidence of such vote, unless either sworn to or certified by some person who is made by law a certifying officer for such purpose. Hallowell, &c. Bank v. Hamlin, 14 Mass. 178; Rosc. N. P. 141. Where the law requires a public record to be kept by officers, which all persons interested are entitled to a copy of, some courts, for reasons of convenience, have received a copy authenticated by the officers. Eastport v. East Machias, 35 Me. 404.

[9] Atlantic Mut. Fire Ins. Co. v. Sanders, 36 N. H. 252; 1 Redf. on Rw. 467; State Bank v. Ensminger, 7 Blackf. (Ind.) 105.

[10] L. 1869, c. 589, amending § 1 of L. 1863, c. 206; modified in application by N. Y. Code Civ. Pro. §§ 3343 and 929–931. The Illinois act admitting copies, has been held merely to make certified copies admissible in lieu of originals, and not to make such books and records evidence as were not so previously. Pittsfield, &c. Plank Road Co. v. Harrison, 16 Ill. 81. As to records out of the jurisdiction, proved by deposition, see 4 Allen, 122, and King v. Enterprise Ins. Co. 45 Ind. 48, 59.

62. *Reports.*]—An official statement or report received by the corporation or board from one acting as officer, and accepted and adopted by them, is competent evidence against the corporation, and those bound by its acts, without further proof of the appointment of the officer;[1] but a report to a corporation or board is not made admissible in evidence against it by the mere fact that it was received and "accepted" by it,[2] except for the purpose of charging it with notice of the contents.

63. *Foundation for Secondary Evidence.*]—Where proof of loss is required, as it may be when the corporation offers secondary evidence in its own behalf, testimony of the proper custodian, that he has the control of all the books and papers of the company, and has made most diligent search for the book, and inquiry of every person concerned with the matter, but could get no clue to it, is enough,[3] and if the proper custodians testify to their proper search for a book which they had allowed to be removed, and the inability of themselves and of the person to whom it was lent to find it, and their ignorance as to where it is, this is sufficient in the absence of suspicious circumstances, without calling such third person.[4]

64. *Notice to produce.*]—A person not entitled to the custody of the books or papers is not bound, as against the corporation, to call its officer as a witness before offering secondary proof against it, but may give its attorney notice to produce,[5] and, in default of compliance, may prove the contents by secondary evidence. A written authority of an officer or agent, if delivered to him by the corporation as his evidence of appointment, should be called for by *subpœna duces tecum* to him; but if simply entered in their records as the act of the corporation, although kept in his custody, should be called for by notice to produce.[6] The failure of the corporation to produce its books upon due notice entitles the adverse party to favorable presumptions in aid of his secondary evidence;[7] but it does not preclude them from producing the books on their own behalf for another matter.[8]

65. *Parol Evidence to vary Corporate Minutes.*]—Where the record of meetings of a municipal corporation is kept pursuant to law, parol evidence, although admissible to apply the language to its subject-matter, is not competent to enlarge or contradict the

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[1] Partridge v. Badger, 25 Barb. 172.
[2] 1 Dill. M. C. 357, § 242; see also paragraph 36.
[3] Graff v. Pittsburgh, &c. R. R. Co. 31 Pa. St. 494; Board of Education v. Moore, 17 Minn. 412.
[4] Partridge v. Badger, 25 Barb. 173, s. p. Indianapolis, &c. R. R. Co. v. Jewett, 16 Ind. 273.
[5] Thayer v. Middlesex Mutual Ins. Co. 10 Pick. 326; 1 Redf. Rw. 228 (2).
[6] Westcott v. Atlantic Silk Co. 3 Metc. 291.
[7] Shaw, Ch. J., Thayer v. Middlesex (above); Wylde v. Northern Rw. Co. 53 N. Y. 156. Compare 18 Wall. 544.
[8] Tyng v. U. S. Submarine, &c. Co. 1 Hun, 161.

terms or meaning of proceedings which are recorded;[1] and in general, where the law, for the purpose of preserving authentic evidence, prescribes the keeping of official minutes of public proceedings of a corporate nature, parol evidence is not competent to contradict the minutes.[2] In respect to minutes of private corporations, the better opinion is that parol evidence is competent, except where the minutes are held the best evidence, and even then, unless the issue is between the corporation and another party to the act which they are adduced to prove.[3] Moreover, the restriction on such parol evidence applies only to the records of the proceedings of the corporate body itself; but not to those of the directors of private corporations. They are but agents of the body, and their minutes are not (unless by contract or estoppel) conclusive on the corporation, but may be contradicted by parol.[4] And a witness, an officer of the corporation, may be asked if he knew of any reason why the assent given informally by the directors was not recorded. The mistake or neglect of the secretary, or the direction of the board to delay the entry, may be proved against the corporation.[5] But even where parol evidence is admissible, testimony as to the sense in which the recorded vote was understood by an officer or member is not competent,[6] nor are his declarations as to its meaning competent, except against himself.[7]

66. *Accounts and Business Entries.*]—The third class of corporate books, constituting the accounts of the transactions of a private corporation had through agents and officers, are competent between members, and between the corporation and members on any question which concerns them in their interest as such,[8] and between third persons at issue in respect to the condition and solvency of the corporation.[9] Beyond this, their corporate character gives them no competency in favor of the corporation, nor between third persons,[10] but their admission for these purposes must be sought on grounds common to the accounts of individuals and firms—for instance, by producing the person who made the entry, and reading it as a memorandum in aid of his testi-

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[1] See 1 Dill. M. C. 349, and cases cited pro and con.

[2] See People v. Zeyst, 23 N. Y. 140; and as to supplying omissions by parol, compare Andrews v. Inhabitants of Boston, 110 Mass. 214; as to amending, compare 1 Dill. M. C. 346, §§ 233, 234.

[3] See p. 16, n. 9.

[4] Goodwin v. U. S. Annuity, &c. Co. 24 Conn. 601.

[5] Bay View Ass. v. Williams, 50 Cal. 353.

[6] Ehle v. Chittenango Bank, 24 N. Y. 548; 1 Greenl. Ev. 323, n.

[7] Bartlett v. Kinsley, 15 Conn. 334; Tyng v. U. S. Submarine Co. 1 Hun, 161.

[8] Hubbell v. Meigs, 50 N. Y. 480; Merchants' Bank v. Rawls, 21 Geo. 334.

[9] See paragraph 58, n. 3, (above).

[10] Except when they are the books of a foreign corporation within the statute N. Y. L. 1869, c. 589; N. Y. Code Civ. Pro. §§ 929–931 and 3343, or perhaps when the books of a bank the property of the State. Crawford v. Bank, &c. 8 Ala. N. S. 79.

mony to its correctness,[1] or by showing that the entry was made when the party, being a member, was present and presumably assenting to the entry;[2] or by showing that the memorandum was made by the common agent of the parties, at their request,[3] or that it was made in the course of duty by a person since deceased, who had means of knowledge, and no interest to falsify.[4] In case of a public corporation, admission of accounts may be sought on grounds common to the accounts of public officers;[5] and as *against* the corporation, entries in the corporate books, made by an officer in the discharge of his duty, are competent on proving the books by the secretary or by other regular proof. It is not necessary to produce the officer who made the entries.[6]

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[1] Farmers' & Mech. Bank v. Boralf, 1 Rawle, 152; Chenango Bridge Co. v. Lewis, 63 Barb. 111.

[2] And such an entry is equally competent against those claiming under the member. Union Canal Co. v. Lloyd, 4 Watts & S. 393. And even where the very question is whether he was a member, *prima facie* evidence on that point is enough to let in the entry made in his presence and assent. Graff v. Pittsburgh, &c. R. R. Co. 31 Pa. St. 495.

[3] New England Co. v. Vandyke, 1 Stockton (N. J.) 498; compare Black v. Shreve, 13 N. J. Ch. 455.

[4] Ocean Bank v. Carll, 55 N. Y. 440; 9 Hun, 239; Wheeler v. Walker, 45 N. H. 355; Chenango Br. Co. &c. v. Lewis, 63 Barb. 111.

[5] See Cabot v. Waldron, 46 Vt. 11.

[6] N. Am. Building Asso. v. Sutton, 35 Pa. St. 466.

CHAPTER IV.

ACTIONS BY AND AGAINST EXECUTORS AND ADMINISTRATORS.

1. Nature of official character and title.
2. Necessity of proof of title under pleadings.
3. Appropriate mode of proof.
4. Effect of letters as evidence.
5. Impeaching the letters.
6. Best and secondary evidence of authority.
7. Representatives' declarations and admissions competent against the estate.
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9. Judgments.
10. Testimony of the representative.
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18. Objecting to the testimony.
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21. Proof of an interview.
22. What is a personal transaction or communication.
23. Indirect evidence.
24. Effect of objecting party testifying in his own behalf.
25. Form of offer of testimony in rebuttal.
26. The United States courts rule.

1. *Nature of Official Character and Title.*]—By the modern law, executors and administrators are no longer the presumptive and contingently ultimate owners of the assets, but are constituted trustees of all the property in their hands;[1] and an executor, though designated by the will, derives his power, as truly as an administrator, from letters granted by the probate court.[2] In respect to liability to action, he stands in the place of the deceased, and a creditor is now entitled to judgment without alleging or proving that there are any assets; for the judgment only liquidates the debt.[3] On the other hand, the creditor cannot recover against an executor who has not taken out probate, even on proof of his having assets.[4] Letters must be issued, and it is for the holder of letters to proceed against those who meddle with the estate without having letters. The authority of the executor or administrator to enable him to sue cannot be shown by letters granted by a court of another State.[5] Such letters are

[1] Dox v. Backenstose, 12 Wend. 542; Babcock v. Booth, 2 Hill, 181.

[2] Hood v. Ld. Barrington, L. R. 6 Eq. 222.

[3] Allen v. Bishop, 25 Wend. 414; Parker v. Gaines, 17 Id. 558; Covington v. Barnes, 1 Dill. C. Ct. 16, and cases cited.

[4] As to the exception in equitable actions of a certain class, see Metcalf v. Clark, 41 Barb. 45, and cases cited; Haddow v. Lundy, 59 N. Y. 320.

[5] Doolittle v. Lewis, 7 Johns. Ch. 45, and cases cited; Noonan v. Bradley, 9 Wall. 394. *Contra*, Carmichael v. Saint, 16 Ark. 28.

often relevant for the purpose of justifying his acts without suit, done within this State,[1] his acts done elsewhere,[2] and his suits and proceedings in the State where the letters issued;[3] and when thus relevant, they are competent if authenticated agreeably to the act of Congress,[4] or to the law of the forum.[5] The executor or administrator is thus the official and sole trustee of the estate. He is not, however, a public officer within the rules as to evidence. His actual title must be shown; and, although in the absence of evidence to the contrary, he is presumed to have acted in good faith,[6] the presumption of regularity accorded to official acts does not aid his proceedings.[7] The law distinguishes between his interest and his acts, as representative of the estate, and those in his individual capacity or other official capacity; and acts done in one capacity are not necessarily conclusive against him in the other.[8]

2. *Necessity of proof of title, under Pleadings.*]—If the allegations of the complaint do not show explicitly whether the party sues or is sued in the representative or the individual character, resort will be had to the designation in the title of the pleading. If it is there indicated that he sues, or is sued, "*as*" representative—for example, if he is named "A. B. *as* executor of C. D.," this is enough to characterize the action.[9] But if he is named with a mere addition—for example, A. B., executor, &c., of C. D., this is matter of description only, and does not alone show that the action is in his official capacity,[10] but in connection with allegations in the complaint, may suffice to sustain the action in either capacity. Under the new procedure, a representative suing even on a cause of action accruing on a contract made with himself, or founded on his own actual possession, should be prepared with evidence of his appointment, if his character as such is alleged in his pleading, and not admitted, especially if the re-

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[1] Parsons v. Lyman, 20 N. Y. 103, affi'g 28 Barb. 564, and rev'g 4 Bradf. 268.

[2] Middlebrook v. Merchants' Bank, 3 Abb. Ct. App. Dec. 295, affi'g 41 Barb. 481; 18 Abb. Pr. 109.

[3] Clark v. Blackington, 110 Mass. 369, 374.

[4] U. S. R. S. § 905; Spencer v. Landon, 21 Ill. 192; Graham v. Whitely, 26 N. J. L. 260.

[5] N. Y. R. S. 936, § 26; Code Civ. Pro. § 952.

[6] Sherman v. Willett, 42 N. Y. 146.

[7] Bank of Troy v. Topping, 13 Wend. 563; Hathaway v. Clark, 5 Pick. 490.

[8] So held of ratification of a contract, Caughey v. Smith, 47 N. Y. 244; 50 Barb. 351. So of a judgment, see Rathbone v. Hooney, 58 N. Y. 463. *Contra*, of notice, Burr v. Bigler, 16 Abb. Pr. 177. So of an appearance and accounting, Larrour v. Larrour, 2 Redf. 69. So of a receipt, Wilcox v. Smith, 26 Barb. 316, 350. The rule is usually different where his individual interest is represented by him in his official character. McGovern v. N. Y. Central, &c. R. R. Co. 67 N. Y. 417; but then it may be necessary that his *cestuis que trustent* be parties.

[9] Stilwell v. Carpenter, 2 Abb. N. C. 240, 261; Austin v. Munro, 47 N. Y. 367; Scranton v. Farmers' Bank, 33 Barb. 527.

[10] Merritt v. Seaman, 6 N. Y. 168; Carpenter v. Stilwell (above); 3 Wms. Ex'rs, 6 Am. ed. 2052-3; Id. 1981, n. b.; 1986.

covery will be assets; but, in courts where the common-law rule is still followed, this proof may not be essential in such cases.[1]

3. *Appropriate Mode of Proof.*]—The appropriate proof of the official character is the production of the letters testamentary, or of administration, granted to him by the appropriate tribunal within the State where he sues;[2] and the rule is the same whether he seeks to prove it in his own favor,[3] or it is to be proved against him,[4] or proved by a third person as the source of title.[5] Unless foundation is laid for secondary proof, parol evidence is incompetent.[6] But upon well settled general principles, direct proof may be dispensed with by estoppel,[7] and where direct proof is impossible, indirect evidence may suffice to raise a presumption that letters were duly granted.[8]

The letters, since they are founded on a decree granting administration, are not the only evidence; the decree itself may be proved.[9] The letters, however, are competent without the decree.[10] Unless the statute makes letters testamentary sufficient evidence, an executor must produce also the probate of the will.[11] The identity of the party with the one named in the letters may be presumed by the court from absolute identity of name,[12] but not from identity of surname.[13] In case of ambiguity or difference, parol evidence is admissible to identify.[14]

4. *Effect of Letters as Evidence.*]—Letters in due form, granted by a court, within the State, and having jurisdiction, are at common law presumed to have been regularly issued, and to qualify the holder to sue and be sued;[15] and the giving of bond

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[1] 3 Wms. Ex'rs, 6 Am. ed. 2002, &c. The regulation of this subject varies much in different jurisdictions, according to the extent to which the statutes have embodied the modern principle, that the representative is a mere trustee.

[2] Noonan v. Bradley, 9 Wall. 394.

[3] Belden v. Meeker, 47 N. Y. 307, affi'g 2 Lans. 470; and auth. cited.

[4] Armstrong v. Lear, 12 Wheat. 175.

[5] Pinney v. Pinney, 8 Barn. & C. 335; 1 Wms. Ex'rs, 6 Am. ed. 349; Remick v. Butterfield, 31 N. H. 70, 84.

[6] Williams v. Jarrot, 6 Ill. (1 Gilm.) 120, 129.

[7] As where defendants had covenanted with the executors as such, Farnham v. Mallory, 2 Abb. Ct. App. Dec. 100; or where the alleged representative had as such conveyed to defendant, Bratt v. Bratt, 21 Md. 578; or had procured the action to be revived, by an order of court, reciting his character as such, McNair v. Ragland, 1 Dev. (N. C.) Eq. 539. *Contra*, Shorter v. Urquhart, 28 Ala. N. S. 360, 366.

[8] Marcy v. Marcy, 6 Metc. (Mass.) 360; Battles v. Holley, 6 Greenl. (Me.) 145.

[9] Farnsworth v. Briggs, 6 N. H. 561; Elden v. Keddell, 8 East, 187, Ld. Ellenborough. But if the decree grants administration on condition, the letters should be produced. Dale v. Roosevelt, 8 Cow. 349. In some courts, however, performance of the condition will be presumed. See paragraph 4, n. 1.

[10] Remick v. Butterfield, 31 N. H. 70, 84.

[11] 3 Phil. Ev. 75.

[12] Hatcher v. Rocheleau, 18 N. Y. 86. *Contra*, 3 Wms. Ex'rs, 6 Am. ed. 2060.

[13] Fanning v. Lent, 3 E. D. Smith, 206. *Contra*, Trimble v. Brichta, 10 La. Ann. 778.

[14] See 3 Abb. N. Y. Dig. 2d ed. 95.

[15] Westcott v. Cady, 5 Johns. Ch. 334, 343; even though the death of the decedent was presumed from absence for less than seven years, Newman v. Jenkins, 10 Pick. 515. The seal of the surrogate may be affixed even pending the trial, Maloney v. Woodin, 11 Hun, 202.

and taking of oath may be presumed.[1] In New York and some other States, such letters are conclusive evidence of the authority of the representative, until reversed on appeal, or revoked,[2] and at common law they are conclusive as to the authority of the representative over the personalty.[3] The recital, in the letters, of the jurisdictional facts, is *prima facie* evidence that they existed,[4] but if the record shows that the statutory notice to parties in interest was not given, jurisdiction fails.[5] The fact that a contest is pending in the probate court as to the validity of the letters, does not impair their effect, whether *prima facie* or conclusive, if it be under statutes which impose the burden of proof on the contestants.[6] Letters taken out pending the suit, although competent at common law,[7] and in chancery,[8] especially where no objection was made by pleading, are not sufficient under the modern practice,[9] except in favor of or against one who has been substituted as representative,[10] or who is enabled to avail himself of the fact of appointment under supplemental pleading or pleadings equivalent in effect.[11]

What has been said as to the effect of letters is applicable to letters issued as of course, on producing and recording foreign letters in the probate court, unless the statute authorizing this proceeding, or the foreign statutes under which the original letters were granted, indicate a different rule.[12]

5. *Impeaching the Letters.*]—The burden of proof is upon one who disputes the authority of an executor or administrator, on the ground of want of jurisdiction.[13] The jurisdictional facts are defined by statute, and are usually death and assets, under the prescribed conditions as to domicile and location.[14] These matters may be disproved if the validity of appointment is in issue.[15]

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[1] Brooks v. Walker, 3 La. Ann. 150. So also may a prior resignation creating the vacancy filled by the letters, Gray v. Cruise, 36 Ala. N. S. 559; but only if the surrogate had power to accept a resignation. Flinn v. Chase, 4 Den. 85.

[2] 2 N. Y. R. S. 80, § 56; 1 Wms. Ex'rs, 6 Am. ed. 620, n. (h), and cases cited.

[3] Allen v. Dundas, 3 T. R. 125.

[4] Farley v. McConnell, 52 N. Y. 630, affi'g 7 Lans. 428; Belden v. Meeker, 47 N. Y. 307, affi'g 2 Lans. 470.

[5] Randolph v. Bayne, 44 Cal. 366.

[6] Brown v. Burdick, 25 Ohio St. 266.

[7] Thomas v. Cameron, 16 Wend. 579.

[8] Osgood v. Franklin, 2 Johns. Ch. 1; Doolittle v. Lewis, 7 Id. 45; Goodrich v. Pendleton, 4 Johns. Ch. 549.

[9] Thomas v. Cameron, 16 Wend. 579; Varick v. Bodine, 3 Hill, 444; Bellinger v. Ford, 21 Barb. 311.

[10] French v. Frazier's Ad. 7 J. J. Marsh. 425, 432.

[11] Haddow v. Lundy, 59 N. Y. 320.

[12] See on this subject Parker v. Parker, 11 Cush. 519; Dublin v. Chadbourn, 16 Mass. 433.

[13] Welch v. N. Y. Central R. R. Co. 53 N. Y. 610.

[14] Comstock v. Crawford, 3 Wall. 403; 2 R. S. of N. Y. 73, § 23; L. 1837, ch. 460, § 1, same stat. 3 R. S. 6th ed. 826, § 2; Farley v. McConnell, 52 N. Y. 630, affi'g 7 Lans. 428.

[15] Redf. on W. 57. But doubted; see 67 N. Y. 380; 63 Id. 460. The weight of

But the letters cannot be impeached by proving that the surrogate did not comply even with the requirements of the statute expressed to be conditions precedent of his action, such as examination of parties on oath,[1] much less that they issued to a person not entitled,[2] if these requirements do not enter into the definition of the jurisdiction of the court, and do not relate to the notice necessary to bind the adverse party. Nor can the letters be impeached, as to personalty at least, by showing that the testator was incompetent,[3] or that the will was forged;[4] but fraud in obtaining the letters is competent,[5] unless the statute affords an exclusive remedy in the probate court. The minutes of the surrogate are not rendered incompetent because the statute provides that the testimony must be entered in a book and preserved as part of the record.[6]

6. *Best and Secondary Evidence of Authority.*]—If the pleadings require a party to prove his adversary's authority as executor or administrator, it is best to give him notice to produce at the trial the letters or probate, or both, as the case may require, unless the party is prepared to produce the decree or an exemplified copy of the letters as primary evidence. But it is not necessary, in order to let in secondary evidence, to prove that the probate or letters are in the adversary's possession; for proof that he has been duly appointed executor or administrator, raises a sufficient presumption that they are in his possession to let in secondary proof.[7]

7. *Representative's Declarations and Admissions Competent against the Estate.*] — The admissions and declarations of an executor or administrator, made while he was clothed with official authority as such, are competent in evidence against the estate

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the decisions on this point is impaired by two considerations: Many of the English cases are the refusal of common-law courts to hold themselves bound by purely ecclesiastical adjudications. And many of the American cases arose at a time when probate was little more than *prima facie* authentication, like the acknowledgment or proof of a deed. The tendency of recent legislation is to make the decree of the probate court an adjudication in the fullest sense. See 63 N. Y. 460. Whether disproving death avoids the letters so far as to deprive those who have acted on them in good faith, of their protection, see Jochumsen v. Suffolk Bank, 3 Allen (Mass.) 87, in the affirmative; and Roderigues v. East River Bank, 63 N. Y. 460, rev'g 48 How Pr. 166, in the negative.

[1] Farley v. McConnell, 52 N. Y. 630, affi'g 7 Lans. 428.

[2] Comstock v. Crawford, 3 Wall. 403.

[3] 3 Redf. on W. 57; 1 Wms. on Ex'rs, 6th Am. ed. 618. *Contra*, see 2 Whart. Ev. § 811.

[4] Allen v. Dundas, 3 T. R. 125; Steph. Ev. 48.

[5] Exp. Joliffe, 8 Beav. 168, and see Stilwell v. Carpenter, 3 Abb. N. C. 263.

[6] Haddow v. Lundy, 59 N. Y. 320.

[7] 3 Wms. Ex'rs, 6th Am. ed. 2059. A paper imperfectly showing the will and its probate, if shown to have been acted on as such by the representative, may be competent secondary evidence against him of an admission in the will binding the estate, notice to produce the original probate having been given to him and disregarded. 3 Wms. Ex'rs [2004], citing Gordon v. Dyson, 1 Brod. & B. 219.

while represented in the action, either by him[1] or by his successor in the administration.[2] Mere declarations or admissions however, as distinguished from acts, do not bind the representative,[3] but he may explain or contradict them. Declarations and admissions made before he was fully clothed with the trust,[4] or after he was removed, are not competent, as against the estate, to affect the parties beneficially interested other than himself, except perhaps to prove his knowledge of the fact admitted. Where there are several co-representatives, the admissions and declarations of one are not competent against the others, either to establish the demand as an original one,[5] or to revive the debt after the limitation has passed.[6] But proof of an admission of a fact by one is admissible, because it may be followed up by proof of a similar admission by all the others. If not thus followed, the judge should instruct the jury to disregard it.[7]

8. *The Decedent's Declarations and Admissions.*]—If the executor or administrator sues or defends, by virtue of his character as such, evidence of the declarations and admissions made by the decedent in his lifetime is competent against the representative;[8] and even the decedent's declarations as to the value of his

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[1] Faunce v. Gray, 21 Pick. 243; Eckert v. Triplett, 48 Ind. 174; s. c. 17 Am. R. 735; 1 Greenl. Ev. 215. *Contra*, Allen v. Allen, 26 Mo. 327; Crandall v. Gallup, 12 Conn. 372, and cases cited. The contrary has also been held of loose oral declarations to a third person, because the representative was deemed to have no interest, no adequate information, and no legal duty. Hueston v. Hueston, 2 Ohio St. 483; and in Ciples v. Alexander, 2 Const. (Treadw. S. C.), 767, it was held that a bare oral admission is not enough to sustain a recovery; s. p. Jones v. Jones, 21 N. H. 219. The better opinion is that the admission is competent, and if explicit and unexplained, sufficient to go to the jury. As to an account stated with the representative, see 1 Wms. Ex'rs [1947], n. f.; N. Y. Code Civ. Pro. § 395; Young v. Hill, 67 N. Y. 192, and cases cited.

[2] Lashlee v. Jacobs, 9 Humph. 718; Eckert v. Triplett (above); Matoon v. Clapp, 8 Ohio, 248; *contra*, Pease v. Phelps, 10 Conn. 62, 68.

[3] To this extent the principle in Rush v. Peacock, 2 Moody & Rob. 162, is sound.

[4] Moore v. Butler, 48 N. H. 161, 170; Fenwick v. Thornton, M. & M. 51, ABBOTT, C. J.; Legge v. Edmonds, 25 L. J. Ch. 125, 141; 1 Greenl. Ev. 217, § 179. See *contra*, TINDAL, J., in Smith v. Morgan, 2 M. & Rob. 257. "Perhaps the admissibility of statements made by executors, assignees, and others filling an official character, but before they were invested with that character, will be found to depend on the nature of the facts stated by them. So an admission, before probate, by an executor named in a will may perhaps be entitled to more consideration than the admission of a mere stranger who has afterwards obtained letters of administration." Rosc. N. P. 72.

[5] 1 Greenl. Ev. 215, § 176. This rule, originally founded on the fact that otherwise those not admitting might be rendered personally liable, Hammon v. Huntley, 4 Cow. 493, has been reiterated since the reason failed. Elwood v. Diefendorf, 5 Barb. 407.

[6] Tullock v. Dunn, Ry. & Moo. 416; Bloodgood v. Bruen, 8 N. Y. (4 Seld.) 362, rev'g 4 Sandf. 427. *Contra*, Shreve v. Joyce, 36 N. J. (7 Vroom), 44, s. c. 13 Am. R. 417. Otherwise of an *act* such as part payment, made before the statute has run. Heath v. Grenell, 61 Barb. 190; see also 3 Wms. Ex'rs, 6th Am. ed. 2063.

[7] Forsyth v. Ganson, 5 Wend. 558.

[8] Smith v. Smith, 3 Bing. N. C. 29, s. c. 7 C. & P. 401; Cunningham v. Smith, 70 Penn. St. 458, citing Newman v. Jenkins, 10 Pick. 515. As to proving a trust, compare Harrisburgh Bank v. Tyler, 3 Watts & S. 373, Barker v. White, 58 N. Y. 204.

property are competent on the inquiry whether the administrator has made proper effort to administer the estate; but they are not binding, as declarations, upon the administrator, so as to charge him with that amount of assets. Upon a question of due administration, an executor or administrator is not concluded by the statements of the deceased, but is only bound to a faithful attempt to realize the largest amount from the assets which have come to his knowledge.[1] But the decedent's admissions and declarations are not competent in favor of the representative, unless some rule of evidence would admit them in favor of the decedent if living, as, for instance, where they were part of the *res gestæ* of an act properly in evidence.[2]

The delivery of property, necessary to the validity of a gift in view of death, cannot be proved by subsequent declarations of the deceased, shortly before death, to a person not connected with the gift. But subsequent declarations made to the donee, are competent.[3] And when the words of the decedent accompanying the gift are ambiguous, parol declarations of his intention, made previously or afterward, are competent to explain the intent.[4]

9. *Judgments.*]—The executor or administrator is bound by a judgment recovered by or against the decedent, or by or against the representative's predecessor in administration.[5] And where an administrator, or administrator with the will annexed, is appointed here, upon application of the foreign executors or administrators of the same decedent, he is regarded as an ancillary administrator; and a decree of the foreign courts of competent jurisdiction against the foreign representatives is competent and *prima facie* evidence against him.[6]

10. *Testimony of the Representative.*]—Where an executor or administrator is examined under oath by an adverse party, his whole statement must be taken together; and a part tending to charge him cannot be separated from a part tending to explain it and operating in his favor.[7]

11. *Testimony of Interested persons against the estate.*]—Since the common-law incompetency resulting from interest has been removed, the question of the value of an interested witness' testimony against a decedent's estate has been much dis-

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[1] Ginochio v. Porcella, 3 Bradf. 277, 280.

[2] Chase v. Ewing, 51 Barb. 597, 615; Rickets v. Livingston, 2 Johns. Cas. 97; Cheeseman v. Kyle, 15 Ohio St 15.

[3] 1 Wms. Ex'rs, 6th Am. ed. 858, n. Compare Hunter v. Hunter, 19 Barb. 631.

[4] Smith v. Maine, 25 Barb. 33, 48. As to proving a gift, see also p. 4 of this vol.

[5] Steele v. Lineberger, 59 Penn. St. 308, 318; Manigault v. Deas, 1 Bailey Eq. 283, 295; 3 Wms. Ex'rs, 6th Am. ed. 2115.

[6] Cummings v. Banks, 2 Barb. 602; and see 26 N. Y. 146; and is conclusive here on the parties to the foreign suit. 3 Bradf. 233.

[7] Ogilvie v. Ogilvie, 1 Bradf. 356. For the limits of this rule, see Rouse v. Whited, 25 N. Y. 170, rev'g 25 Barb. 279.

cussed. The English courts, without any express statute, hold that the testimony of a party to personal transactions with the deceased, which exonerate himself, is not sufficient, at least in equity, to sustain a decree, unless corroborated.[1]

The general policy of the American statutes is to restrain the admission of the testimony of a party or interested witness, as against the estate of a deceased person or the interest of one succeeding to his right. The ground of the rule is, that, although parties and interested witnesses are made generally competent, some exception should be made where the adversary in the controversy is deceased. The law prefers to admit all parties; but when death silences one, the law will silence the other as to matters peculiarly within their sole knowledge. The statutes for this purpose are very diverse. Some reach the result by forbidding parties and interested witnesses from testifying in all actions where the opposite party is an executor or administrator. Others where the action is on a contract, &c., with one since deceased. Others attempt to define the line with more discrimination. Where the statute is a mere proviso or saving clause in the act abolishing the common-law disqualification of interest, it does not make incompetent such testimony as would be competent at common law;[2] but where it is a new, independent and affirmative provision, it does exclude the kind of testimony described by it, although such as would have been previously competent.[3] Whatever be the frame of the statute, its object and the general guide in its construction is to apply the exclusion in such manner as to put both parties on an equality;[4] but the court will not do violence to the plain language of the statute for the purpose of securing this effect.[5] Difficulties of this kind are less frequent in proportion as the statute is so framed as to define the exclusion by the

[1] Hill v. Wilson, L. R. 8 Ch. App. 888, s. c. 7 Moak's Eng. 449; Gray v. Warner, L. R. 16 Eq. 577, s. c. 7 Moak's Eng. 591. "Nobody would be safe in respect to his pecuniary transactions, if legal documents found in his possession at the time of his death, and endeavored to be enforced by his executors, could be set aside, or varied, or altered, by the parol evidence of the person who had bound himself. It would be very easy, of course, for anybody who owed a testator a debt to say, * * * * 'I met the testator and gave him the money.' The interests of justice and the interests of mankind require that such evidence should be wholly disregarded." JAMES, L. J., in Hill v. Wilson (above). *Contra*, Ford v. Haskell, 32 Conn. 489, 492, where the court say it is a question of credibility, as in case of testimony of an accomplice in a criminal case.

[2] Sheetz v. Norris, 2 Weekly Notes (Pa.) 637. The common-law exception, from necessity, in case of contents of baggage, &c., was admitted in Sykes v. Bates, 26 Iowa, 521, s. p. Nash v. Gibson, 16 Id. 305.

[3] Mattoon v. Young, 45 N. Y. 696.

[4] McGeehee v. Jones, 41 Geo. 123; Brown v. Brightman, 11 Allen (Mass.) 226; Louis v. Easton, 50 Ala. 470; Jones v. Jones, 36 Md. 457; Poe v. Domic, 54 Mo. 124; Hubbell v. Hubbell, 22 Ohio St. 208; Key v. Jones, 52 Ala. 238; Latimer v. Sayre, 45 Geo. 468.

[5] For cases where the courts have refused to do so, see Brown v. Lewis, 9 R. I. 497; Roberts v. Yarboro, 41 Tex. 451; Howe v. Merrick, 11 Gray (Mass.) 129; Ballou v. Tilton, 52 N. H. 607; Graham v. Howell, 50 Geo. 203; Crawford v. Robie, 42 N. H. 162.

kind of testimony rather than by the class of actions or parties. The New York statute, and those modeled from it, have been the most successful in this respect. That act addresses the prohibition to the actual source of danger, viz., the version by an interested person, of his interview with one who can no longer contradict him. To prevent evasion, the prohibition is made applicable not only to parties on the record and parties having an interest in the result, but to assignors and others through whom a party claims. To prevent unequal application, it is not enforceable against one side when the other side has put forward the testimony of the person since deceased.

12. *The New York rule.*]—The statute is as follows: "Upon the trial of an action or the hearing upon the merits of a special proceeding, a party or a person interested in the event, or a person from, through or under whom such a party or interested person derives his interest or title, by assignment or otherwise, shall not be examined as a witness, in his own behalf or interest, or in behalf of the party succeeding to his title or interest, against the executor, administrator, or survivor of a deceased person, or the committee of a lunatic, or a person deriving his title or interest from, through, or under a deceased person or lunatic, by assignment or otherwise; concerning a personal transaction or communication between the witness and the deceased person or lunatic; except where the executor, administrator, survivor, committee, or person so deriving title or interest is examined in his own behalf, or the testimony of the lunatic or deceased person is given in evidence, concerning the same transaction or communication."[1]

13. *What Parties are excluded.*]—A party to the action or proceeding cannot be thus examined in his own behalf or interest, or in behalf of the party succeeding to his title or interest.[2]

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[1] N. Y. Code Civ. Pro. § 829, am'd'g Code of Pro. § 399. The act does not disqualify from making an affidavit. By recent amendment, "the husband or wife of a party or person interested, who cannot be examined concerning a transaction or communication, as prescribed in the last section, cannot be examined as a witness, concerning the same transaction or communication; or a like transaction or communication, between the witness and the deceased person or lunatic." Id. § 830. Compare Taylor v. Kelly, 80 Pa. St. 96.

[2] Where the statute is not in terms restricted to a party called on his own behalf, &c., &c., the courts do not restrict it by construction, but exclude a party called for a co-party. Bennett v. Austin, 5 Hun, 536; Alexander v. Dutcher, 7 Hun, 439; Blood v. Fairbanks, 50 Cal. 140; and even though he has no interest adverse to the executor or administrator, as, for instance, where they are co-defendants, Blood v. Fairbanks (above); and though he might have been sued separately, *e. g.*, the indorser, sued with the maker. Fox v. Clark, 61 Barb. 216, n.; Alexander v. Dutcher (above). The better opinion is that after an action against two has been practically severed for the purposes of trial—for example, by a dismissal of the action against one on his discharge in bankruptcy, Hayden v. McKnight, 45 Geo. 147; or by a judgment against them on default being opened in favor of one only, to allow him to set up a defense personal to himself, Simpson's Exr. v. Bovard, 74 Penn. St. 351, 360—the disqualification of the one who will not be affected by the trial is ter-

14. *What Interested Witnesses are excluded.*]—No person can be thus examined in his own behalf or interest,[1] or in behalf of a party succeeding to his title or interest, if he or his predecessor in interest is, at the time of the trial,[2] interested in the event of the action or proceeding, whether directly interested in the cause of action, or whether merely liable to be legally affected by the judgment,—as, for instance, where he stands in such a position that the effect of a recovery in the action may be to diminish a fund in which he has an interest,[3] or may aid the party unsuccessful in the action to bring and maintain an action against the witness for indemnity;[4] or, to take another instance, where the effect of a recovery may be to exonerate the witness from liability for a tort, by giving the plaintiff satisfaction from another person.[5] But interest in the question is not enough. Thus, where the question is whether a deed shall be set aside as against one heir, another heir, not a party, is not excluded.[6] Nor is the mere fact that the witness or the deceased was the agent of the party in making the very contract sued on sufficient to disqualify.[7] A release which absolutely extinguishes the interest of the witness restores competency, where the disqualification resulted from

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minated; but in New York, on the contrary, it was held that, though the court might in its discretion sever the action, a party on the record could not, so long as he remained a party, be thus examined, against or for another party. Genet v. Lawyer, 61 Barb. 211; and the fact that the defendant who was offered as a witness, did not put in an answer, but suffered default, did not sufficiently sever the action or discontinue it as to him. Ib. Nor did the fact that the plaintiffs executed a release to him affect the question. Ib. In Hubbell v. Hubbell, 22 Ohio St. 208, 226, the court sanction practically severing any action and admitting the evidence against one and excluding it as against the other, wherever separate judgments would be proper. Under a statute which excludes only in a case where judgment might be rendered for or against an executor or administrator, it is held that, on the entire abatement of an action as to an administrator not served, or as to a party dying, he ceases to be a party within the rule. Hall v. The State, 39 Ind. 301; Roberts v. Yarboro, 41 Tex. 451. The word "party" has been held to include a party in interest, though not on the record. Stallings v. Hinson, 49 Ala. 92. Especially if his interest is such that it will be necessary to bring him in as a party. McKaig v. Hebb, 42 Md. 227.

[1] Before this qualification was expressly made, it was held that the fact that the interest was in favor of the executor or administrator against whom the witness was called, and was against the success of the party calling him, did not take the case out of the statute. Le Clare v. Stewart, 8 Hun, 127.

[2] Farnsworth v. Ebbs, 2 Hun, 438, s. c. 5 Supm. Ct. (T. & C.) 1. As the N. Y. statute now refers only to examination at the trial or hearing, it may perhaps be claimed that such testimony may be taken on deposition, and the question of its competency determined at the trial, according to the existence of interest, &c., at the time of trial.

[3] Le Clare v. Stewart, 8 Hun, 127; but the statute has been held not to exclude the foreign administrator of the same decedent in a suit against the administrators here appointed, for the former is not interested. 1 Whart. Ev. 451, § 471, citing Stearns v. Wright, 51 N. H. 606.

[4] Stallings v. Hinson, 49 Ala. 92; Wooster v. Booth, 2 Hun, 426. Compare Cousins v. Jackson, 52 Ala. 262.

[5] Andrews v. Nat. Bank of North America of N. Y. 7 Hun, 20.

[6] Hobart v. Hobart, 62 N. Y. 83; Hooper v. Howell, 52 Geo. 321.

[7] Scurry v. Cotton States Life Ins. Co. 51 Geo. 624; Am. Life Ins. Co. v. Schultz, 2 Weekly Notes (Pa.) 665; Spencer v. Trafford, 42 Md. 17.

being interested, but not where it resulted from the mere fact of being a party.[1]

15. *Assignor, or Source of Title, excluded.*]—No person, from, through, or under whom such a party or interested person derives his interest or title, by assignment or otherwise,[2] can be thus examined, in his own behalf or interest, or in behalf of the party succeeding to his title or interest,[3] if the interest or title thus derived is in the particular claim affected by the transaction or communication.[4]

16. *What Persons are Protected.*]—The ground of the exclusion is the intervening incapacity of the other party to the personal transaction or communication.[5] For this purpose, death is held to be sufficiently established by *prima facie* evidence,—for instance, the production of the letters under which the representative acts.[6] The fact that the action is in the name of the representative for formal reasons, although the estate has no interest as such, does not alter the case, if the interests of other parties are such that the reasons for protection equally apply.[7] And, on the other hand, the prohibition will apply for the protection of the estate, though the representative, being a party as such, be also made a party individually;[8] or, though he be sued only in his individual name, if he might have been sued in his representative character, or if the recovery will enhance or diminish the estate.[9] The words indicating the various personal relations and

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[1] Genet v. Lawyer, 61 Barb. 211.

[2] Even where the statute does not expressly exclude the transferrer of the cause of action, the courts have sometimes excluded him, upon the equity of the statute. Louis v. Easton, 50 Ala. 470; 1 Whart. Ev. 452, § 473.

[3] The owner of chattels transferred the title, and became agent for his transferee, and then bailed them with defendants without disclosing his agency. *Held*, that in his principal's action against the defendants, he could not testify to a demand made on one of them who had since died. Conway v. Moulton, 6 Hun, 650. A partner having assigned or released to his copartner is within the rule. Lyon v. Snyder, 61 Barb. 172. A child emancipated by his father does not derive title to subsequent earnings "from, through, or under" the father, in such sense that the father is incompetent. Shirley v. Bennett, 6 Lans. 512.

[4] This qualification is consonant to the principle of the statute, and seems supported by the doctrine of Cary v. White, 59 N. Y. 336, and Van Tuyl v. Van Tuyl, 8 Abb. Pr. N. S. 5, s. c. 57 Barb. 235. *Contra*, Lyon v. Snyder, above.

[5] See paragraph 11, above.

[6] Parhan v. Moran, 4 Hun, 717.

[7] Hollister v. Young, 41 Vt. 156.

[8] Dixon v. Edward, 48 Geo. 146. Nor does the fact that the representative, by verifying his pleading, has, by virtue of a statute, cast the burden of proof on the other party. Ib.

[9] Louis v. Easton, 50 Ala. 470; Fitzsimmons v. Southwick, 38 Vt. 514. It has, however, been held that, in a probate proceeding, the executor is not protected, because it is said that before letters issued, he is not a party as such. Hamilton v. Hamilton, 10 R. I. 538; Dietrich's Estate, 1 Tuck. 129. On the other hand, it has been held that the protection in favor of the executor or administrator must be extended by the court to an heir, &c., if the object of the action is to establish a liability of the decedent or a benefit to his estate. Mountain v. Collins, cited in 50 Ala. 472; but see Bragg v. Clark, 50 Ala. 363.

modes of succession protected by the statute, are liberally construed in furtherance of the equity of the rule;[1] and it is not essential that it appear in which of several classes protected by the statute the objector is, if his right or liability must be in one or another.[2] But the only derivative title regarded is one held by the deceased at the time of the transaction, and subsequently devolved upon the objecting party.[3]

17. *Insanity.*]—For convenience of presenting the whole statute in one view, its application, where the incapacity is mental, should be here considered. A question may arise as to what degree of insanity will bring the case within the statute. At common law, the insane are not absolutely disqualified to testify. An insane person may be examined as a witness in a lucid interval, and may then testify even to what took place when he was insane; and even while under delusion, may be examined on the ground of necessity, especially for his own protection, and for the redress of an injury to himself. If the person is insane within the meaning of the language of the rules of evidence as to witnesses, testimony of the interested witness should not be admitted under the statute.[4] And even if not, the existence of an inquisition or the appointment of a guardian *ad litem* in the action, on the ground of insanity, is *prima facie*, though only *prima facie*, evidence of incapacity to testify.[5]

18. *Objecting to the Testimony.*]—The interested witness, when offered, should not be excluded merely because he is called against an executor or administrator, &c., unless it is clear that if sworn he could not testify to anything; until that appears, it is error to exclude him[6] under such a statute as that of New York, where, strictly speaking, the incompetency is not that of the wit-

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[1] Thus, a husband, claiming by marital right of succession, has been treated as if he were next of kin to his wife. Dewey v. Goodenough, 56 Barb. 54. The term "heir" extends to heirs of deceased heirs claiming by representation. Merrill v. Atkins, 59 Ill. 19. "Survivor" protects a surviving partner. Green v. Edick, 56 N. Y. 613; and "assignees" includes grantees of land. Mattoon v. Young, 45 N. Y. 696; and donees of personalty. Howell v. Taylor, 11 Hun, 214. A bank making a loan on stock borrowed by an officer and pledged for his own benefit, under a representation that the loan was for a third person,—*Held*, an assignee of its officer within the rule. Andrews v. Nat. Bank of N. Am. 7 Hun, 20. But a creditor, taking a collateral security by an assignment from a third person, obtained for him by his debtor, is not an assignee of the debtor within the rule. Barney v. Equitable Life Assur. Soc. 59 N. Y. 587. If defendant in trespass justifies as having entered as the agent of the true owners, who claim under a deceased person, plaintiff's grantor cannot testify against defendant to conversations with the deceased. Wheelock v. Cuyler, 4 Hun, 414.

[2] See Mosner v. Raulain, 66 Barb. 213.

[3] Cary v. White, 59 N. Y. 336.

[4] For these rules see People ex rel. Norton v. N. Y. Hospital, 3 Abb. New Cases, 229, note.

[5] Id.; Little v. Little, 13 Gray, 264.

[6] Card v. Card, 39 N. Y. 317; and see Martin v. Jones, 59 Mo. 187; Leaptrol v. Robertson, 37 Geo. 586.

ness, but of his testimony to particular facts.[1] Hence a general objection is not enough.[2]

19. *Preliminary question of Competency.*]—Whenever it appears that a witness who is within the statute is about to testify to an interview at which the deceased may have been present, the question whether the examination proposed relates to a personal transaction or communication between them, is, in strictness, one of preliminary proof, addressed to the judge, for the purpose of determining which, the witness may testify either negatively or affirmatively as to whether the deceased was present, and if so, whether anything passed between him and the deceased, and for this purpose may be asked such questions as are necessary to ascertain whether he merely overheard the conversation, or whether he was privy to it;[3] and the objecting party may be allowed to interpose with evidence to the contrary, to enable the judge to determine whether the witness could testify to what passed at the interview. But in ordinary practice, the examination is allowed to proceed as evidence for the jury, until it appears that the witness is stating a personal transaction or communication between him and the deceased; whereupon all the testimony vitiated by this fact will be struck out, if a proper and timely objection is made. The principle is the same under any statute which treats the witness as competent generally, but incompetent as to particular facts.

20. *Moving to Strike Out Incompetent part of testimony.*]—If a witness is inquired of generally as to a transaction, by a question not indicating that it was a personal transaction or communication with the deceased, he may properly be allowed to answer, reserving to the objecting party the right to move to strike out,[4] and, if the testimony proves incompetent, the motion to strike out must be made at or before the close of the direct examination. Cross-examining the witness at large waives the motion to strike out.[5] If, however, the testimony does not show a personal transaction or communication—for example, if it simply states that the witness had paid what was due to the deceased—it is not to be struck out, unless on cross-examination the objector elicits the facts showing its incompetency; then it must be stricken

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[1] But where the statute makes a general exclusion of the opponent of an executor or administrator, with specified exceptions, an offer of the testimony should show that it is within the exception. White v. Brown, 5 Reporter, 171; Hanna v. McVay, 77 Pa. St. 27, 31; and see Stewart v. Kirk, 69 Ill. 512.

[2] Lewin v. Russell, 42 N. Y. 251. Compare Somerville v. Crook, 9 Hun, 668.

[3] Otherwise any testimony might be objected to on the ground that if the deceased were alive he might contradict it. Isenhour v. Isenhour, 64 N. C. 640; Brower v. Hughes, Id. 642. The statute was not designed to exclude the testimony of a party, to an occurrence at which the deceased need not have been present. Franklin v. Pinkney, 18 Abb. Pr. 186, s. c. 2 Robt. 429.

[4] Kerr v. McGuire, 28 N. Y. 446, 452. Compare Howell v. Van Sicklen, 6 Hun, 115, 120.

[5] King v. Haney, 46 Cal. 560, s. c. 13 Am. R. 217.

out; and the circumstance that the cross-examination had not been confined to this point, does not preclude the objector from moving to strike out all the incompetent testimony.[1]

21. *Proof of an Interview.*]—Under the New York statute, and others which simply exclude all examination in regard to any personal transaction or communication, if the mere fact that a conversation was had between the witness and the deceased be the material fact, it may be error to allow the witness to state even that; but ordinarily, where the material fact is the substance of the interview itself, it is not error to allow the examination to proceed so far as to state that an interview was had, without proving what was said or done.[2] The ordinary test is, does the testimony tend to prove what the transaction was which was had personally by him with the deceased.[3] The exclusion is not, however, merely of testimony to prove what took place. It is equally incompetent to disprove all intercourse as to prove a particular transaction. Testifying that there never was an interview is equally testifying "in regard to" the supposed communications, as is testifying to what took place at an alleged interview.[4] This may seem inconsistent with what has just been said about testifying to the fact of an interview, when only the conversation is material, and about testifying that the deceased was not present at an act, or that a communication when he was present was not personal, between him and the witness; but the distinction, though refined, is clear. If what passed at the interview is the material fact, a witness who testifies only that an interview was had, but does not say what passed, is not considered as having testified in regard to the alleged personal transaction or communication. But if he is allowed to testify that no interview ever took place, he does negative the supposed personal transaction or communication. Proving an interview merely, does not prove personal communication; but disproving all interview does disprove personal communication. Hence the rule that the witness cannot testify, even negatively, as to interviews.

22. *What is a Personal Transaction or Communication.*]—The interview, to be excluded, must have been a personal one. An interview solely with an agent since deceased, is unaffected by the statute.[5] What constitutes a personal "transaction or

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[1] Kerr v. McGuire (above).

[2] Hier v. Grant, 47 N. Y. 278.

[3] Strong v. Dean, 55 Barb. 337.

[4] Clarke v. Smith, 46 Barb. 30; Dyer v. Dyer, 48 Id. 190; Stanley v. Whitney, 47 Id. 586. Thus the witness cannot testify that he never paid money to the deceased, or that the deceased never paid money to him. The rule excludes testimony that an alleged personal transaction or communication was never had. Howell v. Van Sicleu, 5 Hun, 115; Barrett v. Carter, 3 Lans. 68; or that witness did not see, or did not have a transaction with, the deceased. Mulqueen v. Duffy, 6 Hun, 239.

[5] Hildebrant v. Crawford, 65 N. Y. 107, affi'g 6 Lans. 502; Am. Life Ins. Co. v. Shultz, 2 Weekly Notes (Pa.) 665; Cheney v. Pierce, 38 Vt. 515, 528. But under

communication" is not to be defined in the abstract.[1] The statute is aimed at the abuse which might result, if, when the lips of one party to an alleged interview have been sealed by death, the persons deriving from him rights which he held at the time of the interview, could be prejudiced by the testimony of interested persons, as to what took place, or did not take place between them there. The statute is not confined to private communications and interviews, of which there were no other witnesses; but applies to all personal communications, though made in the presence of others who might be called as witnesses.[2] But, on the other hand, it applies only to such communications and transactions as involved the witness as a party thereto. The question is, are the circumstances such as to indicate that in the consciousness of the deceased and the witness, there was any privity between them in the transaction or communication.[3] If the witness merely overheard what went on solely between the deceased and a third person, he is competent.[4] And this rule has been applied even where the conversation was an admission by the deceased of his previous transactions, with the witness.[5] But if in even a part of the conversation the witness took part, or even was included as one to whom the words of the deceased were addressed, or for whose ear they were in part intended, he cannot testify to that part,[6] but may to any other separable part.[7]

23. *Indirect evidence.*]—The prohibition is not to be evaded by questions of a general form, such as whether the witness was in the habit of borrowing from the deceased, where such habit might form a ground of presumption as to what passed at a sup-

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statutes which exclude the surviving party to a contract, the death of a contracting agent has been thought to exclude the surviving party who contracted with him. 1 Whart. Ev. 451, § 469, citing First Nat. Bk. v. Wood, 26 Wis. 500. Where the action was by A. to reform his deed to B. and B.'s to C., *Held*, that A. might testify to what occurred between him and B., although C. was dead. Payne v. Elyea, 50 Geo. 395.

[1] Birth is not a "transaction" between mother and child within the statute, so as to prevent the mother from testifying to it, against the child's executor. Matter of Paige, 62 Barb. 476. As to marriage, see Spicer v. Spicer, 16 Abb. Pr. N. S. 113.

[2] Hatch v. Peugnet, 64 Barb. 189.

[3] Brague v. Lord, 2 Abb. New Cases. 1; Johnson v. Spies, 5 Hun, 471.

[4] Simmons v. Sisson, 26 N. Y. 264; Lobdell v. Lobdell, 36 N. Y. 327, s. c. 4 Abb. Pr. N. S. 56; Sanford v. Sanford, 61 Barb. 293.

[5] Hildebrant v. Crawford, 6 Lans. 502, affi'd in 65 N. Y. 107. So under the Illinois statute allowing exception as to "facts occurring after the death of the deceased," evidence of admissions made by a party after the death, as to previous facts, is competent. Stewart v. Kirk, 69 Ill. 512.

[6] As, for instance, one who went to the interview for the purpose of hearing it, and participated in the negotiation—as where a wife went with her husband when he negotiated a loan on mortgage, and joined in the mortgage to release her dower. Farnsworth v. Ebbs, 2 Hun, 438, s. c. 5 Supm. Ct. (T. & C.) 1; or where the deceased, in speaking to a third person, mentioned the witness, turning partly towards him, to include him, as it were, in the communication. Brague v. Lord (above).

[7] Cary v. White, 59 N. Y. 336.

posed interview;[1] nor is it disregarded because testimony to facts necessarily or presumptively importing personal communications does not specify any particular interview. Thus, a physician or attorney is incompetent to prove his own services as such to the deceased, as against the representative.[2] But the witness may prove an act by any circumstances which do not tend to do so by merely raising a presumption of a personal transaction or communication between him and the deceased. Thus he may testify to the admissions of the representative or heir, raising a presumption of payment to the ancestor.[3]

The exclusion of the transaction or communication excludes all the incidents of it,[4] so far as they are connected with what affected the witness and the deceased together.

24. *Effect of Objecting Party testifying, &c.*]—Where the party for whose protection the statute declares the testimony incompetent, is examined in his own behalf as to the transaction or communication in question, or where the testimony of the deceased or lunatic as to it is given in evidence,[5] by the party adverse to the one calling the witness,[6] the prohibition does not apply; and this qualification is to be taken in connection with the general principle, that a party who puts in evidence concedes the right of the adverse party to tread the same ground in rebut-

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[1] Alexander v. Dutcher, 7 Hun, 439. But compare Kerr v. McGuire, 28 N. Y. 452.

[2] Ross v. Ross, 6 Hun, 182; Somerville v. Crook, 9 Hun, 664. A party is competent against an administrator to identify his shop books offered in evidence. Strickland v. Wynn, 51 Geo. 600; Leggett v. Glover, 71 N. C. 211; Kelton v. Hill, 58 Me. 115. If the books can be deemed admissible as at common law, notwithstanding the death of the other party to the transactions, they should be introduced only upon the common-law proof of accuracy, &c. Knight v. Cunnington, 6 Hun, 100, 105. It has even been said that a witness who cannot prove a personal transaction, is equally incompetent to prove any state of facts from which such transaction might be presumed,—for instance, that to raise a presumption that he had made payments to the deceased, he could not testify that the deceased had no other sources of income than such payments. Jaques v. Elmore, 7 Hun, 675.

[3] Card v. Card, 39 N. Y. 317.

[4] The witness cannot testify even to the fact that he carried an inkstand with him when he had a personal interview with deceased. Dubois v. Baker, 30 N. Y. 355, affg 40 Barb. 556. The fact he saw an instrument in the possession of the assignee of the deceased, was held not incompetent, in Smith v. Sergent, 2 Hun, 107. So of his testimony, that a document produced was a copy of a paper he obtained from the deceased. Moulton v. Mason, 21 Mich. 371. Testimony that he had seen the deceased sign a paper was held incompetent, in Denman v. Jayne, 16 Abb. Pr. N. S. 317, on the authority of Ressique v. Mason, 58 Barb. 89, which has been superseded by amendment of the statute. The rule has been pressed so far as to exclude the witness from testifying to his own undisclosed intent in making a transfer to the deceased. Tooley v. Bacon, 8 Hun, 176, 70 N. Y. 37. But this conclusion is to be accepted with caution. Intent communicated to, or even legally presumable to have been shared by the deceased, at the interview, could not be proved by the witness; but if the transfer is proven *aliunde*, an undisclosed intent is no part of the communication or transaction between them, and, if relevant (see 40 N. Y. 221) might be proved by the witness.

[5] As, for instance, by deposition. Munn v. Owens, 2 Dill. C. Ct. 477; Munroe v. Napier, 52 Geo. 388.

[6] Miller v. Atkins, 9 Hun, 9.

tal, so far as it can be done without violating a positive prohibitory statute.[1] But the fact that a third person interested in the estate has testified for the representative does not open the door for the adversary. It is only giving the testimony of the decedent or incompetent person, or of the representative who is a party, that entitles the adversary to put in that of the interested witness.[2] And giving testimony as to one transaction or communication does not relieve the adversary from the prohibition in respect to a distinct and independent communication.[3]

25. *Form of Offer of testimony in rebuttal.*]—Where the door is opened for the testimony of the party or interested witness, by the giving of that of the other, the offer need not be confined to the disputable part of the testimony which has been given. In this case, as in the case of an offer in the first instance, the witness may be sworn unless it appears that he could testify to nothing; and his examination should be restricted to the matters as to which the objecting party has given the evidence.[4]

26. *The United States Courts rule.*]—In the courts of the United States, no witness can be excluded "in any civil action, because he is a party to or interested in the issue tried: Provided, that in actions by or against executors, administrators, or guardians, in which judgment may be rendered for or against them, neither party shall be allowed to testify against the other, as to any transaction with, or statement by, the testator, intestate, or ward, unless called to testify thereto by the opposite party, or required to testify thereto by the court. In all other respects, the laws of the State in which the court is held shall be the rules of decision as to the competency of witnesses in the courts of the United States in trials at common law, and in equity and admiralty." [5]

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[1] Where one party gave evidence of admissions made by the grantor of the other, —*Held*, that the grantor could testify to rebut this evidence, although it related to transactions with a deceased person through whom the former claimed title. Cole v. Denue, 3 Hun, 610. Where testimony to oral declarations of the deceased was admitted,—*He'd*, that counter declarations in writing were admissible. Smith v. Christopher, 16 Abb. Pr. N. S. 332. Plaintiff having put in evidence letters by defendant to a person since deceased,—*Held*, that defendant was entitled to give testimony explaining away the letters, although such testimony related to a transaction with the deceased. Sanford v. Sanford, 61 Barb. 293. If the executor or administrator testifies to an admission by the plaintiff that the demand had been satisfied by the decedent, plaintiff can, by way of explaining or contradicting the testimony, testify that no such settlement was made. Cousins v. Jackson, 52 Ala 265. If a witness testifies that a party admitted certain transactions with the deceased, the party may contradict this. Martin v. Jones, 59 Mo. 187.

[2] Canaday v. Johnson, 40 Iowa, 587.

[3] Goodwin v. Hirsche, 37 Super. Ct. (J. & S.) 511.

[4] Brown v. Richardson, 20 N. Y. 472, rev'g 1 Bosw. 402.

[5] U. S. R. S. § 858. Under this act, if the decedent had been examined in his own behalf, and his deposition was read on the trial, by his representative, the adverse party is competent on his own behalf. Mumm v. Owens, 2 Dill. C. Ct. 475. But an *ex parte* order obtained by a party before process issued, for his own examination, is not the requirement of the court intended. Eslava v. Mozange, 1 Woods, 623.

CHAPTER V.

ACTIONS BY AND AGAINST HEIRS AND NEXT OF KIN, DEVISEES AND LEGATEES.

I. Death.
1. Direct testimony.
2. Registry of death or burial.
3. Presumptions of death, and of the time of death.
4. Circumstances raising a natural presumption of death.
5. Voyages and other special perils.
6. Seven years' absence in case of life-estates.
7. Seven years' rule in other cases.
8. Absence and inquiry.
9. Rebutting the presumption.
10. Time of presumed death.
11. The English rule.
12. The contrary rule.
13. Survivorship in common casualty.

II Marriage.
14. Burden of proof and presumptions.
15. Direct evidence of marriage.
16. Certificate or registry.
17. Indirect evidence of marriage.
18. Cohabitation and repute.
19. Cohabitation and declarations.
20. Marriage after meretricious intercourse.
21. Second marriage during absence.
22. Rebutting evidence of marriage.
23. Foreign law.

III. Issue and failure of issue.
24. Burden of proof.
25. Presumptions as to failure of issue.
26. Escheat.
27. Possibility of issue extinct.
28. Registry of birth or baptism.
29. Consorting as a family.
30. Direct testimony as to age.
31. Physician's testimony or account.
32. Legitimacy: Burden of proof and presumptions.
33. Parents' testimony and declarations.

IV. Hearsay as to facts of family history (pedigree).
34. Grounds of receiving it; and its weight.
35. What facts are within the rule.
36. Whose declarations may be proved.
37. Family records.
38. Other written declarations.
39. General family repute.

IV. Hearsay as to, &c.—*continued.*
40. Declarations in view of controversy.
41. Repute beyond the family; Acquaintance; Newspaper notice; Insurance.
42. Best and secondary evidence.

V. Registry of facts of family history (pedigree).
43. Registries authorized by law.
44. Registries not authorized by law.
45. Best and secondary evidence.
46. Impeaching registries.

VI. Judicial records, showing facts of family history (pedigree).
47. Letters of administration, &c.
48. Judgments and verdicts.

VII. Identity.
49. Necessity of proof.
50. Mode of proof.

VIII. National character; and domicile.
51. Citizenship and alienage.
52. Naturalization.
53. Nature of the question of domicile.
54. Presumptions; and material facts as to domicile.
55. Change of domicile.
56. The intent.
57. Evidence of residence, and of intent.

IX. Wills.
58. Presumptions, and burden of proof as to intestacy.
59. Domestic will proved by producing probate.
60. Decree of probate court, how far conclusive.
61. Formalities of execution.
62. Testamentary capacity.
63. Conduct and declarations of testator.
64. Opinions as to mental soundness.
65. Hereditary insanity.
66. Inquisitions, and other adjudications.
67. Undue influence;—the burden of proof.
68. Indirect evidence.
69. Relevant facts.
70. Declarations and conduct of testator.

IX. Wills—*continued.*
71. Fraud.
72. Revocation.
73. Marring the document.
74. Disappearance of the document.
75. Testator's declarations.
76. Subsequent testamentary acts.
77. Constructive revocations.
78. Action to establish lost or destroyed will.
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X. Extrinsic evidence as to wills.
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XI. Advancements.
117. The general presumption.
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XII. Title, declarations, and judgments.
125. Ancestor's title, and successor's election.
126. Declarations and admissions of the ancestor as to title, &c.
127. Declarations of third persons.
128. Declarations of successors, representatives and beneficiaries.
129. Judgments.

XIII. Action to charge heir, next of kin, &c., with ancestor's debt.
130. Material facts.
131. Mode of proof.

I. Death.

1. *Direct testimony.*]—Death, like birth and marriage, and the number and names of children, &c., may be proved by the testimony of a witness directly to the fact, and such testimony is not necessarily rendered incompetent by its appearing that his memory is aided by family records not produced,[1] nor even that he was not an eye-witness of the occurrence. When such testimony is offered the adverse party may, if he choose, interpose with cross-examination to ascertain if the witness has personal knowledge of the occurrence. If he has not, the burden is thrown upon the party calling him to show the conditions of lapse of time, relationship or information which render hearsay competent under the rules stated below;[2] but such testimony, whether admitted after scrutiny or without objection, is not very cogent.[3] Its weight depends much on the absence of other evidence to the contrary.

2. *Registry of death or burial.*]—Death may be proved by an official registry of *the death*, kept pursuant to statute,[4] or by a church or other registry *of burial*, shown to have been kept in the manner hereafter stated;[5] and upon the same principle the

[1] Secrist v. Green, 3 Wall. 750.
[2] See paragraphs 33, &c.
[3] See Scheel v. Eidman, 77 Ill. 301.
[4] But a memorandum indicating death is not competent merely because found in an official record kept for other purposes. Ridgeley v. Johnson, 11 Barb. 527.
[5] See paragraph 41, below.

entry of death in a hospital register would be competent.[1] A burial registry kept without authority of statute is not, as an official registry of death may be, evidence of the *time* of death, any further than to show that it was presumably within a reasonable season previous to the burial, unless the time of death is shown to have been recorded by direction of a member of the family since deceased, so as to bring it within the rule hereafter noticed of declarations as to facts of pedigree.

3. *Presumptions of Death and of the Time of death.*]—He who founds his claim on an assertion of death, must give some evidence from which the law or the jury may infer that death has occurred; for as against him the presumption of law is that a person of whom nothing is known but that he was living at a certain time, continues to live,[2] at least until he would reach the age of one hundred, after which he may be presumed to be dead in the ordinary course of nature.[3] When there is no definite evidence of the fact of death, as in the case of a person absent and unheard of, the law receives all proper evidence of the circumstances which can throw light upon motive, cause, and casualty, and in civil cases inquires not whether it is possible that he can be alive, but whether the circumstances do not warrant that strong probability of death upon which a court of justice should act.[4] And the tendency of such circumstances may be aided by the presumption of innocence, as, for instance, where continued life would prove guilt in the party to a second marriage.[5]

Presumptions drawn from the circumstances of absence may, and often do suffice, to establish that a person was dead at and after a specific date, without affording any indication that in fact he died on that date, or on any given date. The law, which follows common reason in sifting this kind of evidence, often agrees with the family in giving up the lost one as dead, but the question at what date he died may remain inscrutable for the law as well as for the family. Upon the first question the law aids a decision by the convenient artificial rule that one absent and unheard of for seven years may be presumed no longer living. Whether any artificial rule exists aiding the decision of the question at what time his death shall be deemed to have occurred, is discussed below.

4. *Circumstances raising a Natural Presumption of death.*]—Death within a very recent time may be inferred from the circum-

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[1] See Doe v. Andrews, 15 Q. B. 759.

[2] O'Gara v. Eisenlohr, 38 N. Y. 296, and cases cited; Duke of Cumberland v. Graves, 9 Barb. 595.

[3] Hayes v. Berwick, 2 Martin (La.) 138; Watson v. Tindall, 24 Geo. 474; Sprigg v. Moale, 28 Md. 497, 505.

[4] Merritt v. Thompson, 1 Hilt. 550, 555, and cases cited.

[5] Smith v. Knowlton, 11 N. H. 191, 196; Kelly v. Drew, 12 Allen, 107, 110. Compare O'Gara v. Eisenlohr, 38 N. Y. 296.

stances of absence, or disappearance. Sudden disappearance is not alone enough, in the case of a man without social or pecuniary ties, or fixed abode,[1] though it may be in that of one endeared to his home and fixed in his habits,[2] or having strong pecuniary motive to appear, according to his habit, if alive,[3] or in case of one who was last seen in proximity to danger, and left his effects in a situation suggestive of accident or suicide.[4] Where the presumption of death turns upon unexplained absence, all the circumstances surrounding the absentee within a reasonable time before his departure, or at any time afterward, which, in their nature, have reasonable bearing on the probabilities, are relevant—such as the state of his domestic and business relations, his habits, his health of body and mind, previous threats of suicide, the immediate and ultimate purposes of his departure, the circumstances of his correspondence and its cessation, &c.[5] The presumption of death from absence rests on the fact that it is strange that a man should absent himself, without communicating with his friends if living[6]—hence it is aided by whatever in his situation and habits makes it the more strange, and is impaired by whatever makes it easily credible.[7]

5. *Voyages, and other Special Perils.*]—It is well settled that evidence that at last accounts the absentee was exposed to great and immediate peril may, in connection with the failure of further tidings, raise a presumption of a death consequent on the peril.[8] So one who has sailed in a vessel which has never been heard of, after such lapse of time as would be sufficient to allow information to be received from any part of the world to which the vessel or persons on board might be supposed to have been carried, may be presumed to be dead,[9] if on inquiry in the proper quarters it appears that no intelligence of him has been received.[10] In such a case evidence that the insurers of the ship have paid

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[1] Hancock v. American Ins. Co. 62 Mo. 26, s. c. 3 Centr. L. J. 595.

[2] Id.; and see 62 Mo. 121.

[3] In re Beasney's Trusts, L. R. 7 Eq. 498.

[4] Lancaster v. Washington Life Ins. Co. 62 Mo. 121, 129.

[5] For illustrations of this principle, see Tisdale v. Ins. Co. 26 Iowa, 170, again 28 Id. 16, rev'd on another point in 91 U. S. (1 Otto), 238; Stouvenel v. Stephens, 2 Daly, 319; Sheldon v. Ferris, 45 Barb. 124; Hancock v. Am. Ins. Co. 62 Mo. 26, s. c. 3 Centr. L. J. 595; Garden v. Garden, 2 Houst. 574; John Hancock Ins. Co. v. Moore, 16 Am. L. Reg. N. S. 214.

[6] Per Ld. Denman, 2 Mees. & W. 913.

[7] See paragraph 9, below. Thus the mere fact that the person was absent as a mariner does not raise a presumption of death before the lapse of seven years. Eagle's Case, 3 Abb. Pr. 218, s. c. 4 Bradf. 117; and see Smith v. Knowlton, 11 N. H. 191, 197; Burr v. Sim, 4 Whart. 150, 171.

[8] Eagle's Case, 3 Abb. Pr. 218, s. c. 4 Bradf. 117; Merritt v. Thompson, 1 Hilt. 550, 555, and cases cited.

[9] Id. and cases cited; White v. Mann, 26 Me. 361, 370; Merritt v. Thompson, 1 Hilt. 550; Gerry v. Post, 13 How. Pr. 118; Lancaster v. Washington Life Ins. Co. 62 Mo. 121, 129.

[10] See paragraphs 8 and 34, &c., below.

the policy as on a total loss, is deemed competent evidence of the death of one on board,[1] probably on the principle by which common repute from proper sources is received. The concurrence of a particular storm or a hurricane season, with the route of voyage, is relevant, as enhancing the probability of loss and indicating the probable time.[2]

6. *Seven years' absence in case of Life Estates.*]—The inconveniences resulting to persons entitled as reversioners upon the termination of life estates, in England, for want of proof of the death, while absent, of the persons upon whose life the termination depended, led in 1667 to the enactment of a statute[3] by which seven years' absence in such cases raised a legal presumption of death. This rule, in the form adopted in New York,[4] is as follows: "If any person, upon whose life any estate in lands or tenements shall depend, shall remain beyond sea, or shall absent himself, in this state or elsewhere, for seven years together, such person shall be accounted naturally dead, in any action concerning such lands or tenements, in which his death shall come in question, unless sufficient proof be made in such case, of the life of such person." It is not necessary for the party relying on such a statute to prove either alternative specifically, but a general proof of absence, showing a case which must be within one or the other alternatives of the statute, is enough.[5]

7. *Seven years' rule in other cases.*]—In analogy to the statute as to life estates, and another as to bigamy, the courts established the rule that in all cases, whatever presumption may be claimed of the continuance of a life from the mere fact that it was shown once to exist, ceases at the expiration of seven years from the time the person was last known to be living, and that from the mere lapse of that time arises a legal presumption that the person is no longer living. This presumption, first suggested as a proper one for the jury to draw in analogy to the statutes,[6] is now a well recognized legal presumption, constituting, in the absence of evidence to the contrary, a *prima facie* case.[7]

8. *Absence and Inquiry.*]—To bring a case within either a statutory or judicial rule as to seven years' absence, it is not enough that no evidence of the whereabouts of the person is adduced. There must be affirmative evidence of absence, from his established

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[1] Goods of Main, 1 Sw. & Tr. 11; In re Hutton, 1 Curteis, 595.

[2] Gibbes v. Vincent, 11 Rich. (S. C.) 223; Silleck v. Booth, 1 Younge & C. 117. The same facts which, under the law of insurance, would be competent as bearing on the presumption of loss of the vessel, will in such cases be usually relevant to the presumption of death.

[3] 19 Car. II, c. 6; 1 Chitt. Stat. 1370.

[4] 1 R. S. 749, § 6.

[5] Osborn v. Allen, 26 N. J. L. (2 Dutcher), 388.

[6] Doe d. George v. Jesson, 6 East, 80, 85.

[7] Forsaith v. Clark, 1 Foster (N. H.), 409; King v. Paddock, 18 Johns. 141.

residence,[1] if he had one, and that he has not been heard of by those who would be likely to have heard of him if alive.[2] For this purpose such persons should be called as witnesses, or a reasonable inquiry among them, or search for them, without success, must be shown.[3] If he had a known and fixed residence in a foreign country when last heard from, there should be some evidence of inquiries made there. If he had relatives in this country, there should be some evidence of inquiries of them, or an unsuccessful search for them at their last known place of residence; and the mere fact that letters addressed to relatives at a last known place of residence remained unanswered, is not sufficient.[4]

What is a reasonable inquiry is a mixed question of law and fact, to be determined upon the particular circumstances of the case.[5]

9. *Rebutting the Presumption.*]—The presumption is a convenient artificial rule, defining the limit of a mere probability,[6] and is not conclusive,[7] but susceptible alike of being strengthened and impaired by any of the circumstances relevant to the natural presumption of death in case of long absence.[8] The presumption is strengthened by the fact that the person left home for temporary purposes;[9] while, on the other hand, it is weakened if he left clandestinely under circumstances indicating intention of concealment abroad,[10] or appears to have broken with friends after departure, and ceased to desire intercourse.[11] And the testimony of a witness that even others than members of the family have heard that he was living,[12] or that a single letter has been received from him,[13] within the seven years, wholly rebuts this presumption. While modern facilities of intercourse by mail and telegraph add significance to continued cessation of correspondence,

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[1] Doe v. Andrews, 15 Q. B. 760; Stinchfield v. Emerson, 52 Me. 465; Spurr v. Trimble, 1 A. K. Marsh. 278.

[2] Doe v. Andrews, above; Duke of Cumberland v. Graves, 9 Barb. 595, 608; McCartee v. Camel, 1 Barb. Ch. 455.

[3] Even producing the only surviving relative, without further inquiry, is not alone enough. Doe v. Andrews (above).

[4] McCartee v. Camel, 1 Barb. Ch. 455, 463.

[5] See Clarke v. Cummings, 5 Barb. 339, 353.

[6] Compare Ram on Facts (by Townshend), 110.

[7] R. v. Harborne, 2 A. & E. 540, s. c. 4 Nev. & Man. 344.

[8] Thus a court of equity, having discretionary power, may require security to refund, even after the lapse of twelve years. Dowley v. Winfield, 14 Sim. 277.

It has been held that acts of a party tending to recognize the existence of the absentee, such as reserving a fund for him on a trust accounting, or proceeding in a suit on proof of personal service of process on him, is competent as against such party. Keech v. Rinehart, 10 Penn. St. 244.

[9] Loring v. Steineman, 1 Metc. 204.

[10] Watson v. England, 14 Sim. 28.

[11] Bowden v. Henderson, 2 Smale & G. 360.

[12] Flynn v. Coffee, 12 Allen, 133. But as to mere rumors, see Koster v. Reed, 6 B. & C. 19; Whiteside's Appeal, 23 Penn. St. 114, 117.

[13] Smith v. Smith, 49 Ala. 158. The letter, if stated still to exist, should be produced, or its absence accounted for. Brown v. Jewett, 18 N. H. 230. Slight evidence is enough to account for absence. Am. Life Ins. Co. v. Rosenagle, 77 Penn. St. 507, 513.

yet, on the other hand, the presumption from absence itself is weakened by modern facilities for travel,[1] the expanse of our country, and the migratory habits of population.[2]

10. *The Time of Presumed Death.*]—The presumption of continuance of life ends on the expiration of the seven years, but whether life is presumed to have ended on that day is another question. Where the death is presumed from circumstances naturally pointing to a particular period, it will ordinarily be a question for the jury to find the date of death,[3] either specifically or relatively to other events material to the cause; where a party rests on the seven years' presumption, much difference of opinion exists, and two rules contend for control.[4]

11. *The English rule.*]—The doctrine recently established in the English courts,[5] and followed in some American cases,[6] is that he upon whom is the burden of proof to show either death or survival, at a particular time within the seven years, must adduce distinct proof bearing on that time.[7]

12. *The American rule.*]—The rule more generally recognized in the courts of this country is that the principle which raises a presumption of the death of a person absenting himself for seven years without being heard from, furnishes a legal presumption of the *time* of the death, as well as of the *fact* of the death; for in the absence of such a presumption, the presumption would be that the person was still alive; and this presumption of the continuance of life ceases only when it is overcome by the countervailing presumption of death arising at the end of seven years; but the presumption of death so arising cannot operate retrospectively to indicate a death previous to the time it arose. In other words, the legal presumption of life is suf-

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[1] Watson v. England, 14 Sim. 28.

[2] Smith v. Smith, 49 Ala. 158.

[3] When the fact of death is conceded, and the inquiry is when did it happen, the question of presumptions arising from the fact that the vessel was never heard of, is not postponed to the latest possible period, but is a question of reasonable probability in view of the known usual and not necessarily longest time for voyages like that in question. Oppenheim v. Wolf, 3 Sandf. Ch. 571.

[4] See paragraph 4, above.

[5] In re Phené's Trusts, L. R. 5 Ch. 139, and cases cited; In re Lewes' Trusts, L. R. 6 Ch. 356, affi'g L. R. 11 Eq. 236.

[6] State v. Moore, 11 Ired. (N. C.) L. 160; Spencer v. Roper, 13 Ired. 333; McCartee v. Camel, 1 Barb. Ch. 455; see also Hancock v. Life Ins. Co. 62 Mo. 26.

[7] The grounds assigned for this rule are: 1. That to presume death upon the last day of the seven years would be to presume that which would be almost always contrary to the fact; 2. That, if life on the last day of the seven years is presumed, death on the day following is extremely improbable; and, 3. That to allow the presumption of continuance of life in a case where continuance of life is the main fact in issue, is a different thing from allowing it where the continuance is only incidentally involved. The English rule is supported in this country by the opinions of RUFFIN, Ch. J., NASH, J., and WALWORTH, Chan. in the cases above cited, and that of Dr. Wharton (2 Whart. Ev. § 1276), who deems it supported by the preponderance of American authority. It is assumed, also, by Mr. Bishop, 1 Bish. Mar. & D. § 456.

ficient, in the absence of all other evidence, to sustain an allegation of existence at any time during the period that the presumption lasts, viz., until the lapse of the seven years.[1] The presumption that death occurs at that time fixes the rights dependent on death, until evidence to the contrary appears. Hence an executor is chargeable with interest for not paying over to the legatee entitled by reason of the presumable death. It is not necessary that the presumption should be judicially adjudged in order to fix the rights of parties.[2]

13. *Survivorship in common casualty.*]—Where death of several is caused by one catastrophe, the burden of proof is on him

[1] This doctrine is fully supported by the following decisions: Montgomery v. Beavans, 1 Sawyer, 653, s. c. 4 Am. L. T. U. S. Cts. 202, FIELD, J.; Eagle's Case, 3 Abb. Pr. 218, s. c. 4 Bradf. 117, BRADFORD, Surr.; Exr's of Clarke v. Canfield, 15 N. J. Ch. (2 McCarter), 119, GREEN, Chan.; Whiting v. Nicholl, 46 Ill. 230, 241, BREESE, Ch. J.; Barr v. Sim, 4 Whart. 150, 171, and Bradley v. Bradley, 4 Id. 173, GIBSON, Ch. J; Smith v. Knowlton, 11 N. H. 191, 196, PARKER, Ch. J.; Tilly v. Tilly, 2 Bland (Md.) 436, 444, BLAND, Chan. The same principle is also recognized, though not decisively, in Whiteside's Appeal, 23 Penn. St. 114, 117, BLACK, Ch. J., and Stouvenel v. Stephens, 2 Daly, 319, DALY, Ch. J.; and Gilleland v. Martin, 3 McLean, 490, LEAVITT, J. In the earliest English cases it seems to have been a question of the weight of testimony; and, in 1560, it was held that, on evidence of seven years' absence, without being heard of, and on proof of belief in the family of death, death might be presumed. Thorne v. Rolff, Dyer, 185 a, s. c. more fully, Bendloe, 86. In 1624, the question arose as to who had the burden of proof, as to whether absentees, shown once to have been in life, were still alive, and it was held that the burden was on the plaintiff asserting their death, for it having been shown that they were once in life, they should be presumed living till the contrary was shown. Throgmorton v. Walton, 2 Rol. R. 461. Or, in the words of Lord ELLENBOROUGH, "where the issue is upon the *life or death* of a person once shown to be living, the proof of the fact lies on the party who asserts the *death*." Wilson v. Hodges, 2 East, 312. See also 10 Viner's Ab. 298, Estate R. a. 4. After the decision in Throgmorton v. Walton, the statute 19 Car. II, as to life estates was passed, see paragraph 6, above, directing judges to instruct the jury that seven years' absence, &c., raised a legal presumption of death. The reasons supporting the American and earlier English rule are: 1. That the old common-law presumption of continuance of life lasts until intercepted by the statutory or judicial seven years' limit, or by evidence pointing to death at a particular time. 2. Death is presumed at the end of seven years, not for the purpose of fixing on the true date, but because the true date is inscrutable. The presumptions of continuance of life, and of death after seven years, are presumptions founded on ignorance, and are not to be tested by the question whether the artificially designated day is probably the true one. Like other presumptions founded on ignorance, the object is merely certainty, because truth cannot be ascertained. 3. Because the true date is unascertainable, it becomes necessary to fix a day on which rights shall be deemed to devolve, as if actual death on that day were known. 4. Without this rule, where proof of the actual date cannot be made, the property must either remain undistributed, or be distributed among the contestants, not according to any settled principle, but according to the accident of possession, or as one or the other claimant happens to be the moving party in court. Apart from these considerations of theory and policy, the question resolves itself into this, viz., is the legal presumption, that a person once shown to be living continues to exist until the contrary is indicated, sufficient to stand as a *prima facie* case in favor of one who assumes the affirmative? In some other cases, the presumption of the continuance of a fact shown once to have existed is *prima facie* proof in favor of him who alleges the fact, as, for instance, in case of indebtedness, partnership, insanity, &c. It may be observed that the law constantly acts on this presumption of life, in service of process on absentees by advertisement.

[2] Whiteside's Appeal, 23 Penn. St. 114, 117. Compare Chap. IV, p. 57, n. 15.

who claims that one survived the other, to give some evidence rendering survival probable. The law neither makes nor permits a presumption that one survived the other from the mere fact of age or sex; but if there is evidence that the prolongation of life depended on struggle or endurance, then the relative strength may be relevant, and in such case, as well as where there is even slight evidence that one was seen alive after the other may be presumed to have been dead, the question may be one for the jury.[1]

II. Marriage.

14. *Burden of proof, and presumptions.*]—Marriage is not presumable from marriageable age and lapse of time,[2] and proof that a woman was a wife during a given period does not raise a presumption of marriage at any particular earlier date;[3] but, on the other hand, the court will not, in the absence of evidence, presume that one never married. The burden of proof is on him who asserts either marriage or the contrary.[4] For the purposes of actions considered in this chapter, it may be presumed that every competent couple who live together ostensibly in the way of husband and wife, are in reality such.[5] This presumption, for which considerations of public order and decency are a sufficient support, is aided by the presumption of innocence in favor of a party to the marriage claiming under it, and is greatly strengthened when the only question depending is the legitimacy of offspring. The presumptions in favor of marriage increase in strength with the prolongation of the matrimonial cohabitation.[6]

15. *Direct evidence of Marriage.*]—Marriage may be proved either by evidence of the contract which constitutes it (sometimes called evidence of actual marriage), or by evidence of the status, or matrimonial condition in life, of which that contract is the foundation (sometimes called *de facto* or presumptive marriage). There is, however, but one kind of marriage, and the difference is in the evidence by which the relation is proved. To prove the contract, it is sufficient to prove an unconditional agreement of marriage in the present, as distinguished from an executory agreement to marry, if intended by the parties to constitute them husband and wife,[7] though without solemnization,[8]

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[1] Moehring v. Mitchell, 1 Barb. Ch. 264; Newell v. Nichols, 12 Hun, 604, and cases cited; 13 Moak's Eng. R. 679, n.; Ommaney v. Stilwell, 23 Beav. 328; Robinson v. Gallier, 2 Woods, 178; Kansas, &c. Railw. Co. v. Miller, 2 Col. T. 442, 464.

[2] Erskine v. Davis, 25 Ill. 251, 256.

[3] Id.

[4] Doe v. Deakin, 3 Carr. & P. 402.

[5] 1 Bish. on Mar. & D. §§ 434, 443.

[6] 1 Bish. on Mar. & D. § 458, and cases cited.

[7] Hill v. Burger, 3 Bradf. 432; Steuart v. Robertson, L. R. 2 Sc. App. 494, s. c. 13 Moak's Eng. 165; McClurg v. Terry, 21 N. J. Eq. (6 C. E. Green), 225.

[8] Clayton v. Wardell, 4 N. Y. 231; Cheney v. Arnold, 15 N. Y. 351, and cases cited.

or witnesses;[1] and proof of cohabitation is not necessary,[2] at least if there be proof of solemnization.[3] But proof of a contract *per verba de futuro* is not enough, though followed by cohabitation.[4] The contract or its solemnization before a clergyman or magistrate may be proved by the testimony of an eye witness, and for this purpose a party is competent;[5] and parol testimony is not excluded by the fact that the statute provides for a record.[6] It is enough that the witness be able to testify that the marriage was celebrated according to the usual form, and he need not be able to state the words used.[7] From the fact of solemnization assent is presumed,[8] even though it was not expressed.[9] Where solemnization was necessary by the law under which the marriage was contracted, if it is proved, and matrimonial cohabitation under it, the law presumes that all the necessary formalities were had, unless the contrary is shown;[10] and even then a subsequent valid marriage may be presumed from continued matrimonial cohabitation under color of the informal solemnization.[11]

16. *Certificate or Registry.*]—Marriage may equally be proved by a marriage certificate, if made evidence by statute,[12] or if so connected with the parties as to be competent as part of the *res gestæ*, or as their declaration, or if by lapse of time and family tradition it is competent as hearsay.[13] It may also be proved by an official registry kept pursuant to statute,[14] or by the registry kept by the officiating clergyman,[15] or the proper officer of a church or religious society,[16] pursuant to his duty, though without requirement of statute.[17] The registry is evidence both of the fact of marriage and the date of solemnization.[18]

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[1] Van Tuyl v. Van Tuyl, 8 Abb. Pr. N. S. 5, s. c. 57 Barb. 235.
[2] Jackson v. Winne, 7 Wend. 47; Caujolle v. Ferrie, 26 Barb. 177.
[3] Jaques v. Pub. Administrator, 1 Bradf. 479.
[4] Cheney v. Arnold, 15 N. Y. 345; Holmes v. Holmes, 1 Abb. U. S. C. Ct. 539; Duncan v. Duncan, 10 Ohio St. 181. *Contra*, 1 Bish. on Mar. & D. §§ 251–256.
[5] Bissell v. Bissell, 7 Abb. Pr. N. S. 16, s. c. 55 Barb. 325.
[6] Commonwealth v. Norcross, 9 Mass. 492.
[7] Fleming v. People, 27 N. Y. 329.
[8] Id.
[9] Harrod v. Harrod, 1 Kay & J. 4, 17. *Contra*, Dennison v. Dennison, 35 Md. 361.
[10] Smith v. Huson, 1 Phill. 287, 294; 1 Bish. Mar. & D. §§ 450, 451. It is the better opinion that, even where the law requires solemnization, it is enough to show solemnization before an officer *de facto*, that is, a person assuming to act by authority in the solemnization. 1 Bish. on Mar. & D. § 496.
[11] Johnson v. Johnson, 1 Coldw. (Tenn.) 626, 634; Harrod v. Harrod, 1 Kay & J. 4, 17; Rex v. Brampton, 10 East, 288; Raynham v. Canton, 3 Pick. 293.
[12] Otherwise of a certificate given many years after the fact. Gaines v. Relf, 12 How. U. S. 472, 555.
[13] See paragraph 34, below.
[14] See paragraph 43, below, and Jackson v. Boneham, 15 Johns. 266.
[15] Maxwell v. Chapman, 8 Barb. 579, 582.
[16] Jackson v. King, 5 Cow. 237.
[17] Maxwell v. Chapman (above); Rosc. N. P. 232.
[18] Doe v. Barnes, 1 Moo. & Rob. 386.

17. *Indirect evidence of Marriage.*]—Evidence of cohabitation and repute—that is of status or matrimonial condition—is only indirect or presumptive evidence of a contract of marriage. This is primary not secondary evidence,[1] but its efficacy depends entirely on its justifying an inference that a contract of marriage was once made;[2] still it is not essential that such evidence point to any particular time of contract, unless time is material under the issue. One who alleges and fails to prove a formal contract of marriage is not thereby necessarily precluded from adducing indirect evidence,[3] although its value may be fatally impaired by the false allegation of a formal marriage.[4] Indirect evidence may be sufficient to establish a marriage, even though it may have the effect to invalidate a subsequent marriage.[5]

18. *Cohabitation and Repute.*]—In the absence of direct proof, marriage cannot be proved by cohabitation alone, however long continued;[6] there must be something to show that the cohabitation was matrimonial, not meretricious. The fact that the parties were reputed among friends and acquaintances to be man and wife will suffice, with evidence of cohabitation, if the reputation be a general or at least a consistent reputation. A divided repute is of no avail.[7] A mere local repute, if residence is brief and frequently changed, is of little account alone, for an intended meretricious connection might be concealed by a regard for appearances. Hence there should be some degree of public recognition of the relation of husband and wife among acquaintances and friends.[8] The mere fact that the man, under particular circumstances, may have attempted to give to his mistress a different character from the meretricious one which she, in fact, sustained toward him, is not sufficient.[9]

In proving marriage by general repute, a witness may testify that the reputation at the place of residence was that the persons in question were man and wife; but he may be cross-examined as to the sources of his information, and if it appear on cross-exam-

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[1] 1 Bish. Mar. & D. § 483.

[2] Breadalbane Case, Campbell v. Campbell, L. R. 1 Sc. App. in H. of L. 182.

[3] Tummalty v. Tummalty, 3 Bradf. 369.

[4] The question of weight rather than competency seems to have been passed on in Redgrave v. Redgrave, 38 Md. 98. Compare Blackburn v. Crawfords, 3 Wall. 194. Inconsistencies in testimony, due to family pride, &c., explainable. Gaines v. New Orleans, 6 Wall. 705. Testimony to a marriage between dissolute or unscrupulous persons to be cautiously weighed. Steuart v. Robertson, L. R. 2 Sc. App. 494, 520, s. c. 13 Moak's Eng. R. 165, 191.

[5] Brower v. Bowers, 1 Abb. Ct. App. Dec. 214, s. c. as Bowers v. Brower, 9 N. Y. Leg. Obs. 196, s. p. O'Gara v. Eisenlohr, 38 N. Y. 296.

[6] Commonwealth v. Stump, 53 Penn. St. 132.

[7] Cunninghams v. Cunninghams, 2 Dow, 482, 511; Commonwealth v. Stump (above). *Contra*, Lyle v. Ellwood, L. R. 19 Eq. C. 98, s. c. 11 Moak's Eng. 702.

[8] Hill v. Burger, 3 Bradf. 432, 437.

[9] Rose v Clark, 8 Paige, 574, 582. The degree of proof of cohabitation and repute must be increased when one of the parties is still living. Hill v. Burger, 3 Bradf. 432, 437.

ination that he is speaking from information given him by a particular person, either of the fact or of the general reputation, the evidence is shown to be incompetent, unless the source of information was a member of the family of either spouse, in which case the rule as to declarations may apply.[1]

19. *Cohabitation and Declarations.*]—Evidence of confessions or declarations by one or both parties that they were married, is competent against them, and if made during cohabitation, so as to characterize it, is competent for or against third persons;[2] and so are the acts and conduct of the parties toward each other.[3] Concealment which prevented any public repute from arising, though a very strong circumstance against the presumption of marriage,[4] is not necessarily fatal to it, but may be explained;[5] and if explained, dispenses in so far with evidence of repute. Admissions and declarations made, and a general repute originating, after the cohabitation had ceased, are not competent except as against the declarant. They must be reasonably contemporaneous with the alleged status, so as to characterize it, as facts in the nature of part of the *res gestæ*.[6]

20. *Marriage after Meretricious Intercourse.*]—If the cohabitation is shown to have commenced as a meretricious one, the mere continuance of cohabitation, even with matrimonial repute, can never amount to evidence of marriage;[7] but the presumption in favor of marriage is so favored,[8] that the courts lay hold of any circumstances significant of actual change from an illicit to a lawful relation, even without any evidence pointing to the actual time and mode of the change. Marriage may be presumed, where cohabitation under circumstances that would have been matrimonial but for the impediment of an existing marriage of one of the parties, is continued after that impediment is removed, and known to the parties to be so removed.[9] While the mere removal of the disability is not enough to purge the meretricious character, even when coupled with evidence of a prior promise to marry after its removal,[10] evidence that the parties recognized the new relation, and held themselves out as man and wife, and professed to be bound by marital ties, and thus exhibited the

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[1] Shedden v. Patrick, 30 L. J. P. M. & D. 217, 223 (1860–1861).

[2] See Hayes v. People, 25 N. Y. 396, per ALLEN, J.; 1 Bish. Mar. & D. § 497. Compare Westfield v. Warren, 3 Halst. 249.

[3] See Christy v. Clarke, 45 Barb. 529.

[4] Cunningham v. Burdell, 4 Bradf. 343.

[5] Gaines v. New Orleans, 6 Wall. 707.

[6] Matter of Taylor, 9 Paige, 611, 616.

[7] This seems to be the result of the present state of the authorities; but see, for a rule more favorable to the inference of marriage, 1 Bish. Mar. & D. §§ 506–509.

[8] And especially where the question is on the legitimacy of issue; see Caujolle v. Ferrie, 23 N. Y. 90, aff'g 26 Barb. 177, 4 Bradf. 28.

[9] O'Gara v. Eisenlohr, 38 N. Y. 296; Rose v. Clark, 8 Paige, 574, 581, and cases cited.

[10] Foster v. Hawley, 8 Hun, 68.

continuation of their cohabitation upon a new and different footing, is sufficient.[1]

21. *Second Marriage during Absence.*]—At common law, marriage, however proved, may be disproved by evidence that one of the parties was at the time a party to a prior valid marriage.[2] The burden of proving the prior marriage is on the one who seeks by it to impeach the later;[3] but direct evidence of the prior marriage is not essential; it may be proved by cohabitation and repute.[4] The principle of the statute of bigamy of 1604,[5] which excepted from the offense cases of second marriage contracted while the former husband or wife was beyond seas for seven years, or was absent and not known to be living for that period, was early adopted by the common-law courts, by analogy, as furnishing a presumption of death in such cases, for civil purposes, and this rule has been generally followed in this country, the time being shortened in some States by statute, as in New York to five years,[6] where, also, a further provision has been adopted to the effect that such a second marriage shall not be void, as formerly, if it appear that the party to both marriages contracted the second after the lapse of that period, without having meanwhile known that the absentee was living,[7] and in good faith believing him dead.[8] Under that provision the court will not adjudge it void in a collateral action involving only questions of property;[9] and after the death of one of the parties to the second marriage, that marriage is good for the purpose of succession and legitimacy;[10] and even during the life of both, it may be sustained for those purposes, by proof that the former husband or wife was absent, and not heard of for seven years, and that, after the lapse of that time, the second marriage occurred; or that previous cohabitation and repute were continued under circumstances sufficient to raise a clear presumption of marriage on grounds subsequent in point of time to the legally presumable death of the former husband or wife.[11] Upon proof that the absentee was reputed in

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[1] Hyde v. Hyde, 3 Bradf. 509, 518.

[2] Blossom v. Burritt, 37 N. Y. 434; Emerson v. Shaw, 1 L. & Eq. Reporter, 635 (N. H. Mar. 1876).

[3] Patterson v. Gaines, 6 How. U. S. 550. But evidence of an admission by such party that he was guilty of bigamy in the second marriage (Gaines v. Relf, 12 How. U. S. 472, 534), or that his first wife was then living (1 Bish. Mar. & D. § 455), is not sufficient.

[4] Brower v. Bowers, 1 Abb. Ct. App. Dec. 214, a. c. 9 N. Y. Leg. Obs. 196.

[5] 2 Ja. I, ch. 11 (3 Stat. at L., A.D. 1770, p. 9), § 2.

[6] 2 R. S. 687, § 9.

[7] 2 R. S. 139, § 6; Cropsey v. McKinney, 30 Barb. 47, 58.

[8] Whether the presumption of innocence avails to require evidence to the contrary—compare Valleau v. Valleau, 6 Paige, 209; Spears v. Burton, 31 Miss. 555; O'Gara v. Eisenlohr, 38 N. Y. 296; Fleming v. People, 27 N. Y. 334.

[9] Cropsey v. McKinney (above); compare O'Gara v. Eisenlohr (above), and Spicer v. Spicer, 16 Abb. Pr. N. S. 112, and note.

[10] 1 Bish. Mar. & D. § 114.

[11] Jackson v. Claw, 18 Johns. 346, 350.

the family, before the lapse of that period, to be dead, or other presumptive evidence, the jury may find death to have occurred before the second marriage.[1] But absence for less than seven years, without other evidence raising the presumption of death, will not suffice; for the technical presumption of innocence does not avail against facts raising a presumption of guilt on the one hand, and negativing the existence of any motive for remarriage on the other hand.[2]

22. *Rebutting evidence of marriage.*]—Where the only evidence of marriage is indirect, or where evidence of actual marriage is conflicting, declarations and conduct of either or both parties inconsistent with the matrimonial character, are competent, within the limits above stated, unless the issue is upon legitimacy. Thus declarations of either that they were not married, the fact that the woman had sued, or been sued, in her maiden name,[3] that they terminated cohabitation and separated, without further claim to matrimonial relation,[4] or that each married other persons,[5] are sufficient to go to the jury as negativing the presumption from mere habit and repute. The effect even of such evidence of cohabitation and repute as, standing alone, would establish marriage, may be nullified by evidence that the parties afterward formally solemnized a marriage under circumstances showing that their motive was to legalize their connection, for this conclusively proves that, in their judgment, it was previously illicit.[6] The moral and social character of the parties themselves is relevant as bearing on the question of the matrimonial or meretricious character of the connection,[7] though incompetent against evidence of a ceremonial marriage.[8] But the opinion of a witness as to whether their character rendered such a connection improbable, is not competent.[9] Evidence of loose oral denials by the parties are of little weight against otherwise clear and satisfactory evidence of matrimonial cohabitation and repute;[10] and mere declarations that the declarant is unmarried, made without reference to a reputed relation between the particular parties, are held incom-

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[1] Cochrane v. Libby, 18 Me. (6 Shepl.) 39.

[2] O'Gara v. Eisenlohr, 38 N. Y. 296. *Contra*, see 1 Bish. Mar. & D. § 453, and cases cited; and see Kelly v. Drew, 12 Allen, 107, 109.

[3] Scudder v. Gori, 18 Abb. Pr. 223, s. c. less fully, 3 Robt. 661.

[4] Jackson v. Claw, 18 Johns. 346. An advertisement forbidding trust, appearing in the newspaper at their domicile, immediately after separation, has been held competent, the original manuscript being lost. Jewell v. Jewell, 1 How. U. S. 219, 232; but the better opinion is that there must be evidence connecting one of the parties with it.

[5] Niles v. Sprague, 13 Iowa, 202.

[6] Shedden v. Patrick, L. R. 1 Sc. & D. App. 470.

[7] Hill v. Burger, 3 Bradf. 432, 449, s. p. Steuart v. Robertson, L. R. 2 Sc. App. 494, 520, s. c. 13 Moak's Eng. 165, 191.

[8] Per Bradford, Surr. Hill v. Burger (above).

[9] Such testimony was held to have no weight, in Gaines v. New Orleans, 6 Wall. 706.

[10] Tummalty v. Tummalty, 3 Bradf. 369.

petent.[1] Denials of "marriage" are inconclusive, because they may be meant of a ceremonial marriage, while the parties were actually man and wife.[2]

23. *Foreign Law.*]—The written law of another State, or of a foreign country, may be proved in the manner stated at p. 22 of this volume. The unwritten law may be proved by calling as a witness one practically conversant with it, either as a lawyer in that country, or as having had a course of legal duty to perform there in respect to marriage, such as to make it probable that he has made himself acquainted with the law on that subject. One who is not so qualified, and who has acquired his knowledge solely from books, is not competent.[3]

III. Issue or Failure of Issue.

24. *Burden of proof.*]—In the absence of evidence neither birth of children, nor the contrary, is presumed. But slight evidence may suffice.[4] One claiming by collateral descent must show who was last entitled, and then prove his death without issue; next prove all the different links in the chain of descent which will show that he and the claimant descended from the same common ancestor, together with the extinction of all those lines of descent which could claim any preference to the claimant. He must prove the marriages, births and deaths, and the identity of persons necessary to fix title in himself, and the extinction of others who would have, if in existence, a better title.[5] This is done by proving the marriages, births and deaths necessary to complete his title, and showing the identity of the several parties.[6] He must prove that all the intermediate heirs between himself and the ancestor from whom he claims, are dead, without issue.[7] The non-existence of issue is a fact separate from death, in support of which some evidence must be given.[8]

25. *Presumptions as to Failure of Issue.*]—In the absence of evidence, the presumption is that a person dying intestate, left heirs;[9] and the mere fact that the death occurred under twenty-

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[1] Van Tuyl v. Van Tuyl, 8 Abb. Pr. N. S. 5, s. c. 57 Barb. 235.

[2] Where there is ample evidence of long and uninterrupted cohabitation and repute, evidence of the declaration of the man that they were not married, and his testimony that they were never married, since they may be construed as referring to a ceremonial marriage, are not enough to take the case from the jury. Richard v. Brehm, 73 Penn. St. 140, s. c. 13 Am. R. 733.

[3] 16 Moak's Eng. 591 n. and cases cited; Rosc. N. P. 138, 139; 1 Bish. Mar. & D. §§ 409–430, 521–536.

[4] Emerson v. White, 29 N. H. (9 Fost.) 491, 497, and cases cited.

[5] Sprigg v. Moale, 28 Md. 497, 505; 3 Washb. R. P. 4th ed. 18 (38).

[6] Emerson v. White (above).

[7] Richards v. Richards, 15 East, 294 n.

[8] Sprigg v. Moale (above).

[9] Harvey v. Thornton, 14 Ill. 217.

one,[1] or that it is only presumed from the lapse of time, is not enough to raise a presumption that he left no issue,[2] except after great lapse of time, and only for the purpose of setting that branch of the family out of the case;[3] but slight evidence of death without issue, may, after great lapse of time, be sufficient;[4] and unsuccessful inquiry for children, if any, at places where, if such had existed, information could be obtained, will suffice to sustain a verdict in such case.[5]

26. *Escheat.*]—Every citizen dying is presumed to leave some one entitled to claim as his heir, however remote, unless one or other of the only two exceptions known to our law, alienage or illegitimacy, should intervene. The title of the State, by reason of defect of heirs, can be established by actual proof of the fact of alienage or of illegitimacy, or in certain cases, by proof of reputation of either of those facts, provided such proof be direct and positive, founded upon inquiry, advertisements, personal family knowledge, or actual declaration of the last person seized, or of those from whom his title descended. Mere hearsay reputation of the general fact of defect of relations and heirs is not sufficient.[6]

27. *Possibility of Issue Extinct.*]—The highest authorities in medical jurisprudence sustain the proposition that a woman beyond the age of fifty-five has no possibility of issue. Extinction of possibility may be presumed as a matter of fact at an earlier period, varying with the evidence as to length of married life and condition of health.[7]

28. *Registry of birth or baptism.*]—The fact of birth may be proved by an official registry of birth kept pursuant to statute, or by a registry of baptism shown to have been kept in the manner hereafter stated;[8] but a mere registry of baptism is not, as an official registry of birth may be, evidence of the date of birth, though stated in it,[9] further than to show that it must have been prior to the date recorded as that of baptism,—that is to say, it only proves that the child was in existence at the time of the

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[1] Clark v. Trinity Ch. 5 Watts & S. 266, 271.

[2] Sprigg v. Moale (above).

[3] Rowe v. Hasland, 1 W. Black. 404, MANSFIELD, Ch. J.

[4] Such as proof that his family, if any, or his intimate acquaintances for many years, never heard him speak of wife, children, &c. Jackson v. Etz, 5 Cow. 320; Doe v. Griffin, 15 East, 293; McComb v. Wright, 5 Johns. Ch. 263. So of proof of circumstances showing that the absentee was a young man strongly likely to communicate with his family if living, and to inform them if he were ever married. In re Webb's Estate, Ir. R. 5 Eq. 235.

[5] King v. Fowler, 11 Pick. 302.

[6] People v. Fulton Fire Ins. Co. 25 Wend. 205.

[7] In re Widdow's Trusts, L. R. 11 Eq. 408; In re Millner's Estate, L. R. 14 Eq. 245, s. c. 3 Moak's Eng. 719; and see 25 Weekly R. 901; 4 L. J. N. S. 380.

[8] Paragraph 41 (below).

[9] Clark v. Trinity Church, 5 Watts & S. (Penn.) 266, 269; Blackburn v. Crawfords, 3 Wall. 189; Morrissey v. Wiggins Ferry Co. 47 Mo. 521.

ceremony,[1]—unless the statement of the time of birth is shown to have been made by direction of a member of the family since deceased, so as to bring it within the rule admitting declarations as to facts of pedigree.[2]

29. *Consorting as a family.*]—The fact that persons dwelt or consorted together as members of one family in the apparent relation of parent and child, and assisted and depended on each other as such, is competent, in connection with other substantial evidence to show the existence of the relation.[3] The value of such evidence depends on much the same principles as those which admit cohabitation and repute to prove marriage.

30. *Direct testimony to age.*]—Where age is a fact of pedigree within the rules below stated, it seems that the person whose age is in question, if he be a competent witness, may as properly as any other person, testify to it, under the conditions on which hearsay as to pedigree is admissible; but there seems to be no good foundation for allowing him to state it except upon such sources.[4] Inspection, however, is deemed a sufficient legal criterion to decide the question of infancy,[5] and is sufficient to put a party who may be affected by it upon inquiry;[6] but the mere opinion of a witness respecting the age of a person, from his appearance, unaccompanied by the facts on which that opinion is founded, is incompetent.[7]

31. *Physician's testimony or account.*]—The testimony of the attending physician to the fact and the date[8] of birth is competent for the purpose of proving infancy; and equally for proving existence or age for any other purpose.[9] If he does not remember the date, the charge made by him in his accounts, or any other original contemporaneous memorandum he made of the fact,[10] is competent, if introduced by his testimony that it was correctly made at the time.[11] If the physician is dead, his entry in a register of the births he attended, which he was accustomed to keep in the course of his vocation, though without requirement

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[1] Kennedy v. Doyle, 10 Allen (Mass.) 161; Whitcher v. McLaughlin, 115 Mass. 167.

[2] A statement of illegitimacy in the registry has been deemed competent, but its weight is questionable. Morris v. Davis, 3 Carr. & P. 215, 427; and see Caujolle v. Ferrie, 23 N. Y. 90.

[3] See Kansas, &c. Rw. Co. v. Miller, 2 Col. T. 459; Baltimore, &c. R. R. Co. v. Gettle, 3 W. Va. 376, 385.

[4] Compare Dewitt v. Barly, 17 N. Y. 344; McCarty v. Deming, 4 Lans. 440; Hart v. Stickney, 4 L. & Eq. Rep. 120; Banks v. Metcalfe, 1 Wheel. Cr. Cas. 381.

[5] State v. Arnold, 13 Ired. L. (N. C.) 184.

[6] Conroe v. Birdsall, 1 Johns. Cas. 127.

[7] Morse v. State, 6 Conn. 9, 13.

[8] Beates v. Retallick, 11 Penn. 288.

[9] As to exclusion for professional privilege, see Edington v. Mut. Life Ins. 67 N. Y. 185, rev'g 5 Hun, 1; Blackburn v. Crawfords, 3 Wall. 192, and cases cited.

[10] See Guy v. Mead, 22 N. Y. 462; Marcly v. Shults, 29 Id. 346.

[11] Heath v. West, 26 N. H. (6 Fost.) 191.

of statute, is evidence of the *time* of a birth entered therein, there being some independent evidence of the *fact* of birth.[1]

32. *Legitimacy: Burden of Proof and Presumptions.*]—Legitimacy is a presumption of law in the absence of competent evidence to the contrary,[2] and language in an instrument of evidence designating a person by the word "son," "daughter," "child," or the like, means *prima facie*, legitimate offspring.[3] The burden of proof is on the party denying the legitimacy of one shown to have been born from a wife,[4] and his evidence must show illegitimacy beyond a reasonable doubt. This presumption is additional to the presumptions indulged in favor of marriage, and of innocence of the parents, and may prevail, notwithstanding the cohabitation of the parents is shown to have been illicit in its origin, and there is no definite proof as to when or how the change from concubinage to matrimony took place.[5] A child born during the mother's coverture,[6] (even so soon after marriage that conception must have preceded marriage),[7] is presumed legitimate in the absence of competent evidence to the contrary, and this is a strong legal presumption, and can only be rebutted by proof that no sexual intercourse occurred[8] at any time, (whether before or after marriage),[9] when the child could have been begotten; or what is equivalent, that the husband was physically incompetent, or, that under sentence of a court of competent jurisdiction, they were living separate.[10] Sexual intercourse is pre-

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[1] Arms v. Middleton, 23 Barb. 571, s. p. Blackburn v. Crawfords, 3 Wall. 175. In Higham v. Ridgeway (10 East, 109), such evidence was admitted not as an entry in the ordinary course of duty, but as an entry against pecuniary interest, because the charge was marked "paid." In Matter of Paige (62 Barb. 476), an entry in a book not kept as a journal, but with each account by itself, was held incompetent without proof of its truth. Compare generally 1 Tayl. Ev. 597–607; 1 Smith's L. C. 500, &c.

[2] Banbury Peerage Case, 1 Sim. & St. 153.

[3] Caujolle v. Ferrie, 23 N. Y. 105, 107.

[4] Phillips v. Allen, 2 Allen, 454; Caujolle v. Ferrie, 26 Barb. (N. Y.) 177, s. c. 23 N. Y. 90. The English authorities (which hold to stronger rules of cogency than some American authorities on a question arising in a civil case involving crime or turpitude) require evidence "strong, distinct, satisfactory and conclusive." Hargrave v. Hargrave, 9 Beav. 555; and see 23 N. Y. 109.

[5] Thus the marriage of the parents may be presumed, from the fact that the father desired to marry the mother; and that while he might have maintained an illicit relation with her without opposition from his relatives, he abandoned his home and parents in order to live with her. Caujolle v. Ferrie, 23 N. Y. 90, 108, affi'g 26 Barb. 177, 4 Bradf. 28.

[6] Cross v. Cross, 3 Paige, 139, Banbury Peerage Case (above).

[7] Page v. Dennison, 5 Am. L. Reg. O. S. 469, s. c 1 Grant, 377; Co. Litt. 244 a. But see Phillips v. Allen, 2 Allen, 455. But if the birth was before marriage, though the intercourse was under promise of marriage, the child is illegitimate. Cheney v. Arnold, 15 N. Y. 346.

[8] Proof negativing it beyond a reasonable doubt, for instance showing continued actual separation, with only interviews at which such intercourse was not had, may be enough. Cross v. Cross (above); Van Aernam v. Van Aernam, 1 Barb. Ch. 378.

[9] Page v. Dennison (above).

[10] 1 Best's Ev. 464; Banbury Peerage case (above).

sumed from access.[1] Where access giving opportunity for sexual intercourse is shown, such that the husband might in the usual course of nature[2] be the father, no evidence that he is not, can be received, except such as tends to negative his having had such intercourse.[3] Such evidence is competent,[4] but without it evidence of the wife's simultaneous adulterous intercourse with another man, is incompetent, for if there be a possibility of legitimacy the law will not weigh against it the doubt.[5]

33. *Parents' Testimony and Declarations as to Legitimacy.*] —Neither husband nor wife is competent, either *viva voce* or on deposition, to prove or disprove non-access or non-intercourse, directly or indirectly,[6] even where pregnancy preceded marriage[7] and the fact that the other parent is dead does not alter the case.[8] Modern statutes abrogating common-law disqualifications do not affect this incompetency unless they expressly indicate it.[9] But either is a competent witness,[10] and the declarations of either are competent after his or her death, to prove legitimacy[11] or illegitimacy[12] in any mode not involving the question of access, such as testifying to the date of birth,[13] or on the question of marriage;[14] and the wife's confession of her own adultery is competent evidence of the illegitimacy of her offspring, when the fact of non-access has been shown by independent evidence.[15] Evidence of the treatment of the child by the husband and wife, its recognition or non-recognition by them and by the family, the mention or the omission of the husband to provide for it in a will providing for other children, &c., is competent, within the limits of the rule as to hearsay on facts of pedigree.[16] Evidence that one since deceased admitted his own illegitimacy, is competent against those claiming under or through him.[17]

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[1] Head v. Head, 1 Sim. & St. 150.

[2] For presumption as to period of gestation, see 1 Best Ev. 455, and standard treatises on Med. Jurisp.

[3] Banbury Peerage Case (above).

[4] Head v. Head (above).

[5] Bury v. Phillpot, 2 Mylne & K. 349; Cross v. Cross, 3 Paige, 139. Compare, in favor of admission of strong circumstantial evidence that a child begotten during wedlock was the offspring of adultery, 1 Bish. Marr. & D. §§ 448, 449.

[6] 1 Tayl. Ev. 837, § 868, and cases cited.

[7] Page v. Dennison (above), 472.

[8] 1 Tayl. Ev. §§ 837, 868.

[9] Tioga Co. v. South Creek, 75 Penn. St. 436.

[10] 1 Tayl. 838, § 868.

[11] Bull, N. P. 294, 295; Rosc. N. P. 46.

[12] Blackburn v. Crawfords, 3 Wall. 194. Compare Cope v. Cope, 1 Moo. & Rob. 272; Viall v. Smith, 6 R. I. 422; Gaines v. Relf, 12 How. U. S. 534

[13] Goodright v. Moss, Cowp. 591. But not sufficient to prove illegitimacy without other proof of non-access. Patterson v. Gaines, 6 How. U. S. 550, 589.

[14] Caujolle v. Ferrie, 23 N. Y. 104.

[15] Cross v. Cross, 3 Paige, 141; 1 Tayl. Ev. 838, § 868.

[16] 1 Tayl. Ev. 580, § 584; and see Stegall v. Stegall, 2 Brock. Marsh. 256. Except, perhaps, where the child is proved to have been born in wedlock, and there is no evidence of non-access. Page v. Dennison, 5 Am. L. Reg. O. S. 469, s. c. 1 Grant, 377.

[17] But perhaps not against others. 1 Tayl. Ev. 571, § 573.

IV. Hearsay as to Facts of Family History (Pedigree).

34. *Grounds of receiving it: and its Weight.*]—For the present purpose I use the term "Facts of Family History," instead of "Pedigree," as conveniently characteristic of the American rule, which admits certain hearsay evidence of such facts, for any legitimate purpose within the scope of this chapter, whether directly involved in the issue or not,[1] and does not restrict its use, as it seems the English rule does, to cases where it is offered for a genealogical purpose, that is to make out one link in a chain of pedigree.[2] In other respects the American and English rules stand upon the same principle, viz., that upon such questions the law will receive the natural effusions of a party who knew the truth, and who spoke upon an occasion where his mind stood in an even position without any temptation to exceed or fall short of the truth.[3] The value of such evidence is enhanced in proportion as it relates to long past occurrences,[4] other evidence of which is impaired or lost by lapse of time,[5]—in proportion, too, as it consists of contemporaneous declarations or records formally[6] or solemnly[7] made by persons naturally cognizant of the facts, and who would have no motive to misrepresent; and in proportion as those from whom it proceeded bore such a relation as created an interest to ascertain and perpetuate the truth;[8] and, if consisting of an oral declaration, by the naturalness of the circumstances which led to its being made;[9] and, if consisting of records, in proportion as they have been public, open, and well known in the family, thus acquiring such confirmation as the tacit consent of those interested can give.[10] Without some degree of these characteristics it is not admissible. At best it is weak evidence,[11] its value often depending upon the absence of other sources, and although the weight of such evidence is for the jury, it is proper for the court to instruct them whether, upon a view of the whole, it is sufficient to sustain a finding.[12]

35. *What facts are within the rule.*]—The facts of family history which may be proved by hearsay from proper sources, are

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[1] North Brookfield v. Warren, 16 Gray, 174, and other cases cited in next paragraph; Primm v. Stewart, 7 Tex. 178. The contrary is held in settlement cases, &c., where marriage, &c., is the substantive fact. Westfield v. Warren, 3 Halst. 249.

[2] 1 Tayl. Ev. 575, 577, without sufficient reason. 1 Phil. Ev. C. & H. N. 252, n. 91.

[3] Whitelocke v. Baker, 14 Ves. 514.

[4] In proving recent events, where the fact is directly in issue, stricter proof may be reasonably required. Rosc. N. P. 49.

[5] Stouvenel v. Stephens, 26 How. Pr. 244, and cases cited.

[6] Thus a formal "family record" in a Bible requires less authentication than a similar memorandum casually made elsewhere.

[7] Thus dying declarations of legitimacy are entitled to special weight. Caujolle v. Ferrie, 23 N. Y. 90, 94.

[8] Per Ld. Eldon, Walker v. Wingfield, 18 Ves. 511.

[9] Id.

[10] North Brookfield v. Warren, 16 Gray, 174, per Bigelow, C. J.

[11] Morewood v. Wood, 14 East, 330.

[12] Sprigg v. Moale, 28 Md. 497, 509.

the following:—birth;[1] living or survival;[2] marriage;[3] issue or want of issue;[4] death;[5] the times, either definite[6] or relative,[7] of these facts; relative age or seniority;[8] name;[9] relationship generally;[10] its degree;[11] in some sense legitimacy and the contrary;[12] and the place of residence, when proved for purpose of identification.[13] At this limit the rule stops. It does not admit hearsay as to a specific fact, however closely connected with these facts of family history, if one which, in its nature is susceptible of being proved by witnesses speaking from their own knowledge, even although all such witnesses are dead.[14] The virtue of the evidence depends on the fact being a salient fact in a family history which concerns the declarant. A declaration as to a fact of this character is not excluded because the fact is only incidentally in issue; and on the other hand, a declaration as to an ordinary fact is not made competent by its enabling to fix the date or existence of a fact of family history.[15]

36. *By Whose declarations such facts may be proved.*]—To render the evidence competent (unless it is admissible as matter of general repute under the rule stated below), it must appear that the declarant, or source of the witness's information, was a deceased[16] member of the family, that is to say *legally*[17] related by blood or marriage,[18] to the family whose history the fact concerns. Therefore the witness must name the source of information,[19] and

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[1] North Brookfield v. Warren, 16 Gray, 174; Am. Life Ins. Co. v. Rosenagle, 77 Penn. St. 507, 516.

[2] Johnson v. Pembroke, 11 East, 504.

[3] Caujolle v. Ferrie, 23 N. Y. 90, and see paragraph 18 (above).

[4] People v. Fulton Fire Ins. Co. 25 Wend. 208; and see paragraph 25 and notes.

[5] Masons v. Fuller, 45 Vt 29; 1 Tayl. Ev. 570, § 572.

[6] Roe v. Rawlins, 7 East, 290; Webb v. Richardson, 42 Vt. 465.

[7] Bridger v. Huett, 2 Fost. & F. 35.

[8] Johnson v. Pembroke. 11 East, 504.

[9] Per Ld. Brougham, Monkton v. Att. Gen. 2 Russ. & M. 158.

[10] Doe v. Randall, 2 Moore & P. 20, 26; Vowles v. Young. 13 Ves. 147.

[11] Webb v. Richardson, 42 Vt. 465; and see Chapman v. Chapman, 2 Conn. 350.

[12] See paragraph 33.

[13] See Cuddy v. Brown, 78 Ill. 415; Sheilds v. Boucher, 1 De Gex & Sm. 40, s. p. Doe v. Randall, 2 Moore & P. 20; see 1 Tayl. Ev. 578, § 582.

[14] Thus hearsay as to legal status, as slave or free, is not competent. Mima Queen v. Hepburn, 7 Cranch, 290, 295. Nor is hearsay as to place of birth or death. Town of Union v. Town of Plainfield, 39 Conn. 563; Monkton v. Att. Gen. 2 Russ. & M. 156, Ld. Brougham; McCarty v. Deming, 4 Luns. 440. But see 1 Whart. Ev. § 208. As to whether statement of a legal conclusion, such as that one was "heir," or "could get nothing by law," and the like, is competent, the authorities are in conflict. In the affirmative, see Doe v. Randall, 2 Moore & P. 20; Doe v. Davies, 10 Q. B. 314. In the negative, Chapman v. Chapman, 2 Conn. 350. Compare Viall v. Smith, 6 R. I. 417.

[15] 1 Tayl. Ev. 576.

[16] Emerson v. White, 29 N. H. (9 Fost.) 491, and cases cited.

[17] 1 Tayl. Ev. 569.

[18] Doe v. Randall, 2 Moore & P. 20. Where the declarant's tie to the family was by marriage, the fact that it had been dissolved by death before the declaration, does not render the declaration incompetent. 1 Tayl. Ev. 571.

[19] Entire certainty not necessary. Scott v. Ratcliff, 5 Pet. 81.

show affirmatively that it was a relative or connection,[1] (though the degree need not be stated,[2]) who is since deceased.[3] It is not enough that the adversary might bring out the contrary by cross-examination.[4]

It is enough to show that the declarant was thus connected with the family, without showing him to be a connection of the person whose connection with the family is to be established;[5] and, conversely, relationship of the declarant with the particular person is sufficient to admit his declarations of the relationship of that person to the family.[6] But his relationship to one or the other must be established by other evidence than the declarations themselves;[7] and this is a preliminary question for the judge,[8] and slight evidence that the declarant was connected, even without showing precise degree of relationship, seems to be enough.[9] But if the relationship is remote, the question will be whether the connection was such as to bring the declarant within the natural probability of knowledge and correctness.[10]

It is not, however, necessary that the declarant should have had personal knowledge,[11] nor need the declarations have been contemporaneous with the event,[12] nor indicate the source of the declarant's information.[13]

37. *Family records.*]—Records of such facts of family history, made or preserved as such by a member of the family, are com-

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[1] Waldron v. Tuttle, 4 N. H. 371, 378; Emerson v. White, 29 Id. 491; s. p. Chapman v. Chapman, 2 Conn. 347.

[2] Vowles v. Young, 13 Ves. 146, Ld. Erskine.

[3] Greenleaf v. Dubuque, &c. R. R. Co. 30 Iowa, 301; Butler v. Mountgarret, 7 H. of L. Cas. 633; Emerson v. White (above); Waldron v. Tuttle (above). In the two last mentioned cases the opinion is also expressed, that it must affirmatively appear that the declarants had no interest to misrepresent; but this is not sound if intended to require affirmative evidence of want of interest. It is enough, in the first instance, to show a relationship that is entirely free from the indication of any such interest.

[4] Emerson v. White (above). *Contra*, Webb v. Richardson, 42 Vt. 465.

[5] Monkton v. Attorney General, 2 Russ. & M. 156, Ld. Brougham.

[6] Id.

[7] Thus, to prove a marriage, for the purpose of legitimating the issue as heirs of the alleged husband, evidence of a declaration of a relative of the woman, is not competent in the first instance, because the declarant must first be shown to be connected with the family of the man. Blackburn v. Crawfords, 3 Wall. 187, and cases cited. But compare Jewell v Jewell, 1 How. U. S. 219, 231, where declarations of the husband of a daughter, that his wife's mother was not married, were held competent. See also Alexander v. Chamberlain, 1 Supm. Ct. (T. & C.) 600, and cases cited.

[8] Even where the question is the same with that on which the jury are to pass. Doe v. Davies, 10 Q. B. 323. *Contra*, Dyke v. Williams, 2 Sw. & Tr. 491.

[9] 1 Tayl. Ev. 573, § 576.

[10] Chapman v. Chapman, 2 Conn. 349. The tradition must be from persons having such a connection with the party to whom it relates, that it is natural and likely from their domestic habits and connections, that they are speaking the truth, and that they could not be mistaken. Whitelocke v. Baker, 13 Ves. 511, 514, Ld. Eldon. To render objection to the preliminary proof available as error, the proof must appear in the exceptions. Whitcher v. McLaughlin, 115 Mass. 167.

[11] Jewell v. Jewell, 1 How. U. S. 219, 231. But declarations of his own age have been held incompetent. Clark v. Trinity Ch. 5 Watts & S. (Penn.) 266.

[12] 1 Tayl. Ev. 572, § 575.

[13] Jewell v. Jewell (above). Compare 7 Scott N. R. 193, 213.

petent—for instance, entries of births, deaths and marriages, in the family Bible,[1] or other book[2] or memorandum-book;[3] a chart or genealogical table preserved as such in the family;[4] almost any document which, even though not evidence in its own character, has been preserved as a memorial by the family, such as a marriage certificate,[5] transcript of a parish register,[6] an ancient canceled will,[7] a ring worn publicly by a member of the family, stating the date of death of the person whose name is engraved upon it.[8] Except in case of a tombstone inscription, or a formal family record such as is usually kept in a Bible, there must ordinarily be evidence that the entry or document is in the handwriting of a deceased[9] member of the family, or such evidence of its having been preserved and treated in the family as containing a family memorial, as to give it the character of a declaration by the family or of some of its members.[10] In the case of a tombstone,[11] or a Bible shown to have been the family Bible,[12] this is presumed, and proof of handwriting or direction to make inscription is not required. The existence of errors in a family record, and the fact that it purports to be founded partly on hearsay, affect its credibility rather than its competency,[13] but may render it incompetent as to matters obviously stated without means of knowledge.[14] The handing down of the record in the family, may be proved by oral declarations of members of the family.[15]

38. *Other written declarations.*]—Recitals or other statements in an instrument executed by a member of the family, since deceased, such as a will recognizing children;[16] or a deed in

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[1] Lewis v. Marshall, 5 Pet. 470, 476; Berkeley Peerage Case, 4 Camp. 401.

[2] A hymn book. Collins v. Grantham, 12 Md. 440.

[3] A memorandum-book containing a record of inoculation. Clara v. Ewell, 2 Cranch C. Ct. 208.

[4] North Brookfield v. Warren, 16 Gray, 171; Goodright v. Moss, Cowp. 594.

[5] Doe v. Davies, 10 Q. B. 314.

[6] Kansas, &c. Rw. Co. v. Miller, 2 Col. T. 460, 462.

[7] Johnson v. Pembroke, 11 East, 504.

[8] Rosc. N. P. 47, citing dictum in 2 Russ. & M. 158. So of the fact of the family wearing mourning. Succession of Jones, 12 La. Ann. 397.

[9] Or, perhaps, of one beyond seas. Collins v. Grantham, 12 Ind. 440. Where the member of the family who made the entry, is incompetent as a witness, he may be admitted to prove the entry. Carkshadden v. Poorman, 10 Watts, 82.

[10] Hood v. Beauchamp, 8 Sim. 26. Preservation among the muniments of the family renders competent, especially if the document was against interest. Roe v. Rawlings, 7 East, 291.

[11] Rosc. N. P. 47. Inscription may be proved by a witness. 16 Gray, 171.

[12] Rosc. N. P. 47.

[13] Monkton v. Atty. Gen. 2 Russ. & Myl. 147. Even the testimony of a witness, that the memorial was not considered in the family as a correct one, without specifying in what respect, is held to affect not the competency but the credibility only. Southern Life Ins. Co. v. Wilkinson, 53 Geo. 535.

[14] Davies v. Lowndes, 5 New Cas. 161; 6 M. & G. 471, 512, 525.

[15] Doe v. Davies, 10 Q. B 324, Ld. Denman.

[16] Russell v. Jackson, 22 Wend. 276, affi'g 4 Id. 543; Cowan v. Hite, 2 A. K. Marsh. (Ky.) 238; Skeene v. Fishback, 1 A. K. Marsh. (Ky.) 356; Shuman v. Shuman, 27 Penn. St. 90.

which parties are designated, and which they execute, as husband and wife;[1] or in which the woman joins for the purpose of barring her dower;[2] or which a party signs with the addition "child," or "heir," or the like,[3] although not competent on the question of title,[4] are competent as declarations within the rule. And although the original itself must ordinarily be produced,[5] yet in case of an ancient instrument the record or probate, with appropriate evidence to identify it as a family or public memorial, is competent.[6] Letters purporting to have come from the deceased, and containing declarations as to the facts of his family history, are competent if proved to be in his hand-writing by the knowledge of a witness who is acquainted with it, or by the belief of a witness who received them in due course of correspondence, and acted on them as such. The envelopes, if existing, should be produced, and the post-mark, or the witness's testimony to it if the envelope has been destroyed, is *prima facie* evidence that it was deposited at the place and time indicated by the mark.[7] Statements made in a deposition which was not taken between the parties to the action, or those under whom they claim, are not regarded as admissible as declarations, because artificially drawn forth without cross-examination, especially when made after dispute arose.[8]

39. *General family repute.*]—Some facts at least of family history,—such as death, issue or failure of issue, kinship, name, and marriage,—may be proved by general reputation in the family, upon the testimony of a witness whose knowledge of that repute and of the conduct of members toward each other, is that which usually exists among intimate acquaintances.[9] But the testimony of witnesses who are not connected with the family, know nothing personally of the facts to which they speak, and have not derived their information from such persons as had any connection or particular acquaintance with the family, but can only state loose hearsay from unknown sources, is not sufficient to go to the jury.[10]

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[1] Hicks v. Cochran, 4 Edw. 107.
[2] Rose v. Clark, 8 Paige, 574, 581, and cases cited.
[3] Jackson v. Cooley, 8 Johns. 128; Doe v. Davies, 10 Q. B. 325.
[4] Skeene v. Fishback (above).
[5] Doe v. Emerod, 1 Moo. & Rob. 466.
[6] Russell v. Jackson, 22 Wend. 276, affi'g 4 Id. 543. As to value and effect of ancient certificates, see Hunt v. Johnson, 19 N. Y. 279.
[7] Kansas, &c. Rw. Co. v. Miller, 2 Col. T. 460.
[8] Berkeley Peerage Case, 4 Campb. 401. Otherwise of an *ex parte* affidavit. Hurst v. Jones, Wall. Jr. 373.
[9] Eaton v. Tallmadge, 24 Wisc. 217, 222; Bridger v. Huett, 2 Fost. & F. 35; Viall v. Smith, 6 R. I. 419; Spears v. Burton, 31 Miss. 547, 554; Jackson v. Boneham, 15 Johns. 226; Russell v. Jackson, 22 Wend. 276, affi'g 4 Id. 543; and see paragraphs 1, 8, and 18. To the contrary, see language of some authorities cited under paragraph 36.
[10] Jackson v. Browner, 18 Johns. 37.

40. *Declarations made in view of Controversy.*]—It is not every kind or degree of interested feeling on the part of the declarant that will exclude a declaration. The law, while it assumes, as the foundation of the rule, the existence of an interest, created by domestic ties, to know and hand down the truth, recognizes that such declarations are often accompanied with a feeling of interest which will cast suspicion on them, without rendering them incompetent;[1] and even the legal interest of a grantor, in the support of the recitals in his deed, does not exclude them.[2] But if it appears by either the declaration itself,[3] or other evidence, that at the time the declaration was made, a discussion and controversy had arisen (though merely in the family, and before litigation)[4] as to the fact of family history sought to be proved,[5] the declaration is incompetent.[6] It has been said that it makes no difference that the dispute was raised for the purpose of excluding declarations, or that the existence of the dispute was unknown to the declarant.[7] Declarations made for purpose of evidence would not be competent;[8] but this must be taken in connection with the existence either of controversy or adverse interest, for one proper object of formal family records is to preserve evidence in case any question should arise.[9] Writings dated more than thirty years past, and coming from the proper custody, are presumed to have been made at the time of their date, as against the suggestion that they were made after controversy had arisen.[10]

41. *Repute beyond the family—Acquaintance—Newspaper notice—Insurance.*]—General repute, among one's acquaintances, that he had died, is competent, either when he left no kindred,[11] or, in connection with family repute, when he died abroad.[12] In the absence of any direct evidence, the testimony of those who naturally would be likely to hear of the absentee if living—such as one residing near the estate of a tenant for life, though not a member of the family—that he had not been heard of for years,

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[1] Ld. Denman, Doe v. Davis, 10 Q. B. 325.

[2] Id.

[3] Butler v. Mountgarret, 7 H. of L. Cas. 645.

[4] It is the beginning of dispute, involving the very point in question, not that of the state of facts from which the dispute sprang, nor that of resulting litigation, which terminates the competency. Shedden v. Patrick, 2 Sw. & Tr. 170, 188; s. c. L. J. 30 P. M. & A. (1860-1861) 217, 232.

[5] Elliott v. Piersol, 1 Pet. 337; Butler v. Mountgarret, 7 H. of L. Cas. 637.

[6] Lord Brougham's view was that it is not sufficient that the declarant was in the same situation touching the matter in contest with the party relying upon the declaration, but it is for the objector to show either that the declaration was made after controversy commenced, or under bias. Monkton v. Att. Gen. 2 Russ. & M. 160.

[7] Shedden v. Patrick (above).

[8] Chapman v. Chapman, 2 Conn. 347, Swift, Ch. J.

[9] See Berkeley Peerage Case, 4 Campb. 401.

[10] Davies v. Lowndes, 7 Scott N. R. 214, and cases cited. As to recent writings, compare Potez v. Glossop. 2 Exch. 191; Butler v. Mountgarret, 7 H. of L. Cas. 647; and cases cited on p. 14, n. 5, of this vol.

[11] Ringhouse v. Keever, 49 Ill. 470.

[12] Ewing v. Savary, 3 Bibb, 235, 238.

is competent.[1] The courts, also, have taken notice of facts affecting pedigree contained in public histories, biographies and compilations like that of "Debrett's Peerage."[2] But death abroad cannot be proved by a newspaper notice published here,[3] and the better opinion is that to render competent newspaper announcements of facts of family history, there must be something to connect them either with the family or a member, or with common repute properly in evidence.[4] Upon this principle of the probable truth of a general conviction among those likely to know and best qualified to judge, attested by their acting upon it, the courts have received the fact that insurers have paid a loss upon a vessel not heard from, as relevant to the presumption of death of one on board;[5] but, on the other hand, mere memoranda, though found in official record books, are not competent,[6] nor is an assumption of the right of suffrage or a submission to taxation competent evidence that the person was of age, except against himself.[7]

42. *Best and secondary evidence.*]—Oral declarations are equally primary as family records or other documents of the nature of hearsay;[8] but the competency of each depends not, indeed, on entire absence of more satisfactory evidence,[9] but on the death of the declarant; and if he is alive, and present or within reach of process, the declaration, whether oral or written, is incompetent,[10] except as against him and those claiming under him, or by way of corroboration of testimony given by the declarant as a witness.[11] Where the original family record is proved to have been lost,[12] or in any other way properly accounted for, a copy is admissible; otherwise not.[13]

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[1] Doe v. Deakin, 4 B. & Ald. 433; Flynn v. Coffee, 12 Allen, 133. But common repute among his acquaintances, not founded primarily on the fact of death, but on belief that his body was found and buried at a particular time and place, is not competent, unless after great lapse of time. Jackson v. Etz, 5 Cow. 316.

[2] Russell v. Jackson, 22 Wend. 276, affi'g 4 Id. 543.

[3] Fosgate v. Herkimer Mfg. Co. 9 Barb. 287, 295.

[4] Compare Redgrave v. Redgrave, 38 Md. 101; Jewell v. Jewell, 1 How. U. S. 219, 232; Ring v. Huntington, 1 Mill (S. C.) Const. 162; Mann v. Russell, 11 Ill. 586; Henkle v. Smith, 21 Id. 238; Sweigar v. Lowmaster, 14 Serg. & R. 200.

[5] See paragraph 5 (above).

[6] Ridgeley v. Johnson, 11 Barb. 527; see Caujolle v. Ferrie, 23 N. Y. 90.

[7] Clark v. Trinity Church, 5 Watts & S. (Penn.) 266. The declarations of the decedent as to his age are not competent.

[8] Clements v. Hunt, 1 Jones (N. C.) L. 400.

[9] 1 Tayl. Ev. 569, 574; compare Fosgate v. Herkimer Mfg. Co. 12 Barb. 352.

[10] Leggett v. Boyd, 3 Wend. 376; Campbell v. Wilson, 23 Tex. 252; Robinson v. Blakely, 4 Rich. L. (S. C.) 586.

[11] Wiseman v. Cornish, 8 Jones (N. C.) L. 218.

[12] Whitcher v. McLaughlin, 115 Mass. 167.

[13] Ryerson v. Grover, 1 N. J. L. (Coxe), 458. A recital in a deposition not enough. Greenleaf v. Dubuque, &c. R. R. Co. 30 Iowa, 301. It has been held that the age of a member of a family, copied by a son into the family Bible from another book where the original entries were made by his father, is not competent without accounting for the entries of the father. Curtis v. Patton, 6 Serg. & R. 135. But they might be made competent by evidence establishing the family Bible as the recognized family record.

V.—Registry of Facts of Family History (Pedigree.)

43. *Registries authorized by law.*]—A registry, whether of birth, marriage, death or burial, kept pursuant to law (statutory or unwritten), is competent evidence of the main fact and its date,[1] and of any other fact which the law or statute directed the officer to ascertain and record;[2] and it is not incompetent because the statute does not expressly declare it to be evidence.[3]

To prove an entry, in such a register kept *within the State*, the book may be produced by the present keeper of the record, or other witness who can testify that it comes from the proper custody, with evidence either that it is the official register, and that he who was the keeper at the time of the entry, made the entry, or that the entries relied on, or at least some of them, are in his handwriting, and that the book was handed down by the present keeper's predecessors in office as the official register.[4] Instead of the book, a copy in full of the particular entries relied on may be produced,[5] authenticated (if the statute authorizes certified copies) by the certificate of the keeper of the record,[6] or authenticated by the oath of a witness, as in the case of a voluntary register stated below.

A register kept pursuant to the law of a *sister State or foreign nation*, may be proved by proving the law which authorized it,[7] and that it was made and preserved according to that law, and that the person certifying was the proper officer;[8] and by produc-

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[1] See paragraphs 2, 16, and 28 (above).

[2] Derby v. Salem, 30 Vt. 722. But as to a fact not within his personal knowledge, it is, of course, slight evidence, and without the statute would not be competent. But a defective record, or the entry of facts of which the entry is not evidence, may be made competent by tracing it to information furnished by a competent family source, making it admissible as hearsay. Viall v. Smith, 6 R. I. 421.

[3] State v. Wallace, 9 N. H. 515; and see Wedgwood's Case, 8 Greenl. 75.

[4] Doe d. Jaycoks v. Gilliam, 3 Murph. (N. C.) 47; Sumner v. Seebec, 3 Greenl. 223. Absence of authentication of an entry in an ancient record not fatal. Ex'rs of Booge v. Parsons, 2 Vt. 456.

[5] An official certified copy should be a literal exemplification of each entry relied on, but a sworn copy produced by a witness may be the tabulation of several entries if the witness swears that he extracted the details from the register. American Life Ins. & Trust Co. v. Rosenagle, 77 Penn. St. 550. Where the statute requires the officiating clergyman to certify his act to the county clerk for record, the proper evidence is a copy of the certificate, not merely of the memorandum of the clerk. Niles v. Sprague, 13 Iowa, 198; compare Fox v. Lambson, 3 Halst. 275, 280. As to delay in the clergyman's return, see People v. Lambert, 5 Mich. 349; 1 Bish. Marr. & D. § 468.

[6] N. Y. Code Civ. Pro. § 928 (3 R. S. 6th ed. 150, § 17); and see Jackson v. People, 3 Ill. (2 Scam.) 231.

[7] See pp. 22 and 23 of this vol., paragraphs 9, 10; and see Morrisey v. Wiggins Ferry Co. 47 Mo. 521. The fact that the record was kept and preserved pursuant to foreign law may be proved by the custodian, though not a lawyer, for he is in a position to make it probable that he knows the law. Am. Life Ins. Co. v. Rosenagle, 77 Penn. St. 515.

[8] State v. Horn, 43 Vt. 20; State v. Dooris, 40 Conn. 145. A copy of a marriage contract, the original of which was executed and deposited in the public archives of a foreign State, may be admitted, not without authentication, but by a sworn copy or a copy certified by the officers of our government when they have succeeded to the

ing a copy, authenticated as such according to the mode prescribed by the law of the forum for authenticating foreign official acts,[1] or authenticated by the oath of a witness,[2] as in the case of a voluntary register stated below.

The registry being duly proved, compliance with preliminary formalities is presumed.[3]

44. *Registries not authorized by law.*]—A register kept without authority of law is competent, in evidence of the main fact, whether of marriage,[4] baptism,[5] or burial,[6] and of its date, but not of other facts stated in it, such as date or place of birth or death;[7] but, to admit it, it must appear that it was kept by the proper officer,[8] or by the officiating clergyman,[9] pursuant to his duty or in the usual course of his functions,[10] and that he is since deceased;[11] but the fact that he was not a sworn officer,[12] or that he kept it not as a public record belonging to the parish, but as his private memorandum,[13] does not render it incompetent, if he was under a duty to keep it. It should also appear that the register is produced from the custody of his successor, the entry being in his own handwriting and appearing to have been made contemporaneously with the performance of the rite, and before controversy arose, with no apparent inducement to misstate nor interest adverse to his official duty; and in such case additional memoranda on the register, of fee paid, is not necessary to render the paper competent.[14] If the entries were made first in a day-book, and then transferred to the register, the day-book is not, but the register is, evidence of the act entered in the register.[15]

If the record is of a public nature, such as that of a church, an examined copy of the entries relied on, without production of the

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foreign authority and have custody of the original, or certified by the foreign officers who, at the time of certifying, had custody of the original, with proof that the person certifying was acting in the office, and that his signature is genuine. Chouteau v. Chevelier, 1 Mo. 343.

[1] N. Y. Code Civ. Pro. § 956 (L. 1875, c. 136). In Pennsylvania, *ex parte* evidence of the copy has long been held admissible where the registry is beyond seas. Kingston v. Leslie, 10 Serg. & R. 389, and cases cited.

[2] Jackson v. Boneham, 15 Johns. 226.

[3] Inhabitants of Milford v. Inhabitants of Worcester, 7 Mass. 48, 57.

[4] Maxwell v. Chapman, 8 Barb. 579.

[5] Blackburn v. Crawfords, 3 Wall. 182, 189.

[6] Lewis v. Marshall, 5 Pet. 470, 476.

[7] Except to show that the birth or death was prior to the entry. 5 Pet. 470, 476. See paragraphs 2 and 28 (above). Unless shown to have been made under direction of deceased relative or parent. Doe v. Bray, 8 B. & C. 817.

[8] Doe v. Andrews, 15 Q. B. 758. Compare, however, Doe v. Bray, 8 B. & C. 813.

[9] Blackburn v. Crawfords, 3 Wall. 175, 183, 189, 191.

[10] Same cases.

[11] Morrisey v. Wiggins Ferry Co. 47 Mo. 521, a. p. Huntly v. Compstock, 2 Root, 99. Compare 16 Ves. (by Sumner), 72, n. 3.

[12] Kennedy v. Doyle, 10 Allen, 161.

[13] Blackburn v. Crawfords (above).

[14] Kennedy v. Doyle, 10 Allen, 161.

[15] Maxwell v. Chapman, 8 Barb. 579.

original, is admissible.[1] The proper evidence of the copy is testimony of the witness producing it, that it was taken at the proper office, the record being there produced to him by the lawful keeper;[2] and proof of the handwriting of the deceased officer may be made by the witness having inspected the signature in the various places where it occurred in the register.[3] A copy certified under the seal of the corporation, is not evidence unless made so by statute.[4] If the one who made the entry is living, the original entry is competent, on producing him as a witness to testify to accuracy.

The marriage certificate given to the parties at the time by the officiating functionary is evidence, not only when made so by statute,[5] but also if shown to be part of the *res gestæ*, on independent evidence of the act,[6] especially if given by a public officer who is since deceased;[7] or if so preserved and shown by either party as to be his or her admission or declaration,[8] or, with lapse of time, to become a family memorial, competent as hearsay.[9]

45. *Best and secondary evidence.*]—Registers, even though statutory, are not conclusive evidence,[10] nor the only best evidence, so as to exclude parol,[11] unless made so by the statute. The object of the register is to facilitate the proof, not to supersede other modes.[12] Where the register is proved, the witnesses who signed it need not be called.[13]

To prove that *no* entry was made, the book or paper of entries is the best evidence. The statement of the keeper of the record, as a witness, that no entry appeared is secondary.[14]

46. *Impeaching the registry.*]—The fact of a mutilation or imperfection in the register, not material to the series of entries affecting the parties;[15] or that the entry was copied from another contemporaneous or collateral register, both records being made in the course of duty;[16] or the appearance of other entries not made

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[1] Jackson v. King, 5 Cow. 237; Lewis v. Marshall, 5 Pet. 470, 476.
[2] Gaines v. Relf, 12 How. U. S. 472, 522. Compare p. 50 of this vol.
[3] Doe v. Davies, 10 Q. B. 325.
[4] Stoever v. Whiteman, 6 Binn. 416.
[5] As in N. Y. Code Civ. Pro. § 928 (3 R. S. 6 ed. 150, § 17), and in other States.
[6] See Stockbridge v. Quicke, 3 Car. & K. 305.
[7] Wheeler v. McWilliams, 2 U. C. Q. B. 77; and see 10 Allen, 161.
[8] Hill v. Hill, 38 Penn. St. 511, compare Commonwealth v. Morris, 1 Cush. (Mass.) 391.
[9] Paragraph 37 (above).
[10] Derby v. Salem, 30 Vt. 722; Rice v. The State, 7 Humph. 14;
[11] Viall v. Smith, 6 R. I. 419, even to supply a defect; Northfield v. Plymouth, 20 Vt. 582, 589.
[12] State v. Marvin, 35 N. H. 22.
[13] Birt v. Barlow, 1 Dougl. 172.
[14] Blackburn v. Crawfords, 3 Wall. 183, but compare to the contrary, Smith v. Richards, p. 39 of this vol. n. 10.
[15] Walker v. Wingfield, 18 Ves. 445, Ld. Eldon; and see Doe & Jaycocks v. Gilliam, 3 Murph. N. C. 47; Sumner v. Seebec, 3 Greenl. 223.
[16] Doe v. Andrews, 15 Q. B. 756.

at the proper time or by the proper person;[1] or, if an official register, that the making of the entry was somewhat delayed,[2] or was not made on the best information,[3] and the like objections, go rather to the credibility than the competency of the entry.

VI. Judicial Records showing facts of Family History (Pedigree).

47. *Letters of administration, &c.*]—Letters testamentary or of administration, though competent and sufficient in favor of or against the representative to prove his capacity to sue and be sued,[4] are not competent against any other party, to prove the death as a substantive part of a cause of action or defense,[5] unless by lapse of time they have become competent as hearsay.[6] This exclusion is an apparent exception to general principles, and rests on the imperfect judicial character of the proceedings. The statutes regulating the probate court may of course be such as to make the adjudication competent; but as death is the jurisdictional fact, the determination would not be conclusive even between the parties to the proceeding. On other questions directly, not merely incidentally,[7] in issue, and actually determined by the probate court, such as legitimacy or illegitimacy, and kinship, a decree of the surrogate's court is competent evidence between the parties and those in privity with them,[8] and, if the matter was exclusively within the probate jurisdiction and intelligently decided, is conclusive[9] both as to personalty[10] and realty;[11] but as to a third person not strictly claiming under either party, it is, at the most, only *prima facie* evidence in his favor, and is not competent against him.[12]

48. *Judgments and Verdicts.*]—Personal judgments, and judgments affecting particular property only, are not competent evi-

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[1] Maxwell v. Chapman, 8 Barb. 579.

[2] Derby v. Salem, 30 Vt. 727.

[3] Doe v. Andrews, 15 Q. B. 759.

[4] See p. 54, paragraph 1. So they have been admitted after lapse of time, where the question of death did not affect the liability of the objector, but only the question who was the proper plaintiff. French v. French, 1 Dick. 268.

[5] Carroll v. Carroll, 60 N. Y. 123, rev'g 2 Hun, 609. Nor to prove the time of death, either relatively or absolutely. English v. Murray, 13 Tex. 366; Ins. Co. v. Tisdale, 91 U. S. (1 Otto), 238.

[6] Munro v. Merchant, 26 Barb. 383. See U. S. v. Wright, 11 Wall. 648; Johnson v. Towsley, 13 Id. 72, 88, 86, and cases cited.

[7] Anson v. Stein, 6 Iowa (Clarke), 150.

[8] Lalonette v. Lipscomb, 52 Ala. 570.

[9] Doglioni v. Crispin, L. R. 1 H. L. 301; and see Broderick's Will, 21 Wall. 503.

[10] Caujolle v. Ferrie, 13 Wall. 469.

[11] Blackburn v. Crawfords, 3 Wall. 190.

[12] Spencer v. Williams, L. R. 2 P. & D. 230, 237, and cases cited. Thus a decree of the probate court, determining a question of legitimacy of a child, by determining that the parents were never married, is not competent as against other children who were not parties to the proceedings. Kearney v. Denn, 15 Wall. 57. So proceedings before the surrogate for admeasurement of dower, are not evidence of title. Clarke v. Randall, 5 Cow. 168.

dence of facts of heirship or the like, recited in them, except as against a party to the action in which they were recovered, or a person claiming under him,[1] or as to the particular property adjudicated on,[2] unless by lapse of time the rule as to hearsay makes them competent.

Where the circumstances are such that the fact might be established by general reputation, any judgment or decree, or even a verdict,[3] of a court of competent jurisdiction, expressly or by necessary implication determining the fact, is *prima facie* evidence, even against third persons.

A judgment in an action for divorce, being in the nature of an action *in rem*, determines the question of personal status as against all the world, and is therefore competent for or against strangers. Such a judgment, whether foreign or domestic, is to be proved by the production of the record, or a duly authenticated copy, which should include the pleadings, orders, reports, &c., as well as the adjudication.[4]

VII. Identity

49. *Necessity of proof.*]—Where a given name[5] appears with the surname, in a document or testimony, identity of the name with that appearing in other evidence, is sufficient to make a *prima facie* case of identity of person, if there be a reasonable coincidence in whatever circumstances of time, place, age, legal character or capacity, &c., appear in the case, and nothing affirmative to cast doubt on the identity.[6] Under such circumstances, proof of identity of the person named in a record, whether a register of baptism, marriage,[7] &c., or a judgment,[8] is unnecessary in the first instance. The practice in this State is to leave it to the adverse party to give some evidence against identity. This is a principle recognized in civil cases generally.[9]

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[1] Lovell v. Arnold, 2 Munf. 167; Archer v. Bacon, 13 Mo. 149; Wardlaw v. Hammond, 9 Rich. (S. C.) L. 464.

[2] Whitman v. Henneberg, 78 Ill. 109.

[3] Pile v. McBratney, 15 Ill. 314, 319; Patterson v. Gaines, 6 How. U. S. 599.

[4] Lawrence's Will Case, 18 Abb. Pr. 347.

[5] Fanning v. Lent, 3 E. D. Smith, 206.

[6] As, for instance, where the name is very common, or where the name of a signer and of an attesting witness is the same. Jackson v. Christman, 4 Wend. 277.

[7] Jackson v. King, 5 Cow. 241 (disapproving 1 Campb. 196; 4 Id. 34). Entries in a church register, showing that W. A. had a son baptized as S.; that years after S. A. had a daughter baptized as M., and that years after M. A. was married to P., is sufficient evidence to go to the jury that P. married a granddaughter of W. A., if nothing appears to show that there ever were other persons of those names. It may be presumed that the persons named in the register were the ancestors of the claimant, where all bore the appropriate names, the dates of the several baptisms and marriages being at such distance of time from each other as to be consistent with the claim. Id. This appears also to be the modern English rule. Hubbard v. Lees, L. R. 1 Ex. 255. *Contra*, Middleton v. Sandford, 4 Campb. 34; Mooers v. Bunker, 29 N. H. 420; Morrisey v. Wiggins Ferry Co. 47 Mo. 525; 1 Whart. Ev. 623, § 655.

[8] Hatcher v. Rocheleau, 18 N. Y. 86.

[9] Bogue v. Bigelow, 29 Vt. 183; 2 Phil. Ev. 508, and note; 1 Greenl. Ev. § 38, note. Otherwise in criminal cases. Wedgwood's Case, 8 Greenl. 75.

50. *Mode of Proof.*]—Identity of person may be proved by the direct testimony of a witness having means of knowledge;[1] and photographs as well as other miniatures, shown to be good likenesses, are competent, in connection with testimony, to identify the person.[2] Evidence showing correspondence of age, personal appearance, dialect, habits, manners, calling, places of resort, &c., is also competent.[3]

VIII. National Character, and Domicile.

51. *Citizenship and Alienage.*]—Citizenship may be proved by proving birth, at any place, from a father, a citizen of the United States, whether he was native born or not;[4] or birth in this country since the war of the Revolution, without reference to the alienage or citizenship of the parents.[5] Alienage may be proved by proving birth in a foreign country, from a father not a citizen of this country, or who never resided in this country;[6] or birth in this country prior to the declaration of independence, and withdrawal or removal from this country without ever having adhered to our government.[7] Marriage to an American, of an alien woman who might lawfully be naturalized, makes her a citizen;[8] in other cases marriage does not alter the woman's citizenship.[9] Evidence that one deceased was reputed to be of a specified foreign nationality, and had the appearance and dialect thereof, is presumptive evidence of alienage.[10] Residence, if material on a question of national character, may be proved as in case of Domicile.

52. *Naturalization.*]—A record of the judgment of a competent court, admitting an alien to become a citizen, and reciting the facts which entitled the alien thereto, is conclusive, and is complete evidence of its own validity. It cannot be impeached

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[1] The testimony of a grandmother that she verily believed the person produced in court to be the one baptized as a child as proved by the register—is sufficient evidence of identity, for the jury. Queen v. Weaver, L. R. 2 C. C. Res. 85, s. c. 7 Moak's Eng. 323. So evidence that the woman was formerly known by the maiden name mentioned in the marriage register, and that the parties cohabited as husband and wife, is proof of identity. State v. Wallace, 9 N. H. 515, 517.

[2] Ruloff's Case, 11 Abb. Pr. N. S. 245, s. c. 45 N. Y. 213; Luke v. Calhoun, 52 Ala. 115; Udderzook v. Commonwealth, 76 Penn. St. 340; R. v. Folsom, 4 F. & F. 103.

[3] See Jackson v. Etz, 5 Cow. 316; Lindsay v. People, 63 N. Y. 143; Cunningham v. Burdell, 4 Bradf. 343.

[4] Young v. Peck, 21 Wend. 389; U. S. R. S. § 1993.

[5] McKay v. Campbell, 2 Sawyer, 118, s. c. 5 Am. L. T. 407; Lynch v. Clarke, 1 Sandf. 583, 638. Compare as to expatriation, Ludlam v. Ludlam, 26 N. Y. 363, aff'g 31 Barb. 486; 14 Op. U. S. Att. Gen. 295; Op. N. Y. Att. Gen. 380; Juando v. Taylor, 2 Paine, 652.

[6] See Shanks v. Dupont, 3 Pet. 247; U. S. R. S. § 1993; U. S. v. Gordon, 5 Blatchf. 18; Young v. Peck, 21 Wend. 389.

[7] See Inglis v. Sailor's Snug Harbor, 3 Pet. 99; Hollingsworth v. Duane, Wall. C. Ct. 51.

[8] U. S. R. S. § 1941.

[9] Beck v. McGillis, 9 Barb. 35, 49; Shanks v. Dupont, 3 Pet. 242. Compare Citizenship, 14 Op. U. S. Att. Gen. 402.

[10] Jackson v. Etz, 5 Cow. 314.

in collateral proceedings, by proof contradicting these facts.[1] A certified copy of a record of naturalization in another State, certified according to the act of Congress to allow it to be admissible in evidence, is admissible, without further proof that it has been in the custody of the clerk, &c., and without extraneous proof of any of the preliminaries of naturalization.[2] If the local law requires any further declaration or oath as a condition of holding lands, there must be evidence tending to show that the condition was complied with.[3]

53. *Nature of the question of Domicile.*]—Amid the conflict of opinion and decision on questions of domicile, an important guide is to bear in mind that for purposes of succession the object of the inquiry is, to ascertain what jurisdiction, what law, this person's aggregate of legal rights and liabilities was under. For other purposes,[4] a person may belong to several places, in the legal sense, and the law looks at his interests distributively to ascertain the locality for each purpose. But for purposes of succession the inquiry is not as to the locality of any one class of interests, nor even of his chief interests nor political allegiance, but we are to look at the aggregate of his civil interests as an entirety,—the *universitas juris*, of the Roman law,—and ask where in legal society was this entirety centered; in what jurisdiction did this aggregation, considered as a whole, subsist?

54. *Presumptions and material Facts.*]—The domicile of a person *sui juris* is proved by showing a residence at a particular place, or at least within a particular jurisdiction, accompanied with either direct or presumptive evidence of an intention to remain there for a time not limited.[5] If nothing appears indicating that the person ever had a different origin or residence, proof of the mere fact of his being at a place, without more, is sufficient *prima facie* evidence that he was then domiciled there, to put upon the adverse party the burden of rebutting the evidence,[6] which may be done by showing that his presence there was either for a temporary purpose,[7] or by constraint;[8] but the place where one is, for however short a time, may, if he never had any other domicile, be deemed to be his domicile, at least for the purpose of defining his capacities while there. Usually, however, there is evidence of an abode; and the place where the person "lives" is taken to be his domicile until facts adduced establish the con-

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[1] McCarthy v. Marsh, 5 N. Y. (1 Seld.) 263, and cases cited. Compare Case of Stern, 13 Op. U. S. Att. Gen. 376.

[2] People v. Snyder, 41 N. Y. 397, aff'g 51 Barb. 589.

[3] Blight v. Rochester, 7 Wheat. 535.

[4] Such as taxation, voting, settlement, &c.

[5] Mitchell v. U. S. 15 Wall. 350; Guier v. O'Daniel, 1 Binn. 349, n.

[6] Bruce v. Bruce, 2 Bos. & P. 230, n., Ld. Thurlow; Bempde v. Johnstone, 3 Ves. 201; Mann v. Clark, 38 Vt. 55, 60.

[7] Bruce v. Bruce (above).

[8] Bempde v. Johnstone (above).

trary.[1] Thus an immigrant having abandoned his domicile abroad, and come with his family to this country with intent to seek a home here, acquires a domicile at the port where he comes within our jurisdiction, which continues until his movement and intent manifest the adoption of another.[2] Showing long continued residence within a jurisdiction other than that of the domicile of origin, in the absence of anything indicating intent to preserve or return to that original domicile, is enough to throw on the other party the burden of disproving intent to remain.[3] If the person was moving to and fro, the question where he had his home,[4] where he had established his family if he had one,[5] or where his strongest domestic ties were fixed,[6] may determine in which of the several places he "lived," within the meaning of the rule,[7] even though he declared himself a resident of his place of business.[8] It is the residence which indicates the domicile, though but little of his time was spent there, rather than the place of business, though much was spent there.[9] If he maintained two domestic establishments at once, the relative length of time spent in them is of little or no weight;[10] but any circumstances, such as health, climate, &c., indicating that he probably regarded one rather than the other as likely to be his ultimate abode, will control;[11] if, however, the case is equally balanced in respect to intent, the one first adopted as an abode will maintain its character as his domicile. Slight circumstances may fix domicile, if not controlled by stronger evidence; and as the question is usually between two places, each indicated by some circumstances, it often occurs that the evidence of facts pointing to one place would be entirely conclusive were it not for circumstances of a still more decisive character which fix it beyond question in the other.[12] In such cases the intention of the person to consider the one or the other to be his residence or domicile will usually control.[13] Foreign domicile may be proved by evidence of foreign national character, and of residence within the foreign jurisdiction, although the particular place may not be satisfactorily ascertained.[14]

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[1] Bruce v. Bruce, 2 Bos. & P. 229, n.; Bempde v. Johnstone, 3 Ves. 201; Stanley v. Bernes, 3 Hagg. Eccl. 374, 487; Best on Pres. 235.

[2] Kennedy v. Ryall, 67 N. Y. 386, affi'g 40 Super. Ct. (J. & S.) 347; Whart. Notes on Dom. 3 So. L. Rev. 416, 417.

[3] Ennis v. Smith (Kosciusko's Case), 14 How. U. S. 400, 423.

[4] Story's Confl. of L. § 41.

[5] Chaine v. Wilson, 8 Abb. Pr. 78, s. c. 1 Bosw. 673.

[6] See Catlin v. Gladding, 4 Mas. C. C. 308.

[7] See other cases in 2 Abb. N. Y. Dig. 2d ed. tit. Dom.

[8] Wade v. Matheson, 4 Lans. 158.

[9] Chaine v. Wilson (above).

[10] Greene v. Greene, 11 Pick. 410, 415.

[11] Forbes v. Forbes, Kay, 341. Compare Isham v. Gibbons, 1 Bradf. 69.

[12] Thorndike v. City of Boston, 1 Metc. 246; Mann v. Clark, 33 Vt. 60.

[13] Opinion of the judges, 5 Metc. 589. Source of income (if not parental) is not material. Ib. 591.

[14] See Matter of Fitzgerald, 2 Cai. 318.

For the purpose of actions treated in this chapter, *a wife's* domicile is proved by proving that of her husband, if *sui juris*,[1] unless they were separated by the decree of a competent court.[2] The domicile of a legitimate *minor* is proved by proving the domicile of the father,[3] while he was living; after his death, that of the mother; but it does not follow any change in her domicile resulting on her remarriage.[4] That of an illegitimate minor is proved by proving the domicile for the time being of its mother.[5] That of a foundling, by showing where it was discovered, or the place of education or adoption to which it was removed.[6] In case of a continued *absentee, under constraint*, like a soldier or sailor, the residence of his wife at the place where he established her is *prima facie* evidence of his domicile;[7] or, if single, the place where he most usually resorted for board in the intervals of his return.[8]

55. *Change of domicile.*]—Domicile once shown, whether it be the original or an acquired one,[9] is presumed by the law to have continued until a new domicile is shown to be acquired. Merely abandoning the old abode, though without intent to return, does not divest the domicile.[10] The burden is on him who alleges a change of domicile to prove the change.[11] To constitute the new domicile two things are indispensable: 1, residence in the new locality;[12] and, 2, the intention to remain there, either perma-

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[1] Whart. Confl. of L. § 44.

[2] Id.; Greene v. Greene, 10 Pick. 415; and see Yelverton v. Yelverton, 1 Sw. & Tr. 574, 585; Parsons v. City of Bangor, 61 Me. 461, APPLETON, J.

[3] Ludlam v. Ludlam, 26 N. Y. 356, 371; Guier v. O'Donnell, 1 Binn. 352, n.; Forbes v. Forbes, Kay, 353.

[4] Brown v. Lynch, 2 Bradf. 214; and see Ryall v. Kennedy, 40 N. Y. Super. Ct. (J. & S.) 347 (affi'd in 67 N. Y. 386), and cases cited.

[5] Whart. Confl. of L. § 37.

[6] Id. § 39.

[7] Brewer v. Linnæus, 36 Me. 428. But compare Ford v. Hart, L. R. 9 C. P. 273, a. c. 9 Moak's Eng. 400; Yelverton v. Yelverton, 1 Sw. & Tr. 574.

[8] So held of the residence of a fisherman living in his boat at sea. Boothbay v. Wiscasset, 3 Greenl. (Me.) 354.

[9] Opinion of the judges, 9 Metc. 587, 589.

[10] Somerville v. Somerville, 5 Ves. 756, 787; Jennison v. Hapgood, 10 Pick. 77; First Nat'l Bank v. Balcom, 35 Conn. 537; Mitchell v. U. S. 21 Wall. 350. Unless it be in a foreign jurisdiction; The Venus, 8 Cranch, 253; or the intent be to resume domicile of birth. Reed's Appeal, 71 Penn. St. 381, 383. The better opinion is that the principle that original domicile easily reverts, is practically confined to cases where the national character and the original domicile are the same, and does not apply where both domiciles are under one national sovereignty. First Nat. Bk. v. Balcom, 35 Conn. 357. Compare Mann v. Clark, 33 Vt. 55, 61. The intention to abandon, though formed after leaving, effects abandonment. Hampden v. Levant, 59 Me. 559, APPLETON, J.

[11] Crookenden v. Fuller, 1 Sw. & Tr. 441; Hodgson v. De Buchesne, 12 Moore's P. C. 288; Mitchell v. U. S. (above); Desmare v. U. S. 93 U. S. (3 Otto), 605.

[12] There are, however, cases where the establishment of a home or wife at a place, with intent to go and abide there permanently, have been held to fix the domicile there before actual residence commenced. Bangs v. Brewster, 111 Mass. 382; and see Petersen v. Chemical Bk. 32 N. Y. 21, 23; affi'g 2 Robt. 605. Being *in itinere* to

nently or for an indefinite time.[1] The change cannot be made except *facto et animo*. Both are alike necessary. Either without the other is insufficient. Mere absence from a fixed home, however long continued, cannot work the change. But the fact of fixing a residence in another place, from motives of health or business of a permanent nature, may raise a legal presumption of intent to make the change.[2] On the other hand, the intent to change will not be presumed if it would have been illegal.[3]

The domicile of *a minor* cannot be changed by its own act;[4] but an actual change of residence by the guardian with the ward, made in good faith, may have the effect to change the ward's domicile.[5] If a minor, on coming of age, leaves the parental domicile, he may acquire a domicile, as any other person, by taking up a residence,[6] without intent to return otherwise than on visits. But if he retains family ties, and resorts to the old home in vacation, he does not lose his domicile there by his absence and residence at college.[7] *A wife* after divorce, either absolute or by way of separation, may change her domicile by her own act.[8] A soldier or sailor does not lose his domicile by absence in actual service.[9] Naturalization is very strong, but perhaps not conclusive evidence of change of domicile.[10]

56. *The Intent.*]—Usually the intent to which the evidence is to be directed is not intent to secure domicile, as a legal result, but to take up continuous residence, as a matter of fact. In some

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the intended new domicile may be enough. Forbes v. Forbes, Kay, 341. But mere intention to change is not enough. Guier v. O'Donnell, 1 Binn. 352, note. If it sufficiently appears that the necessary intent to remain existed, the right of domicile is acquired by ever so brief a residence. The Venus, 8 Cranch, 253, 279. But the force of residence as evidence of domicile is increased by the length of time during which it has continued. Stanley v. Bernes, 2 Hagg. Ecc. 437. Under what circumstances "locating" with intent to return for family, effects a change before they are brought, compare Burnham v. Rangeley, 1 Woodb. & M. 7; State v. Hallett, 8 Ala. 159; Smith v. Croom, 7 Fla. 81, 158.

[1] Jennison v. Hapgood, 10 Pick. 77. As to intent to return in the indefinite future, see Bruce v. Bruce, 2 Bos. & P. 230, n.; Ross v. Ross, 103 Mass. 575.

[2] Elbers v. U. S. Ins. Co. 16 Johns. 128.

[3] Mitchell v. U. S. (above).

[4] Forbes v. Forbes, Kay, 353. *It seems* not even after emancipation. Trammell v. Trammell, 20 Tex. 406, 417.

[5] Wheeler v. Hollis, 19 Tex. 522, and cases cited; and see Brown v. Lynch, 2 Bradf. 214. Otherwise, if made fraudulently for the guardian's benefit. Trammell v. Trammell, 20 Tex. 406. The domicile of a person *non compos* may be changed, where it does not affect succession, by the committee or guardian. Holyoke v. Haskins, 5 Pick. (Mass.) 20.

[6] Hart v. Lindsey, 17 N. H. 235.

[7] Granby v. Amherst, 7 Mass. 1, 5. And see Putnam v. Johnson, 10 Mass. 488. An intent to change domicile is not so readily presumed from residence at a public institution for purposes of education, as from a like removal for ordinary purposes. Opin. of the Judges, 5 Metc. 590.

[8] Barber v. Barber, 21 How. U. S. 582.

[9] Brewer v. Linnæus, 36 Me. 428, s. p. per SHAW, Ch. J., Sears v. City of Boston, 1 Metc. (Mass.) 250, 252.

[10] See Moore v. Darrall, 4 Hagg. 53.

cases, however, especially where two residences are shown, there may have been an intent that one should be made the domicile to the exclusion of the other. Intent of either kind is competent evidence. On the one hand it is enough to show the residence as a fact, and the intent to abide, without showing that the person had any intention or even knowledge as to the legal consequence in fixing domicile;[1] on the other hand the intelligent intention to retain the existing domicile as the legal habitat, while making a change of residence which it was apprehended might be permanent, may be effectual to prevent a change of domicile.[2] But where the facts show all the preponderating indicia of domicile in one of two residences, the mere election of the person to have the other considered as the domicile cannot suffice.[3]

57. *Evidence of Residence and of Intent.*]—A witness may testify to the fact of a person's residence; and even negatively, by showing that the witness had adequate acquaintance with the place, and that the person could not, in his opinion, have lived there without the witness knowing it.[4] A person, whether a party to the suit or not, may testify what was his own intent in taking up his residence or removing,[5] but against his testimony all material circumstances may be weighed.[6]

Evidence of *declarations* manifesting intent, made by the person before suit, and accompanying the residence or the acts of change, is competent, whether the person is living[7] or not[8] at the time of trial, if the intent related to the present or future,[9] but declarations of the intent of a former residence or removal are not competent.[10]

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[1] This is the American rule. The English courts seem not agreed. In Moorhouse v. Lord, 10 Ho. of L. 282, 285, 292, it was held (in case of a national change) that the intent must be intent to change the domicile as distinguished from the residence. In Douglas v. Douglas, 41 L. J. Eq. 74, 88, this was said not to be the English law, and the rule was laid down that the evidence of intention may be either express, or such as to lead to the inference that, if the question had been formally submitted to the party whose domicile is in dispute, he would have expressed his wish in favor of a change; that such an intention must be either shown to have actually existed in the mind, or it must appear that it was reasonably certain it would have been formed or expressed if the question had arisen in a form requiring a deliberate and solemn determination. Id. p. 89.

[2] Dupuy v. Wurtz, 53 N. Y. 556, affi'g 64 Barb. 156.

[3] Gilman v. Gilman, 52 Me. 165; Holmes v. Greene, 7 Gray, 299, 301; Butler v. Farnsworth, 4 Wash. C. Ct. 101.

[4] Cavendish v. Troy, 41 Vt. 108. It was also held that to prove his presence, ancient documents of other persons, showing his business and litigation there, were competent.

[5] Fisk v. Chester, 8 Gray (Mass.) 50; Hulett v. Hulett, 37 Vt. 581, 586.

[6] Wilson v. Wilson, L. R. 2 P. & D. 435, 444, s. c. 4 Moak's Eng. 663, 671.

[7] Kilburn v. Bennett, 3 Metc. (Mass.) 199; Burgess v. Clark, 3 Ind. 250.

[8] Brodie v. Brodie, 2 Sw. & Tr. 259, 262; Ennis v. Smith, 14 How. U. S. 400, 421.

[9] A letter written a year after leaving, and expressing intent never to return, with business instructions based on it, is competent on the question of previous change. Thorndike v. City of Boston, 1 Metc. 242, 247.

[10] Salem v. Lynn, 13 Metc. 544. But this limit is not to be too strictly applied. It depends perhaps on the existence of interest. See also Crookenden v. Fuller, 1 Sw. & Tr. 450.

A written declaration, although more reliable than mere words in point of preservation, may or may not be more significant of intent in proportion as it is spontaneous and deliberate.[1] Thus, an averment in pleading,[2] or a description in a will,[3] deed or contract,[4] being formal acts drawn usually by another; or an entry in a hotel register,[5] being usually a careless act,—though each competent, are entitled to little weight.

Acts are usually more cogent evidence of intent than declarations.[6] The law, in the absence of direct evidence of intent, presumes that a man did not intend to abandon his family; hence the act of leaving one's family at the pre-existing domicile, or of breaking up the establishment and removing the family to the new abode, and leaving them there while returning, raises a strong presumption of intent to retain, in the first case the old,[7] in the second case the new residence.[8]

Evidence that the person voted,[9] or attempted to vote,[10] or that he refrained from voting,[11] or that he voted elsewhere,[12] or that he paid[13] or did not pay[14] taxes as a resident, to the State or local treasury where he was, or that he paid such taxes elsewhere,[15] though not direct evidence of domicile, is competent on the question of residence, which is one of the elements in proof of domicile. But such facts are slight evidence, taken into consideration because of the want of direct or decisive proof; and their competency depends on their manifesting his own intent or opinion as to his residence, not that of the officers of taxation or election.[16]

Evidence of acts is not confined to acts contemporaneous with the alleged change. After proof of actual removal or of declara-

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[1] See Dupuy v. Wurtz, 53 N. Y. 556, 561, aff'g 64 Barb. 156.

[2] Hegeman v. Fox, 31 Barb. 475, 478.

[3] Gilman v. Gilman, 52 Me. 165. Compare Ennis v. Smith, 14 How. U. S. 400, 421.

[4] Lougee v. Washburn, 16 N. H. 134. A declaration of residence, in a conveyance, is not conclusive, unless the domicile is one of the causes of the contract. Tillman v. Mosely, 14 La. An. Rep. 721.

[5] Gilman v. Gilman (above).

[6] Dupuy v. Wurtz (above). The "intent is manifested by what he does, and by what he says when doing, and sometimes as significantly by what he omits to do or to say." THOMAS, J., in Cole v. Cheshire, 1 Gray, 444.

[7] Jennison v. Hapgood, 10 Pick. 99.

[8] Greene v. Greene, 11 Pick. 410.

[9] Smith v. Croom, 7 Fla. 81, 158.

[10] Guier v. O'Donnell, 1 Binn. 354 n.

[11] Hitt v. Crosby, 26 How. Pr. 413.

[12] Lincoln v. Hapgood, 11 Mass. 350.

[13] See Mann v. Clark, 33 Vt. 61.

[14] Hitt v. Crosby, 26 How. Pr. 413.

[15] If the law of the foreign State does not, like the law of the *forum*, impose taxes on personalty merely upon residence, it is for the adverse party to show the law in order to render evidence of having paid taxes in the other State incompetent. Hulett v. Hulett, 37 Vt. 581, 587.

[16] Thus, if the registering officers have no authority to register a voter, except on his application, their testimony, that they decided him to be an inhabitant and registered him, is incompetent without evidence that he requested it. Fisk v. Chester, 6 Gray (Mass.) 506.

tions of intent to remove, it is competent to prove the character of the sojourn at either place.[1]

It is said that intent must be proved by very satisfactory evidence,[2] especially when the change is to a foreign country,[3] but this requirement varies according to the transitory or settled habits of the person.

IX. Wills.

58. *Presumptions, and Burden of Proof as to Intestacy.*]—The law never presumes a will[4] in the absence of all evidence; and in trying the title of an heir, it is not necessary for him to show that his ancestor died intestate. The intestacy is presumed until the contrary appears.[5] And mere existence of a will being shown, the law does not presume that it was a will of real as well as of personal property.[6]

59. *Domestic Will proved by producing probate.*]—A will is put in evidence by showing it to have been duly proved[7] in the probate or other competent court within the State; and the mode of due probate depends on the statutes of the State, which should be carefully consulted. This is now usually the primary and exclusive mode of proving a domestic will, or a devise of lands within the State. Under a statute which allows the record, or an exemplification of the record, to be received in evidence the same as the original,[8] the whole record must be presented or exemplified,—that is, the record of the proofs,[9] as well as of the will itself.[10] The original record of the surrogate is equally competent;[11] and, independent

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[1] See Wilson v. Terry, 11 Allen (Mass.) 206; Crawford v. Wilson, 4 Barb. 523. So, to show that a removal before suit brought was with intent to take up a domicile, evidence is competent that it was continued after so brought, and down to the time of trial; for these facts, although occurring pending the action, are competent as throwing light upon the character of the previous fact. Hulett v. Hulett, 37 Vt. 581, 585.

[2] Donaldson v. McClure, 20 Scotch Sess. Cas. 2d ser. 307, 321, affi'd in 3 McQ. 852.

[3] Moorhouse v Lord, 10 Ho. of L. 283.

[4] Duke of Cumberland v. Graves, 9 Barb. 595, 606.

[5] 3 Washb. R. P. 18 (37). Because it is the negative (Lyon v Kain, 36 Ill. 368); and because the law entitles heirs to rest on the right of inheritance until a will is proved. Delafield v. Parish, 26 N. Y. 9.

[6] Duke of Cumberland v. Graves (above). The contrary held after probate, in Stevenson v. Haddleson, 13 B. Monr. (Ky.) 299.

[7] A copy of the decree of probate, not the mere certificate of the clerk that the will has been proved, is the proper evidence. Creasy v. Alverson, 43 Mo. 13. At common law, the will itself is the primary evidence as to lands; the probate the primary and exclusive evidence as to personalty.

[8] 2 N. Y. R. S. 58, § 15; L. 1850, c. 94; L. 1861, c. 12; but *contra* in N. Y. as to wills proved before 1830. L. 1871, c. 361. In Pennsylvania, probate without the proofs is held *prima facie* evidence. Kenyon v. Stewart, 44 Penn. St. 188.

[9] Including the sworn petition, if any. Bolton v. Jacks, 6 Robt. 166.

[10] Morris v. Keyes, 1 Hill, 540; Caw v. Robertson, 5 N. Y. 125; Ackley v. Dygert, 33 Barb. 176; Marr v. Gilliam, 1 Coldw. 488, 512; Bright v. White, 8 Mo. 422, 427.

[11] Elden v. Keddell, 8 East, 187.

of statute, would be so on proof that the original will was lost.[1] If from the record, including the sworn petition for probate, if one was presented, jurisdiction appears on the face of the proceedings, the authority for record is *prima facie* established, and the will and record are admissible in evidence without further proof *aliunde*.[2] If it affirmatively appear by them that the will was not duly proved,—as, for instance, where it was admitted on the oath of one of the subscribing witnesses, without accounting for the others,—the probate is not evidence.[3] The proofs are, however, required only for authentication; they do not become evidence in the cause for other purposes.[4] Without the probate, the will itself as a title to property, or as giving a right to the executor or administrator to sue, cannot be received in evidence.[5]

60. *Decree of Probate Court, how far conclusive.*]—The decree of a surrogate having jurisdiction of the subject, declaring a will of *personalty* duly executed, is conclusive evidence thereof, against all the world, in a collateral action, as to personalty.[6] But as to *real property* the probate of a will containing a devise was not, at common law, any evidence whatever of its execution; and the American statutes making it competent evidence do not, without express language or necessary implication, have the effect to make it conclusive, but only *prima facie* evidence. The effect of the probate, whether conclusive (as it always is as to personalty, and under some statutes is as to realty), or *prima facie* (as usually in respect to realty), extends to all points peculiar to the testamentary act, and which were necessarily determined, including the capacity of the testator, in respect of age,[7] coverture or non-coverture,[8] soundness of mind,[9] the form and mode of execution,[10] the competency of witnesses,[11] and the weight of the evidence upon these points.[12]

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[1] Jackson v. Lucett, 2 Cai. 363.

[2] Bolton v. Jacks, 6 Robt. 166. As to presumptions in favor of due notice, &c., see Marcy v. Marcy, 6 Metc. (Mass.) 360; Bolton v. Brewster, 32 Barb. 389.

[3] Staring v. Bowen, 6 Barb. 109. And see Thompson v. Thompson, 9 Penn. St. 234. *Contra*, Telford v. Barney, 1 Greene (Iowa), 575; Stevenson v. Huddleson, 13 B. Monr. (Ky.) 299.

[4] Nichols v. Romaine, 3 Abb. Pr. 122.

[5] Graham v. Whitely, 26 N. J. L. 254; Thorn v. Shiel, 15 Abb. Pr. N. S. 81; 1 Whart. Ev. 78, § 66, and cases cited. And see Broderick's Will, 21 Wall. 503.

[6] Vanderpoel v. Van Valkenburgh, 6 N. Y. (2 Seld.) 190; Matter of Kellum, 50 Id. 298; Colton v. Ross, 2 Paige, 396; Muir v. Trustees of Leake & Watts Orphan House, 3 Barb. Ch. 477. See also Clark v. Bogardus, 4 Paige, 623. This is so at common law, and also by express statutes usual in the American States.

[7] Howard v. Moot, 64 N. Y. 262, affi'g 2 Hun, 475. Otherwise where the age for devising real property was not necessarily determined. Dickenson v. Hayes, 31 Conn. 417.

[8] Cassels v. Vernon, 5 Mas. 332; and see Picquet v. Swan, 4 Mas. 443.

[9] Poplin v. Hawke, 8 N. H. 124; Osgood v. Breed, 12 Mass. 531.

[10] Vanderpoel v. Van Valkenburgh (above).

[11] Fortune v. Buck, 23 Conn. 1.

[12] Holliday v. Ward, 19 Penn. St. 490; Holman v. Riddle, 8 Ohio St. 384; Jourden v. Meier, 31 Mo. 40; Taylor v. Burnsides, 1 Gratt. (Va.) 165. *Contra*, Ferguson

It is also evidence conclusive or *prima facie*, as the case may be, in respect to the contents of the will, except that for the purposes of construction or interpretation, so far as that may appear from the grammatical skill or the accuracy of the writer in punctuation, parenthetical clauses, mode of writing, and the like, which are never perfectly reproduced in a copy, the court may, even when the probate is conclusive, examine the original,[1] and for this purpose production of the original may be compelled by subpœna *duces tecum*.[2] The probate, however, does not determine the legality of the dispositions of the will. In those States where the probate is only *prima facie* evidence as to realty, it may be impeached by evidence to the contrary as to capacity or execution, or on the weight of evidence,[3] even by parties who were parties to the probate proceedings.[4] Where probate would not be conclusive in favor of a will, a decree of the probate court rejecting the will is not conclusive against it.[5] Where probate would be conclusive in its favor, rejection is conclusive against it.[6] In any case, the jurisdiction, over the subject, of the surrogate whose decree is produced may be impeached, and in a case of personal property where this is done, as well as in all cases of real property, the validity of the will may be questioned.[7]

61. *Formalities of Execution.*—When proof of execution is necessary, it must appear, 1. That the will was subscribed by the testator, at the end; that is to say, after, and in reasonable proximity to the last clause; 2. That it was subscribed by the testator in the presence of each of at least two witnesses, or that it was acknowledged by him to have been made, to each of such attesting witnesses, or to such of them as were not present at the making of the subscription; 3. That at the time of making such subscription, or at the time of acknowledging the same,—or both, if subscribed in presence of one and acknowledged after subscription to the other,—he declared in the presence of both witnesses, or in the presence of each, that the instrument was his will; 4. That each of at least two such witnesses signed his name as a

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v. Hunter, 7 Ill. (2 Gilm.) 657; Hale v. Monroe, 28 Md. 98. See also, as to probate by less than the statutory number of witnesses, paragraph 59, note 3.

[1] 1 Wms. Exr. 6th Am. ed. 637, n. citing Manning v. Purcell, 24 L. J. Ch. 523, n. 3 Redf. on W. 62 (8) and n.

[2] See Kenyon v. Stewart, 44 Penn. St. 179, unless deposited in the probate court, pursuant to law. Randall v. Hodges, 3 Bland (Md.) 477.

[3] See Staring v. Bowen, 6 Barb. 109; Rowland v. Evans, 6 Penn. St. 435; Holliday v. Ward, 19 Id. 490; Kenyon v. Stewart, 44 Id. 179. The opposing party may even show statements made out of court by one of the subscribing witnesses, in order to contradict the statements of such witness in the record of the proofs before the surrogate, as to the due execution of the will. Otterson v. Hofford, 36 N. J. (7 Vroom) 129, s. c. 13 Am. R. 429. See note 8 (below).

[4] Bogardus v. Clark, 4 Paige, 623.

[5] Smith v. Bonsall, 5 Rawle (Penn.) 80.

[6] Picquet v. Swan, 4 Mas. 461.

[7] Redf. Surr. Pr. 119; Code of 1877, § 2478.

witness at the end of the will, at the testator's request. Any of the acts thus required of the testator may be done by another, in his presence and by his direction or manifested approval: and the order in which they are to be done is not material, except that the testator must subscribe before the witnesses do.[1] On a trial in an action at law, the execution may be proved by one witness, if he is able to prove perfect execution;[2] but if he can only prove his own signature, the other witnesses, if living, must be produced, or, if they are dead, their handwriting and that of the testator must be proved; and it is then a question of fact, whether, under all the circumstances, all the requisites of the statute are to be deemed complied with.[3] The testimony of the subscribing witnesses, whether in support of or against the will, is not conclusive, but is liable to be rebutted by other evidence, either direct or circumstantial.[4] But the rebutting proof should be clear.[5] The signature of a deceased witness to a full attestation clause is not alone enough, against the positive testimony of a surviving witness.[6] But a full attestation clause may after the lapse of time be enough as against the entire forgetfulness of the witnesses.[7] The subscribing witnesses are subject to same rules as to contradiction and impeachment as other witnesses.[8] The conduct and declarations of the testator at the time of the execution are competent upon the question of execution, and its intelligence and freedom, because a part of the *res gestæ;* but his previous or subsequent conduct and declarations are not competent upon this question,[9] except within the limits below stated as to

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[1] These rules, which state the requisites under the New York statute, are from Redf. Surr. Pr. 75. The statutes in the various States vary more or less.

[2] Cornwall v. Wooley, 1 Abb. Ct. App. Dec. 441. Otherwise, perhaps, in an action in equity to establish the will. Thornton v. Thornton, 39 Vt. 122, s. c. 6 Am. L. Reg. N. S. 341.

[3] Jackson v. Le Grange, 19 Johns. 386; Jackson v. Vickory, 1 Wend. 406.

[4] Orser v. Orser, 24 N. Y. 51; Theological Seminary of Auburn v. Calhoun, 25 N. Y. 422, rev'g 38 Barb. 149; s. p. Peck v. Cary, 27 N. Y. 9, affi'g 38 Barb. 77; and see 25 N. Y. 425, note, and cases cited.

[5] Redf. Surr. Pr. 98.

[6] Orser v. Orser (above).

[7] Nelson v. McGiffert, 3 Barb. Ch. 158.

[8] Peebles v. Case, 2 Bradf. 226; Losee v. Losee, 2 Hill, 609. And as to weight of testimony, see Thornton v. Thornton, 39 Vt. 122, s. c. 6 Am. L. Reg. N. S. 341; Stevens v. Van Cleve, 4 Wash. C. Ct. 262; Turner v. Cheeseman, 15 N. J. Eq. 243. But evidence of the bad character of a deceased subscribing witness is not admissible. Boylan ads. Meeker, 4 Dutcher, 275. Whether his declarations of opinion as to the insanity of testator are admissible, compare Scribner v. Crane, 2 Paige, 147; Baxter v. Abbott, 7 Gray (Mass.) 71; Beaubien v. Cicotte, 12 Mich. 459. The party calling the subscribing witness to support the will, may impeach his testimony unfavorable to the will, by proof of his declarations of fact in its favor, though not by declarations of contrary opinion, nor by attacking his veracity generally. Thornton v. Thornton (above). Compare Fulton Bank v. Stafford, 2 Wend. 483; and, as to contrary opinions, Schell v. Plumb, 55 N. Y. 592, affi'g 16 Abb. Pr. N. S. 19.

[9] Waterman v. Whitney, 11 N. Y. 172; Boylan ads. Meeker (above). Compare Sugden v. Ld. St. Leonards, L. R. 1 Prob. Div. 154, 227.

mental capacity and undue influence.[1] Proof of due execution raises a sufficient presumption of knowledge of the contents, unless circumstances of suspicion exist,—for instance, where the will was drawn up by a devisee. In such case he must give affirmative evidence that the testator knew its contents, and that it expressed his real intentions. Any evidence is sufficient which shows that he had full knowledge of the contents, and executed it freely and without undue influence.[2] So where the testator is shown to be unable to read, there should be some evidence that he knew its contents. The will cannot be shown to be void by parol proof that dispositions which the testator directed to be inserted were omitted by the mistake of the scrivener. For the purpose of determining the genuineness of the will, the circumstances attending its production, the history of its custody, and the declarations of its custodian made during the custody, are competent.[3] The genuineness of signatures may be proved by the opinion of any witness who has at any time seen the person write, or who has received documents purporting to be written by the person, in answer to documents written by himself, or under his authority, and addressed to the person, or to whom, in the ordinary course of business, documents purporting to be written by the person have been habitually submitted.[4] But it cannot be proved by the opinion of an expert, unless he is acquainted with the handwriting, nor can his opinion be received on a comparison of handwritings, unless the signature produced is attached to papers otherwise in evidence, and material to the issue, or admitted to be genuine.[5] Photographic copies of a signature are not admissible to aid the expert.[6]

62. *Testamentary Capacity.*[7]]—The burden of proving to the satisfaction of the court that the paper in question does declare the will of the deceased, and that the supposed testator was, at the time of making and publishing the document propounded as his will, of sound and disposing mind and memory,[8] is on the

[1] Paragraphs 63 and 70. And except, perhaps, if part of the *res gestæ* of his custody of the will (see paragraph 75, note 9, below), or to rebut evidence impeaching the genuineness of the signature (Taylor Will Case, 10 Abb. Pr. N. S. 306), or where the declarations are offered to support or rebut evidence of his ignorance of its contents (Davis v. Rogers, 1 Houst. 44; Redf. on Wills, 567).

[2] Lake v. Ranney, 33 Barb. 49, and cases cited; see Harrison v. Rowan, 3 Wash. C. Ct. 580; Comstock v. Hadlyme, 8 Conn. 254.

[3] Boylan ads. Meeker, 4 Dutcher, 275, s. p. Nexsen v. Nexsen, 3 Abb. Ct. App. Dec. 360. Subject, however, to the professional privilege, if any exist. Taylor Will Case, 10 Abb. Pr. N. S. 300. See N. Y. Code Civ. Pro. §§ 833–836; 3 Wall. 176, 192; Redf. Surr. Pr. 101.

[4] See pp. 393–7 of this vol.

[5] This is the New York rule. Johnson v. Hicks, 1 Lans. 150, 162. The English rule allows irrelevant documents to be proved and submitted to the jury for purpose of comparison. Steph. art. 52; 1 Greenl. § 581.

[6] Taylor Will Case, 10 Abb. Pr. N. S. 300.

[7] As to age, see paragraphs 27–30.

[8] For the test in case of delusion, see Banks v. Goodfellow, L. R. 5 Q. B. 549; Van Guysling v. Van Keuren, 35 N. Y. 70; Clapp v. Fullerton, 34 Id. 190; Bonard

party undertaking to establish the will; and this burden is not shifted during the progress of the trial, and is not removed by proof of the formal execution of the will and the testamentary competency, by the attesting witnesses, but remains with the party setting up the will.[1] The ordinary presumption of sanity does not alone suffice to dispense with all evidence on the point. Slight evidence, however, is sufficient to go to the jury.[2]

After the formal and usually slight evidence of mental capacity has been given, if evidence to the contrary is adduced by those resisting the will, it is in the discretion of the court, if not a matter of right, that the party alleging the will may give cumulative evidence of capacity, &c., in rebuttal.[3] Evidence that incapacity of a continuing nature previously existed (within reasonable limit of time), is sufficient to raise a presumption of its existence at the time of execution, which must be rebutted by affirmative evidence.[4] Evidence of the existence of such incapacity, at a time subsequent to the execution of the will, is competent in case of idiocy, and is competent in other cases if sufficiently near in point of time to raise a presumption (in connection with other evidence, and when the nature of the defect is considered) that it existed at the time of execution; but is not competent except on that ground.[5]

A general or continuing insanity having been shown within a reasonable time prior to the act. the burden is thrown upon the other party to show a lucid interval at the time of the act.[6] Evidence of cessation of the symptoms is not enough, but there must be evidence of sufficient restoration to act intelligently and

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Will Case, 16 Abb. Pr. N. S. 128; Dunham's Appeal, 27 Conn. 192; Boughton v. Knight, L. R. Prob. & D. 64, 68; Duffield v. Morris, 2 Harr. (Del.) 375; Stackhouse v. Horton, 15 N. J. Eq. 202; Redf. Am. Cas. on L. of Wills, 384. For the test in case of imbecility or mental weakness, see Delafield v. Parish, 25 N. Y. 9, 27, 29, overruling Stewart v. Lispenard, 26 Wend. 225. Whether it be deemed that a will requires greater capacity than a contract (as said in Boughton v. Knight, above, which is usually sound as to mere question of mental capacity), or that a contract requires greater capacity than a will (as said in Harrison v. Rowan, 3 Wash. C. Ct. 586; Kinne v. Kinne, 9 Conn. 102; Converse v. Converse, 21 Vt. 168, which may be true on a question of weakness in case of undue influence), the question whether testator had capacity for contracts or other transactions, civil or criminal, is not relevant, except so far as the facts adduced show testamentary incapacity or susceptibility to undue influence. See Dew v. Clark, 1 Hagg. Ec. 311.

[1] Delafield v. Parish (above); Redf. Am. Cas. on L. of Wills, 4. *Contra*, Id. 28, and Higgins v. Carlton, 28 Md. 115. As to the right to open and close, see Brooks v. Barrett, 7 Pick. 94; Comstock v. Hadlyme, 8 Conn. 254; Taylor Will Case, 10 Abb. Pr. N. S. 300.

[2] Id.; and 1 Wms. on Exrs. 6th Am. ed. 24–30, and notes reviewing conflicting cases.

[3] Taylor Will Case, 10 Abb. Pr. N. S. 300; and see Redf. Am. Cas. on L. of Wills, 32.

[4] See Clark v. Fisher, 1 Paige, 171, and cases cited; and Smith v. Tebbett, L. R. 1 P. & D. 398.

[5] Stevens v. Van Cleve, 4 Wash. C. Ct. 262. Compare Terry v. Buffington, 11 Geo. 342.

[6] Dicken v. Johnson, 7 Geo. 488, and cases cited.

freely.[1] The reasonableness and good sense of the will itself,[2] and the mode in which it was executed,[3] are competent evidence of the existence of a lucid interval when it was made. In the case of drunkenness, the evidence must be directed to the particular moment, so as to show that the testator was so excited by liquor, or so conducted himself during the act, as to be at the moment legally disqualified;[4] or there must be evidence of confirmed derangement caused by habitual indulgence.[5] The fact of being deaf and dumb does not now raise a legal presumption of mental incapacity;[6] but necessitates stricter proof of open dealing and intelligent assent. Old age alone does not incapacitate.[7]

63. *Conduct and Declarations of Testator.*]—On the question of mental condition, whether raised as to unsoundness or undue influence, the conduct and declarations of the testator, both before and after execution, are competent to show capacity or incapacity, if they tend to show its existence at the time of execution,[8] but not otherwise.[9] A sudden change to excentric and peculiar habits is cogent evidence of insanity.[10] Suicide is not conclusive evidence of insanity.[11] The testator's correspondence, his manner of conducting business, &c., are competent.[12] The fact that others dealt with him as sound or unsound of mind, is competent when adduced merely to lay a foundation for evidence of the manner in which he received such treatment, but not otherwise.[13]

His declarations, if not part of the *res gestæ* of execution, must be offered not as his statement of facts of fraud or undue influence, for in this respect they are hearsay and incompetent, but as statements which, independent of their truth or falsity, disclose his state of mind, strength or weakness of will, independence or infirmity of purpose, capacity or imbecility. What

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[1] Lucas v. Parsons, 27 Geo. 593; Boyd v. Eby, 8 Watts (Penn.) 66; *Ex parte* Holyland, 11 Ves. 10.

[2] Cartwright v. Cartwright, 1 Phillim. 90, as qualified in Banks v. Goodfellow, L. R. 5 Q. B. 549, and Gombault v. Pub. Admr. 4 Bradf. 226.

[3] Hall v. Warren, 9 Ves. 605, s. c. Ewell's Cases, 702.

[4] Peck v. Cary, 27 N. Y. 9.

[5] Gardner v. Gardner, 22 Wend. 526.

[6] Christmas v. Mitchell, 3 Ired. Eq. 535, 541.

[7] Collins v. Townley, 21 N. J. Eq. 353.

[8] Boylan ads. Meeker, 4 Dutcher, 274.

[9] Kinne v. Kinne, 9 Conn. 104.

[10] Lucas v. Parsons, 27 Geo. 593.

[11] Brooks v. Barrett, 7 Pick. 94; and see Burrows v. Burrows, 1 Hagg. 109, 146.

[12] Harper v. Harper, 1 N. Y. Supm. Ct. (T. & C.) 351; s. p. United States v. Sharp, 1 Pet. C. Ct. 118; Irish v. Smith, 8 Serg. & R. 578.

[13] Thus letters written to him, even by persons since deceased, are not competent evidence as to his mental soundness, unless his conduct in reference thereto is shown. The fact that they were found in his possession is not enough. Doe d. Wright v. Tatham, 5 Clark & F. 670; 7 Ad. & E. 313. But a witness may testify that he was told by the wife in the husband's presence that he did not attend to business, he was incapable,—and that he said nothing. Irish v. Smith, 8 Serg. & R. 578.

the testator said, the law does not credit, for it is unsworn; but the fact that he said it, the law receives, because to ascertain his state of mind we must hear how he talked, and read what he wrote. His declaration is not evidence of the fact declared, but it is evidence of the state of mind from which the declaration proceeded.[1] With this purpose, great latitude is allowed in the admission of such evidence.[2] The rule allows *previous* as well as *subsequent* declarations as to testamentary intentions to be received in evidence.[3] The weight of the declarations depends on their proximity in point of time to the act, and on whether they were before or after it. Declarations before the act are more pregnant of presumption than those made after it; and a state of weakness shown to exist before the act, being presumed to continue, affords more influential evidence than if only shown to exist after the act, because it is possible that the weakness might have intervened.[4] Unreasonableness of a will is, alone, no evidence of incapacity;[5] but in connection with evidence of mental unsoundness, or of weakness and influence, or intoxication, it is to be considered in corroboration or rebuttal of those allegations; and, in such case, evidence of the situation of the family and property is competent for the purpose of throwing light upon the reasonableness of the will.[6] In proportion as the will departs from reasonable and natural division of the estate, evidence of mental competency and evidence to rebut circumstances tending to show undue influence becomes necessary.

64. *Opinions as to mental soundness.*]—On the question of the testator's mental capacity, a *Subscribing* witness may state the opinion which, at the time of the execution, he formed. It is not necessary that he should first state the facts upon which he formed this impression.[7] The fact that he was an attesting witness gives the right to ask his opinion. All the facts and circumstances seen or known by the witness at the time may be brought out on direct or cross-examination;[8] but the opinion is not excluded, even if the facts engendering it have been forgotten.[9]

An Expert[10] may testify directly as to the mental capacity, in

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[1] Waterman v. Whitney, 11 N. Y. 157.

[2] Robinson v. Adams, 62 Me. 369, s. c. 16 Am. R. 473.

[3] Tunison v. Tunison, 4 Bradf. 138; Dennison's Appeal, 29 Conn. 399; Den v. Vancleave, 5 N. J. L. (2 South.) 589. Even the draft of a former will more or less similar, directed or approved, though not executed by the testator, is competent. Thornton v. Thornton, 39 Vt. 122, s. c. 6 Am. L. Reg. N. S. 341.

[4] See 1 Redf. on Wills, 136–163, 548.

[5] Munday v. Taylor, 7 Bush (Ky.), 491; Ross v. Christman, 1 Ired. L. 209.

[6] Per WALWORTH, Ch., Betts v. Jackson, 6 Wend. 175.

[7] Robinson v. Adams, 62 Me. 369, s. c. 16 Am. R. 473.

[8] Id.

[9] Clapp v. Fullerton, 34 N. Y. 190.

[10] The question whether the witness is an expert is not in the discretion of the judge, but is a question of law on the facts concerning qualifications. Baxter v. Ab-

either of three ways: 1. If he had adequate opportunities of personal examination of the testator, he may state his opinion positively, based upon his personal knowledge of the facts, but not upon hearsay,[1] nor upon conflicting testimony in the cause.[2] 2. An expert who has heard *all*[3] the testimony adduced upon the trial bearing on the question, may, if it is not conflicting, give his opinion on the question, what the facts sworn to, if true, would indicate as to the mental condition.[4] 3. An expert may be asked what a supposed state of facts, put to him hypothetically, but corresponding in details to the facts already in evidence, would indicate as to the mental condition.[5] When the evidence involves conflict, the opinion, if not based wholly on personal examination, should be drawn out by an hypothetical question, having reference to the facts in evidence on one side or both, or on each side separately.[6] The expert is not to be substituted for the jury; but so long as the question is framed according to the principles here stated, it can be no objection to it that the issue and the other evidence is such that the question to be submitted to the jury must call for the same answer. An expert may also, within limits not very well defined, be asked general questions upon the laws of mental disorder, decay, or imperfect development, relevant to the case, or upon the consistency with each other of alleged symptoms, for the purpose of enhancing the qualifications of the court or jury to weigh and apply the evidence; and, on cross-examination, he may be interrogated generally for the purpose of testing his qualifications.[7]

An *Ordinary* witness (that is to say, any witness other than an expert or subscribing witness) may testify to facts and circumstances within his own knowledge bearing on the question of mental capacity; and after he has stated them, if they show reasonable means of forming an impression,[8] he may be asked, either on

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bott, 7 Gray (Mass.) 71. An educated, practising physician, who attended the testator, is competent, though not specially conversant with insanity; and, in a case of gradual decay, the family physician's opinion is more cogent than that of a stranger who is a specialist. Id.

[1] The better opinion is that, under this rule, a medical witness must give the facts on which his opinion is founded, in connection with his opinion. If those facts necessarily include information given him by the attendants of the patient, his opinion is not competent, for those communications are hearsay. Heald v. Thing, 45 Me. 396, a. p. Wetherbee v. Wetherbee, 38 Vt. 454.

[2] Woodbury v. Obear, 7 Gray (Mass.) 467, 471.

[3] People v. Sanchez, 22 N. Y. 147, 154.

[4] Redf. Surr. Pr. 103; People v. Lake, 12 N. Y. 358; Commonw. v. Rogers, 7 Metc. 500.

[5] Bonard's Will, 16 Abb. Pr. N. S. 128.

[6] Woodbury v. Obear (above). This is the better mode of inquiry than referring to the testimony. See Dexter v. Hall, 15 Wall. 14, 26.

[7] The principal elements of qualification, apart from personal examination of the testator, are knowledge of the subject of mental disorder, experience in dealing with it, freedom from any peculiar abstract theory, and from conceit. The fact of receiving large compensation for testifying is not in itself derogatory to the witness. People v. Montgomery, 13 Abb. Pr. N. S. 209.

[8] An opinion of an ordinary witness is competent in connection with the facts ob-

direct or cross-examination, the impression as to mental soundness made on his mind at the time by the acts and declarations of the testator to which he has testified, and may characterize them as rational or irrational;[1] but he cannot express an opinion on the general question, whether the mind of the testator was sound or unsound,[2] nor testify to his opinion, or to impressions made upon his mind, independently of stating the facts and circumstances.[3] Nor can he be asked the broad question whether the testator was of sound and disposing mind, or its equivalent in any form. The question must be so framed as not to embrace the law of the case.[4] But where the alleged incapacity is imbecility, as distinguished from delusion, such a witness may be asked to state the character of the testator in respect to decision and independence, and whether he appeared capable of attending to business,[5]—all such statements being preceded by a statement of the facts. Such a witness cannot, either on direct or cross-examination, be asked his opinion on a hypothetical question.[6] Such a witness is, however, competent to testify whether testator was sick or well,[7] able to help himself, or re-

served by him, although founded on observation at a single interview, and of which, notwithstanding a general impression of mental quality, he remembers no distinct marked act of folly or childishness. Clary v. Clary, 2 Ired. 78; Potts v. House, 6 Geo. 324.

[1] Clapp v. Fullerton, 34 N. Y. 190. A witness giving facts may say, "His countenance indicated childishness." The expression of countenance is matter of fact, though depending in some measure on opinion. Irish v. Smith, 8 Serg. & R. 573. s. p. De Witt v. Barley, 17 N. Y. 340, 350. A witness having testified to facts was allowed to say, "His insanity manifested itself in hostility to myself,"—this being regarded rather as a general statement of fact, than an opinion. Pelamourges v. Clark, 9 Iowa, 17.

[2] Clapp v. Fullerton (above). Compare Pidcock v. Potter, 68 Penn. St. 342, s. c. 8 Am. R. 181. An answer by an ordinary witness, that he observed nothing peculiar, did not observe any failure of mind—being a mere negation, does not amount to an opinion which it is error to receive. Robinson v. Adams, 62 Me. 369, s. c. 16 Am. R. 473.

[3] Hewlett v. Wood, 55 N. Y. 634; Cram v. Cram, 33 Vt. 15; Dicken v. Johnson, 7 Geo. 484, and cases cited; Hickman v. State, 38 Tex. 190. *Contra*, Beaubien v. Cicotte, 12 Mich. 459, and State v. Pike, 51 N. H. 105, s. c. 11 Am. L. Reg. N. S. 233, where the cases are reviewed, and it is held that the opinion is competent on direct, leaving the facts to be brought out on cross-examination. See further on this subject Brooke v. Townshend, 7 Gill, 10, 27; Dunham's Appeal, 27 Conn. 192. It has been said, in a criminal case, that the circumstances must be such as to have afforded the opportunity to form an accurate judgment as to the existence or non-existence of the disease, considered with reference to the character or degree in which it is alleged to exist. Powell v. State, 25 Ala. 21. But this, if applicable at all to testamentary causes, must be taken with the qualification that, when the facts and circumstances are sufficiently connected with the time of execution, the impression of a casual observer of the conduct and language of the testator may be competent.

The important elements in the weight of the opinion of a non-expert are the intelligence of the witness, experience with the subject, freedom from abstract theories, and from interest or prejudice, personal acquaintance with the decedent, the nature and adequacy of the facts stated as the ground of the opinion, and the fidelity of the witness's memory of those facts.

[4] De Witt v. Barley, 17 N. Y. 347; Deshon v. Merchants' Bank, 8 Bosw. 461. *Contra*, Beaubien v. Cicotte (above).

[5] Gardiner v. Gardiner, 34 N. Y. 155, 165.

[6] Dunham's Appeal, 27 Conn. 192.

[7] Higbie v. Guardian Mut. Life, 53 N. Y. 603; 66 Barb. 462.

quiring assistance,[1] intoxicated,[2] deaf, dumb,[3] or blind. *Common repute*, or the opinion of the neighborhood, is not competent evidence on the question of mental capacity.[4] *Books*, whether written by lawyers or physicians, cannot be read to the jury by way of evidence;[5] but may, within proper limits, be read and commented on in argument.

65. *Hereditary insanity.*]—Where there is evidence directly relating to the testator and tending to show insanity in him (as distinguished from imbecility[6]), it is competent to show the insanity of a parent or of an uncle.[7]

66. *Inquisitions and other adjudications.*]—An *inquisition*, if taken on notice to the subject of it,[8] though without notice to the parties to the present action, is *prima facie* evidence of testamentary incapacity during the period expressly[9] overreached by it pursuant to the statute, and, if a guardian is thereupon appointed, is conclusive evidence of incapacity from the time of the finding until further direction of the court, except that a will may be proved to have been made in a lucid interval.[10]

Other adjudications are not conclusive except as between the parties to them and those claiming under such parties,[11] nor always even competent then.

A verdict on the mental state on a particular day, is held not even *prima facie* evidence of the state on a prior or subsequent day.[12]

67. *Undue influence,—the burden of proof.*]—Where no defect of powers on the part of the testator is indicated, the burden of proving undue influence is on the party alleging it.[13] In such case the mere fact of the existence of an intimate or fiduciary relation between the testator and the person provided for, does not, without evidence that the latter exerted some influence in the

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[1] Sloan v. N. Y. Central R.R. Co. 45 N. Y. 125.

[2] People v. Eastwood, 14 N. Y. 562, affg 3 Park. Cr. 25.

[3] Rex v. Pritchard, 7 C. & P. 303, 305; King v. Jones, 1 Leach C. C. 102.

[4] Foster v. Brooks, 6 Geo. 287; Lancaster Co. Bk. v. Moore, 78 Penn. St. 407.

[5] Commonwealth v. Wilson, 1 Gray (Mass.) 337. *Contra*, 5 Cent. L. J. 439. Compare 1 Wms. Exrs. 6th Am. ed. 415; Pierson v. Hoag, 47 Barb. 243.

[6] Shailer v. Bumstead, 99 Mass. 112, 131; s. p. Cole's Trial, 7 Abb. Pr. N. S. 321.

[7] Baxter v. Abbott, 7 Gray, 71, 81.

[8] Hathaway v. Clark, 5 Pick. 490.

[9] Rippy v. Gant, 4 Ired. N. C. Eq. 443.

[10] The general rule here stated is unquestioned; the exception is perhaps open to controversy. See Breed v. Pratt, 18 Pick. 115, and cases cited; Wadsworth v. Sherman, 14 Barb. 169, 8 N. Y. 382. Lewis v. Jones, 50 Barb. 645; Banker v. Banker, 63 N. Y. 409; Hall v. Warren, 9 Ves. 605.

[11] Gibson v. Soper, 6 Gray, 279; Supervisors of Munroe v. Budlong, 51 Barb. 493; Hovey v. Chase, 52 Me. 305; and see 1 Whart. & St. Med. Jur. § 2; Bogardus v. Clark, 1 Edw. 266, 4 Paige, 623.

[12] Emery v. Hoyt, 46 Ill. 258.

[13] Tyler v. Gardner, 35 N. Y. 559; Baldwin v. Parker, 99 Mass. 79; 1 Wms. Exrs. 72 n. Old age alone is not sufficient ground for presuming imposition. Butler v. Benson, 1 Barb. 526.

making of the bequest, raise the slightest ground for any presumption of undue influence.[1] Nor, again, does the mere fact that a beneficiary was the draftsman of the will or gave instructions for it, raise such a presumption,[2] unless he stood in a fiduciary relation.[3] Nor, again, is the mere fact that a beneficiary possessed influence and ascendancy not shown to be undue, enough, even though the will be unreasonable;[4] although if the evidence justifies the conclusion that the interfering mind must have been conscious that an unjust result was being obtained by personal influence, this evidence of constructive fraud, combined with the unnatural character of the will, may be enough to shift the burden of proof.[5] If, however, it is shown that the beneficiary and the testator stood in an intimate or fiduciary relation toward each other,—such as that of parent and child,[6] or grandchild,[7] husband and wife,[8] physician and patient,[9] legal adviser and client,[10] confessor and penitent,[11] guardian and ward,[12] or agent and principal,—and that the beneficiary [13] drew the will,[14] or gave the instructions to the draftsman,[15] or was concerned in clandestine execution,[16] the burden of proof is thrown on him.

Where there is evidence of defect in the powers of the testator, whether it be unsoundness or weakness,[17] or defect of the senses,[18] then either the fact that the beneficiary exercised influence to secure an unequal will,[19] or that he stood in a fiduciary relation above mentioned, and had any agency in framing the document,[20] or exercised control over the testator,[21] throw upon the proponent the burden of giving evidence of free and intelligent volition.

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[1] Parfitt v. Lawless, L. R. 2 P & D. 462, 468, s. c. 4 Moak's Eng. 692; Bleecker v. Lynch, 1 Bradf. 458. Otherwise where the formation of the fiduciary relation was induced by fraud and undue influence. Baker's Case, 2 Redf. Surr. 179.

[2] Coffin v. Coffin, 23 N. Y. 9, 13. Compare Barry v. Butlin, 2 Moore P. C. 480, 1 Curt. Ecc. 637.

[3] Crispell v. Dubois, 4 Barb. 393; Tyler v. Gardiner, 35 N. Y. 559, 595.

[4] Kevill v. Kevill, 6 Am. L. Reg. N. S. 79. But as to the disposition of juries, see 1 Redf. on Wills, 3 ed. 527, § 87; Redf. Am. Cas. on L. of W. 308 n.

[5] See Redf. Am. Cas. on L. of W. 504 n. and cases cited.

[6] Tyler v. Gardiner (above).

[7] See Carrol v. Norton, 3 Bradf. 291.

[8] Baker's Case, 2 Redf. Surr. 179, and cases cited; Delafield v. Parish (above).

[9] Ashfield v. Lomi, L. R. 2 P. & D. 477, s. c. 4 Moak's Eng. 700.

[10] Wilson v. Moran, 3 Bradf. 172.

[11] See McGuire v. Kerr, 2 Bradf. 244; Parfitt v. Lawless (above).

[12] See Limburger v. Rauch, 2 Abb. Pr. N. S. 271; Matter of Paige, 62 Barb. 476.

[13] Or the husband or wife of such an one. Mowry v. Silber, 2 Bradf. 133; Lansing v. Russell, 13 Barb. 510.

[14] Crispell v. Dubois, 4 Barb. 393.

[15] Delafield v. Parish (above).

[16] Ashwell v. Lomi (above).

[17] See Tyler v. Gardiner (above).

[18] See Lansing v. Russell, 13 Barb. 510.

[19] Harrel v. Harrel, 1 Duvall (Ky.) 203; Redf. Am. Cas. on L. of W. 505 n.

[20] See Lee v. Dill, 11 Abb. Pr. 214, and cases above cited in notes 6 to 16.

[21] Forman v. Smith, 7 Lans. 443, 450, and cases cited.

68. *Indirect evidence.*]—Undue influence may be shown by indirect or circumstantial evidence;[1] and so may the freedom of the testator; for suspicious circumstances, which change the burden of proof, do not alter the mode of proof, but require the court to be vigilant in enforcing the rule.[2]

Opportunity and interest, however, are not alone enough to sustain a finding of undue influence.[3] The evidence must justify the conclusion of a present constraining operative power upon the mind at the time of the act. Influence long before[4] or after[5] the act, is not alone enough, but may, in connection with other circumstances, raise a presumption of its existence at the time.[6]

69. *Relevant Facts.*]—On either side of the question of undue influence a very wide range of inquiry is allowed.[7] Evidence of the disposition and mental qualities of the testator;[8] his condition at the time;[9] his manifestation of feeling toward those benefited,[10] and toward those cut off;[11] their situation in life;[12] the testamentary intentions the testator entertained before he was subjected to influence;[13] the circumstances of the preparation of the instrument;[14] the influence exercised, by the party charged, over the testator in other matters;[15] and the personal relation sustained by them;[16]—is all competent. It is also competent to show that

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[1] Marvin v. Marvin, 3 Abb. Ct. App. Dec. 192.

[2] 1 Wms. on Exrs. 6 Am. ed. 147, and n. 149.

[3] Seguine v. Seguine, 3 Abb. Ct. App. Dec. 191; Cudney v. Cudney, 68 N. Y. 148. Many authorities as to what is sufficient evidence of undue influence, may be found in the cases arising on deeds and other contracts between the living; but these lay down too stringent rules to be applied against a beneficiary under a will. The law allows a person standing in a fiduciary relation to use a degree of influence to obtain a bequest which he cannot use to obtain a grant. Parfitt v. Lawless, L. R. 2 P. & D. 462, 468, a. c. 4 Moak's Eng. 693.

[4] McMahon v. Ryan, 20 Penn. St. 329.

[5] Eckert v. Flowery, 43 Id. 46.

[6] 1 Wms. on Exrs. 6 Am. ed. 72.

[7] Redf. on W. 3d ed, 536, § 51; Beaubien v. Cicotte, 12 Mich. 459; 1 Wms. Exrs. 6 Am. ed. 74 n.

[8] Belief in witchcraft, ghosts, spiritualism, &c., in connection with evidence of feeble mind, is competent on the question of undue influence. Woodbury v. Obear, 7 Gray (Mass.), 467, SHAW, C. J. Compare Robinson v. Adams, 62 Me. 369.

[9] Directions given by his physician, since deceased, competent as part of *res gestæ*. Platt v. Platt, 58 N. Y. 648.

[10] Beaubien v. Cicotte, 12 Mich. 459.

[11] Lewis v. Mason, 109 Mass. 169; Fairchild v. Bascomb, 35 Vt. 417.

[12] Thus their poverty, and his knowledge of the intemperance of the sole legatee is competent. Fairchild v. Bascomb, 35 Vt. 417.

[13] Cases in note 4 (below). As to declarations after it ceased, see 1 Redf. on Wills, 551; and note 4 (below).

[14] Beaubien v. Cicotte, 12 Mich. 459.

[15] Evidence of instances in which the person charged with undue influence exercised controlling authority over the testator by imperious language, to which the testator submitted, is competent. Lewis v. Mason, 109 Mass. 169. And evidence of other transfers of property obtained by the same person, and the testator's forgetfulness of them, is competent. Lewis v. Mason, 109 Mass. 169.

[16] The unlawful cohabitation of a testator with the mother of an illegitimate child,

the party charged knowingly made false statements that he was ignorant of the existence of the will, or that its contents were less favorable to him than in fact they were.[1]

70. *Declarations and Conduct of Testator.*]—When there is evidence tending to show fraud or undue influence, then the conduct and declarations of the testator not only at the time of execution, but before and after; are relevant for the purpose of manifesting his mental qualities and disposition, and consequent susceptibility to the fraud or undue influence;[2] his intelligent understanding of the will made; his testamentary intentions existing before he was subjected to the influence,[3] and his satisfaction or dissatisfaction with it after the influence was removed.[4] It seems to be now considered that a declaration which is competent for throwing light on the testator's mind is not to be excluded merely because it includes his narratives of menace, or confessions of fear, or acknowledgments of submission to pressure or urgency, or even his statement that the will previously made was not freely or not intelligently executed; but that all that is requisite to the competency of the declarations is that they be of a nature to manifest the mental quality, and be sufficiently approximate in point of time to throw light on the mental quality at the time of execution; and the jury are to be directed not to regard them as evidence of the fact declared.[5] In other words, the declarations of the testator as to the acts or influence of others are not, alone, competent evidence of such acts or influence,[6] except when part of the *res gestæ*,[7] or so far as made in the presence of the parties against whom they are adduced; although, when the acts are proved, the declarations of the testa-

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a legatee in the will, is not of itself sufficient evidence to justify a jury in finding undue influence on the part of the mother. Rudy v. Ulrich, 69 Penn. St. 177, a. c. 8 Am. R. 238. But if the relation of intimacy was consciously *unlawful*, as in the case of a married man living with a paramour, and making his will in favor of her or her children, undue influence may be inferred by the jury, as a question of fact. Dean v. Negley, 41 Penn St. 312; Monroe v. Barclay, 17 Ohio St. 302.

[1] Fairchild v. Bascomb, 35 Vt. 404, 418. And see Platt v. Platt, 58 N. Y. 648. Compare Jenkins v. Hall, 7 Jones L. N. C. 295.

[2] Shailer v. Bumstead, 99 Mass. 119.

[3] 1 Redf. on W. 3d ed. 536, § 51; Redf. Am. Cas. on L. of W. 487, n.; Neel v. Potter, 40 Penn. St. 483; Dennison's Appeal, 29 Conn, 402. So also is evidence of his pecuniary arrangements for the benefit of those charged with undue influence in procuring the later will. Beaubien v. Cicotte, 12 Mich. 459.

[4] Thus to rebut evidence of undue influence, evidence that the influence was afterwards wholly removed, and the testator, though he lived long in freedom made no alteration, is competent (Wilson v. Moran, 3 Bradf. 172; 1 Redf. on W. 526, par. 35); and so *a fortiori*, is evidence that he affirmatively recognized the will. Taylor v. Kelly, 31 Ala. 59. *Contra*, Lamb v. Girtman, 26 Geo. 625.

[5] Shailer v. Bumstead, 99 Mass. 113, and Beaubien v. Cicotte, 12 Mich. 459. Thus, declarations that he was afraid of his wife and compelled to submit to her demands, in order to have peace, were held competent. Beaubien v. Cicotte (above).

[6] 1 Redf. on W. 546, § 39. And the fact that they were dying declarations does not render them competent. Jackson v. Kniffen, 2 Johns. 32.

[7] Doe v. Allen, 8 T. R. 147; Rosc. N. P. 22.

tor may be given in evidence to show the operation they had upon his mind.[1]

71. *Fraud.*]—Fraud in obtaining a will may be shown by indirect and circumstantial evidence; and any circumstance, howsoever slight, if not wholly irrelevant to the issue of fraud, may be admitted.[2]

72. *Revocation.*]—The modes of revocation are now usually prescribed by statute;[3] and statutes declaring that specified acts shall be deemed a revocation, create a conclusive presumption, which is not rebuttable by extrinsic evidence.[4] Where the statute makes the testator's intent an essential element, as in the case of marring the document, parol evidence is admissible in respect to the intent, within the limits hereafter stated. In other cases, extrinsic evidence is admissible to show the situation upon which the legal question of revocation according to the statute depends; and the effect of these facts under the statute is matter of law which cannot be varied by evidence of testator's actual intent.[5]

73. *Marring the document.*]—When a revocation by burning, cancelling, tearing, or obliterating, is relied on, it must appear that the testator had testamentary capacity at the time,[6] and that the act was done[7] by him or his authority,[8] with intent to revoke.[9] The intent may be disproved by evidence that the testator had not the freedom and intelligence requisite for a testamentary act.[10] Direct proof of the act and intent is not essential; for evidence that a will, last seen or heard of in the custody of the testator, was, after his death, found among his effects, cancelled, raises a presumption that the cancellation was done by him with intent to revoke.[11] Feeble and incomplete efforts to cancel or destroy may be sufficient, where the evidence of intent is direct and clear.[12]

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[1] Cudney v. Cudney, 68 N. Y. 148.

[2] Davis v. Calvert, 5 Gill. & J. 269.

[3] 2 N. Y. R. S. 64; 4 Kent's Com. 521. This statute excludes all other modes. Ordish v. McDermott, 2 Redf. Surr. R. 463, and cases cited.

[4] Lathrop v. Dunlop, 4 Hun, 213, affi'd in 63 N. Y. 610; Walker v. Hall, 34 Penn. St. 483, 486.

[5] Adams v. Winne, 7 Paige, 99.

[6] Idley v. Bowen, 11 Wend. 227.

[7] Compare Pryor v. Goggin, 17 Geo. 444; Mundy v. Mundy, 15 N. J. Eq. (2 McCarter), 290; Malone v. Hobbs, 1 Robt. (Va.) 246; Runkle v. Gates, 11 Ind. 95; Boyd v. Cook, 3 Leigh (Va.) 32.

[8] The *onus* of making out that the cancellation of a will was the act of the testator himself lies upon those who oppose the will. 1 Wms. Exrs. 6th Am. ed. 196; 2 Whart. Ev. § 894.

[9] Clark v. Smith, 34 Barb. 140, and cases cited

[10] Batton v. Watson, 13 Geo. 62.

[11] Evans v. Dallow, 31 L. J. Prob. 128.

[12] See Dan v. Brown, 4 Cow. 483, 490. Compare Burns v. Burns, 4 Serg. & R. 295; Sweet v. Sweet, 1 Redf. Surr. 451; Smock v. Smock, 11 N. J. Eq. (3 Stock.) 156; Bennett v. Sherrod, 3 Ired. L. (N. C.) 303; Bethel v. Moor, 2 Dev. & B. L. (N. C.) 311; Bell v. Fothergill, L. R. 2 P. & D. 148; Giles v. Warren, Id. 401; Card v. Grinman, 5 Conn. 164.

74. *Disappearance of the document.*]—Evidence that a will was once in existence, and last heard of in the possession of the testator, and that it was not to be found at his death, raises a presumption that it was destroyed by him with intent to cancel it.[1] This presumption is not conclusive,[2] but it serves to throw upon the party relying on the will the burden of showing that it was not so destroyed, or that the testator was not of sound mind at the time.[3] The presumption is not to be rebutted merely by parol evidence of intent to make another will.[4] Evidence that the lost will, when last known of, was in the control of a person having adverse interest, is sufficient to sustain a finding that it was in existence at testator's death, or was fraudulently destroyed by another.[5] The fact that the testator, after being informed of the loss or destruction of his will, failed to make another, is competent but slight evidence of intent to revoke; and this presumption may be rebutted by evidence that the loss or destruction was without his agency.[6]

75. *Testator's declarations.*]—Declarations of the testator, not made in testamentary form, are not competent as principal evidence of a revocation, because the statute must be complied with;[7] but if there is direct evidence of an act of revocation, such as the statute requires, or if such an act is legally presumable, for instance, where the will cannot be found,—evidence of his declarations is competent to repel or strengthen the presumption of cancellation.[8] A declaration which is a narrative of a past act,—for instance, that he had duly revoked his will,—is incompetent, even for the purpose of proving the intent. It is only declarations forming part of the *res gestæ* which are competent for such purpose.[9] Other declarations, before or after the

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[1] Idley v. Bowen, 11 Wend. 236; Bulkley v. Redmond, 2 Bradf. 281. A principle of universal acceptance in both the English and American courts. 1 Redf. on Wills, 328 (48). It seems that the nature of the contents is material to the question whether the testator destroyed it. Per Sir J. HANNEN, Sugden v. Ld. St. Leonards, L. R. 1 Prob. Div. 176, 195.

[2] Brown v. Brown, 8 Ellis & B. 884, s. c. 92 Eng. C. L. 875. But it is more or less strong, according to the nature of the custody. Per COCKBURN, C. J., Sugden v. Ld. St. Leonards, L. R. 1 Prob. Div. 154, 218.

[3] Idley v. Bowen (above).

[4] Betts v. Jackson, 6 Wend. 173.

[5] See paragraph 78.

[6] Steele v. Price, 5 B. Monr. 58.

[7] Adams v. Winne, 7 Paige, 97.

[8] Bulkley v. Redmond, 2 Bradf. 285; Steele v. Price, 5 B. Monr. (Ky.) 58.

[9] Dan v. Brown, 4 Cow. 483; Sisson v. Conger, 1 N. Y. Supm. Ct. (T. & C.) 569; Waterman v. Whitney, 11 N. Y. 162. Per S. L. SELDEN, J. *Contra*, Youndt v. Youndt, 3 Grant's Cas. 140; Lawyer v. Smith, 8 Mich. 411. Compare Sugden v. Ld. St. Leonards, L. R. 1 Prob Div. 154; Taylor Will Case, 10 Abb. Pr. N. S. 306; Keen v. Keen, L. R. 3 P. & D. 105. Under the freer rules of evidence now administered, several important qualifications of this rule remain to be considered, viz.: Whether the *res gestæ* do not include the custody of the will from the time of execution to the testator's death, and whether his declarations characterizing his possession,—as, for instance, if he should use the will as evidence in a proceeding against the party charged

act, are not usually competent as bearing on the intent, unless the question of intent depends on unsoundness of mind or undue influence, in which case declarations not too remote in point of time are competent for the purpose of proving the state of the mental powers.[1]

76. *Subsequent testamentary act.*]—Evidence that the testator executed a subsequent will does not, without proof that its contents were inconsistent with the earlier,[2] or that its disappearance was by spoliation committed by the party claiming under the earlier will,[3] prove a revocation of the earlier. But the loss of the later will having been proved, its contents may be shown by parol, for the purpose of proving that it revoked the earlier will.[4] Extrinsic evidence cannot be received to show that the cancellation of a later will was intended to revive a former one.[5]

77. *Constructive revocations.*]—Implied or constructive revocations, such as those resulting from marriage, the birth of issue, &c., are now generally defined and limited by the statutes, the terms of which usually control the question of evidence.[6] In the

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with obtaining its execution by duress, or if he delivered it, mutilated, to counsel as being revoked, and as part of his instructions for drawing a new will, or if he should say he had made his will, pointing to the place where it would be found,—are not in all cases admissible, not as principal evidence of execution or revocation, but as material to the ambulatory existence and custody of the will and the circumstances of its production or its disappearance, and as competent on the question of intent, without connection with the testamentary act. The English rule admits the declarations of the testator to show the continuing existence of the will in his possession at the time they were made. Sugden v. Ld. St. Leonards, L. R. 1 Prob. Div. 154, 225. Per Cockburn, C. J. Another principle which will clear up much apparent conflict in the language of the cases as to restoration, is, that revocation does not result from cancellation without intent to revoke; hence, where the testator was insane or delirious when he tore or cancelled the paper (and, perhaps, when he acted under mistake as to its validity), declarations afterwards intelligently recognizing it as his will are competent; for they are not offered to prove a testamentary act. But after an intelligent revocation, a rejoining of the fragments, and a confirmation of the will, on a change of purpose, ought not to be competent. Compare Colagan v. Burns, 57 Me. 449; Patterson v. Hickey, 32 Geo. 156; Whart. Ev. § 900, and cases cited.

[1] Waterman v. Whitney (above).

[2] Nelson v. McGiffert, 3 Barb. Ch. 165, and cases cited. It is not enough that the later will be shown to be different, without showing in what the difference consists. Dickinson v. Stidolph, 11 C. B. N. S. 357, s. c. 103 Eng. C. L. 356.

[3] Jones v. Murphy, 8 Watts & S. 301; Betts v. Jackson, 6 Wend. 180.

[4] Brown v. Brown, 8 Ellis & B. 876; s. p. Matter of Griswold, 15 Abb. Pr. 299. And it has been held that an express revocation contained in it may be thus proved, although the disposing provisions are not susceptible of proof. Day v. Day, 2 Green. Ch. 549, 557; but on the contrary, where the only disposing provisions in the later will are void for undue influence, it is held that the clause of revocation alone is not sufficient evidence of the testator's intention to revoke a former will; for the presumption is, that, if the second will is found to be invalid, the testator intended that the first should stand, rather than that he should die intestate. Rudy v. Ulrich, 69 Penn. St. 177, s. c. 8 Am. R. 238.

[5] 2 N. Y. R. S. 66, § 53; 5 Centr. L. J. 397, and cases cited; 1 Redf. on W. 317 (27); *contra*, Id. (36). But it has been received to show that a later was not intended to supersede a former will. Dempsey v. Lawson, 36 L. T. N. S. 515.

[6] 2 N. Y. R. S. 64; Lathrop v. Dunlop, 4 Hun, 213; aff'd in 63 N. Y. 610. Compare Wheeler v. Wheeler, 1 R. I. 364.

absence of such a statute, or in case of a will or alleged revocation before the statute,[1] a substantial change in the situation of the testator's family or property, or both, so great as to raise new testamentary duties,[2] may be treated by the court as effecting a revocation; or if there is evidence of an equivocal act of the testator tending to show an actual intent to revoke, then a substantial change in the situation, such as might have furnished a reasonable motive for revocation, may be given in evidence to support the inference of revocation;[3] but evidence of the relative wealth or poverty of members of the family, there being no substantial change in situation, is not competent.[4]

At common law, the revocation presumed from marriage and birth of issue otherwise unprovided for, cannot be rebutted by parol evidence of intent. The question, in a court of law at least, is not of actual intent, but the revocation is a legal presumption.[5] But the presumption raised by the birth of a child, in connection with other circumstances than marriage, is not at common law conclusive.[6] Even in case of constructive revocation, republication cannot be proved by parol.[7]

78. *Action to Establish Lost or Destroyed will.*[8]]—The proof of a lost or destroyed will is one of secondary evidence exclusively; and the law accepts the best evidence that the nature of the case admits, as to its valid execution, its contents, its existence at testator's death, and its loss;[9] and is satisfied if it tend with reasonable certainty to establish those facts.[10] But the proof of the contents must be clear and cogent, though it need not always be complete.[11] To prove the existence of the will at the time of testator's death, direct evidence is not essential;[12] but if testator had access to it when last known, its existence at his death cannot

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[1] As to the time when the statute took effect on previous wills, see 4 Bradf. 447, 8 Paige, 446.

[2] Sherry v. Lozier, 4 Bradf. 450, and cases cited.

[3] Betts v. Jackson, 6 Wend. 173, 176.

[4] Id. Compare Warner v. Beach, 4 Gray, 162; Brush v. Wilkins, 4 Johns. Ch. 506.

[5] Marston v. Roe, 8 Ad. & El. 14, s. c. 35 Eng. C. L. 303; 1 Wms. Exrs. 195, 196; 1 Redf. on W. 300, n. 24; and see Bloomer v. Bloomer, 2 Bradf. 339.

[6] Sherry v. Lozier, 4 Bradf. 453.

[7] Carey v. Baughn, 36 Iowa, 540, s. c. 14 Am. R. 534.

[8] Under the statute. 2 N. Y. R. S. 68.

[9] Grant v. Grant, 1 Sandf. Ch. 235.

[10] See Everitt v. Everitt, 41 Barb. 385, 387, and Sugden v. Ld. St. Leonards, L. R. 1 Prob. Div. 154, 239.

[11] Compare, on this point, Sugden v. Ld. St. Leonards, L. R. 1 Prob. Div. 154, and Davis v. Sigourney, 8 Metc. (Mass.) 487, which exhibit the two opposing views. The true principle seems to be that entire provisions may be established, if shown to have been not dependent on nor affected by the portions which cannot be proved,—except where the proceeding is to establish the will under a statute which requires the whole to be proved. An illustration of this is the rule that the revoking clause may be proved, to defeat a prior will, although the disposing clauses are not capable of proof. See also Redf. Am. Cas. on L. of Wills, 217 n.

[12] Schultz v. Schultz, 35 N. Y. 653.

be inferred from his declarations, made a month or so previously, that he had it in his possession.[1] In such case the presumption rather is of destruction by the testator.[2] But any presumption of destruction by him, arising merely from its disappearance, is entirely rebutted by evidence that he had deposited it with another person, and did not afterward have access to it.[3]

Where actual destruction is not shown, parol evidence is not admissible until it has been proved that diligent search for the will has been made by or at the request of the party interested, at the place where it is most likely it would be found,—as for instance (if last traced to testator's possession), search among his papers at his usual place of residence.[4] The mere fact that a person having an adverse interest had opportunities of access to the will while it was in the testator's custody, does not raise a presumption of fraudulent destruction;[5] but the fact that when last known of it was in the control of such a person, may sustain that conclusion.[6] Evidence that the testator gave it into the custody of another who never parted with its possession, but locked it up, and after testator's death could not find it, is enough, for it proves either its existence at his death or fraudulent destruction in his life-time.[7] Direct evidence of actual intent to defraud any particular person, is not essential. The fraud contemplated by the statute is the unauthorized defeating of the will.[8] Evidence of fraud or undue influence, inducing the testator to destroy the will himself, is sufficient,[9] but a destruction by his direction if freely given is not enough, even though the destruction was not so performed as to amount to a revocation under the statute.[10] Unless the statute otherwise provides,[11] the contents of a lost or destroyed will may be proved by a single witness.[12] Declarations, written or oral, made by the testator, whether before, at, or after the execution of the will, are competent secondary evidence of its contents.[13]

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[1] Knapp v. Knapp, 10 N. Y. 276.
[2] Paragraph 74.
[3] Schultz v. Schultz (above).
[4] Dan v. Brown, 4 Cow. 491.
[5] It is not even enough to go to the jury. Knapp v. Knapp, 10 N. Y. 276, 280.
[6] Jones v. Murphy, 8 Watts & S. 299.
[7] Schultz v. Schultz (above), and see Hildreth v. Schillenger, 10 N. J. Eq. (2 Stockt.) 196.
[8] Id.
[9] Voorhees v. Voorhees, 39 N. Y. 463, aff'g 50 Barb. 119.
[10] Timon v. Claffy, 45 Barb. 438.
[11] N. Y. R. S. 68, § 67, requires the provisions to be "clearly and distinctly proved, by at least two credible witnesses, a correct copy or draft being deemed equivalent to one witness."
[12] Sugden v. Ld. St. Leonards, L. R. 1 Prob. Div. 154, and see Fetherly v. Waggoner, 11 Wend. 599. Even though he himself destroyed it under excusable mistake, and he is residuary legatee. Wyckoff v. Wyckoff, 1 C. E. Green, 401. That all the witnesses must be produced or accounted for,—see Thornton v. Thornton, 39 Vt. 122, s. c. 6 Am. L. Reg. N. S. 341.
[13] Sugden v. Ld. St. Leonards, L. R. 1 Prob. Div. 154, 225, 241; and see Johnson v. Lyford, L. R. 1 P. & D. 546.

79. *Foreign Will.*]—A foreign will is proved by producing in the same way as a domestic will a probate by a probate court within the State, granted either upon original proof or upon production there of an exemplified copy of a foreign probate. Ancillary probate thus granted within the State, is equivalent as evidence to original probate here.[1] The foreign exemplification, even if itself receivable in evidence, by virtue of the act of Congress,[2] and competent on the question of the rights and liabilities of the parties arising in such other State,[3] cannot be received for the purpose of affecting title to land within the State (unless expressly authorized by the statutes of the State); but if it has not been recorded in a probate court within the State, the original will must (for such purpose) be produced, or its loss accounted for so as to admit secondary evidence.[4]

80. *Ancient Will.*]—An ancient will is competent *prima facie* evidence, without probate, if it appear that the testator is dead, and that it is regular on its face, that is apparently executed with legal formalities, and is shown to have come from the proper custody, if more than thirty years have elapsed since the testator's death,[5] and if it is corroborated by other circumstances, such as the fact that possession has been continuously held under it. Mere efflux of time is not enough to dispense with proof of execution, but it is not always essential to show possession. It is enough if such account be given of it as may, under the circumstances, be reasonably expected, and as will afford the presumption that it is genuine.[6] Inability to prove handwriting should be shown.[7] If the original is lost, its antiquity and contents may be proved by secondary evidence.[8] Evidence of the acts and declarations of third persons, when in possession of the lands, are competent to prove the continued possession under the will.

X.—Extrinsic Evidence affecting Wills.

81. *Effect of the Statute of Wills.*]—The Statute of Wills, by requiring testamentary acts to be expressed and authenticated in

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[1] Bromley v. Miller, 2 Supm. Ct. (T. & C.) 575; Townsend v. Downer, 32 Vt. 183, 216; Miller v. James, L. R. 3 P. & D. 4.

[2] U. S. R. S. §§ 905, 906. In such case the recital in the record of notice of the proceedings is *prima facie* evidence that it was given, but not conclusive if jurisdiction depended on it. Clark v. Blackington, 110 Mass. 369, 374.

[3] Robertson v. Barbour, 6 T. B. Monr. (Ky.) 523.

[4] Graham v. Whitely, 26 N. J. L. 260. Whether the original is competent without such probate, depends on the local statutes. See Ives v. Allyn, 12 Vt. 589; Barstow v. Sprague, 40 N. H. 27.

[5] Staring v. Bowen, 6 Barb. 109. The appearance of the paper itself, and the date, are, in the absence of anything to raise suspicion, competent on the question of age. Enders v. Sternbergh (below).

[6] This is the New York rule. Enders v. Sternbergh, 2 Abb. Ct. App. Dec. 36, 43; Jackson v. Luquere, 5 Cow. 211. *Contra*, Merrill v. Sawyer, 8 Pick. 297.

[7] Northrop v. Wright, 7 Hill (N. Y.) 476.

[8] Enders v. Sternbergh, 2 Abb. Ct. App. Dec. 42. Jackson v. Van Dusen, 5 Johns. 144.

writing, precludes us from treating oral declarations as a testamentary act, or even as any part of such an act.[1] Every disposition which the testator makes must be embodied in a writing that conforms to the statute. Extrinsic evidence can not establish a provision shown to have been omitted by mistake, nor even supply any essential or vital part left blank, in a provision the frame of which was inserted by the testator.[2] A will may be construed in connection with another writing to which it refers;[3] but it cannot, even by expressing an intention to do so, make an unattested instrument a part of itself, so as to effect a testamentary disposition without compliance with the statutory formalities.[4]

82. *Legitimate Objects of Extrinsic Evidence.*]—Notwithstanding these restrictions, extrinsic evidence is freely admitted for certain purposes, which in a practical aspect may be defined as four, viz.: to aid in *reading*, *testing*, *applying*, and *executing* the testamentary declaration of intention.[5]

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[1] Mann v. Mann, 14 Johns. 1, affi'g 1 Johns. Ch. 231.

[2] Per SHAW, C. J., Tucker v. Seaman's Aid Society, 7 Metc. 205.

[3] Jackson v. Babcock, 12 Johns 389.

[4] Langdon v. Astor, 16 N. Y. 9; Thompson v. Quimby, 2 Bradf. 449; Clayton v. Ld. Nugent, 13 M. & W. 200.

[5] Kent's statement of the rule, in the leading American case (Mann v. Mann, 1 Johns. Ch. 281), is, "Parol evidence cannot be admitted to supply or contradict, enlarge or vary, the words of a will, nor to explain the intention of the testator, except in two specified cases; 1, where there is a latent ambiguity, arising *dehors* the will, as to the person or subject meant to be described; and 2, to rebut a resulting trust. All the cases profess to proceed upon one or the other of these grounds."

Wharton (2 Whart. Ev. § 992) lays down the rule thus: "With two exceptions, evidence of the testator's intentions is inadmissible in explanation of a will. These exceptions are as follows: (1.) What is said at the time of the execution and attestation is admissible as part of the *res gestæ*, though not to contradict the will. (2.) When it is doubtful as to which of two or more extrinsic objects a provision, in itself unambiguous, is applicable, then evidence of the testator's declarations of intention is admissible; not, indeed, to interpret the will, for this is on its face unambiguous, but to interpret the extrinsic objects."

Wigram's seven rules are (Wigr. Ex. Ev.): "I. A testator is always presumed to use the words in which he expresses himself according to their strict and primary acceptation, unless from the context of the will it appears that he has used them in a different sense; in which case the sense in which he thus appears to have used them will be the sense in which they are to be construed.

"II. Where there is nothing in the context of a will, from which it is apparent that a testator has used the words in which he has expressed himself in any other than their strict and primary sense, and where his words so interpreted are *sensible with reference to extrinsic circumstances*, it is an inflexible rule of construction, that the words of the will shall be interpreted in their strict and primary sense, and in no other, although they may be capable of some popular or secondary interpretation, and although the most conclusive evidence of intention to use them in such popular or secondary sense be tendered.

"III. Where there is nothing in the context of a will, from which it is apparent that a testator has used the words in which he has expressed himself in any other than their strict and primary sense, but his words so interpreted, are *insensible with reference to extrinsic circumstances*, a court of law may look into the extrinsic circumstances of the case, to see whether the meaning of the words be sensible in any popular or secondary sense, of which, with reference to these circumstances, they are capable.

The confusion in the cases upon this subject arises partly from the difficulty of preserving the distinction between receiving extrinsic evidence to establish the testamentary intention, which is never allowable—and receiving it to enable us to understand the intention he has expressed, which is always allowable. No extrinsic evidence to interpret the will, is admissible except as light thrown upon the words of the will; and the only intention of the testator which the court can sanction, is that which they can derive through the will itself, it may be by the aid of such light. There is a class of cases, in which direct evidence of the testator's declarations of his intention can be received, to enable us to apply a provision of the will accordingly, viz.: in cases where there are several persons or things equally answering the designation,—but these cases are not in truth an exception to the rule, for the declarations are not allowed to affect the intention, but only to show "what he meant to do;" and when we revert to the will, we may perceive from the will that he has done it by the general words used, if in their ordinary sense they properly bear that construction.[1] If, after understanding the intention, we do not find that the will has declared it with the statute formalities, the court cannot give it effect, no matter how clear may be the evidence.

83. *Reasons for its Liberal Admission.*]—In favor of the liberal application of the rule allowing extrinsic evidence, it may

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"IV. Where the characters in which a will is written are difficult to be deciphered, or the language of the will is not understood by the court, the evidence of persons skilled in deciphering writing, or who understand the language in which the will is written, is admissible to declare what the characters are, or to inform the court of the proper meaning of the words.

"V. For the purpose of determining the object of a testator's bounty, or the subject of disposition, or the quantity of interest intended to be given by his will, a court may inquire into every material fact relating to the person who claims to be interested under the will, and to the property which is claimed as the subject of disposition, and to the circumstances of the testator and of his family and affairs, for the purpose of enabling the court to identify the person or thing intended by the testator, or to determine the quantity of interest he has given by his will.

"The same (it is conceived) is true of every other disputed point respecting which it can be shown that a knowledge of extrinsic facts, can, in any way, be made ancillary to the right interpretation of a testator's words.

"VI. Where the words of a will, aided by evidence of the material facts of the case, are insufficient to determine the testator's meaning, no evidence will be admissible to prove what the testator intended, and the will (except in certain special cases, see Proposition VII.) will be void for uncertainty.

"VII. Notwithstanding the rule of law which makes a will void for uncertainty, where the words, aided by evidence of the material facts of the case, are insufficient to determine the testator's meaning, courts of law, in certain special cases, admit extrinsic evidence of *intention* to make certain the *person* or *thing* intended, where the description in the will is insufficient for the purpose.

"These cases may be thus defined,—where the object of a testator's bounty, or the subject of disposition (*i. e.*, the *person* or *thing* intended), is described in terms which are applicable indifferently to more than one person or thing, evidence is admissible to prove which of the persons or things so described was intended by the testator."

[1] Ld. Abinger in Doe ex dem. Hiscocks v. Hiscocks, 5 M. & W. 363.

be said that text writers of high authority[1] declare that the rules for the admission and exclusion of parol evidence in regard to wills are essentially the same which prevail in regard to contracts generally; and it may be further urged that the right to dispose by will is of great importance;[2] that it is commonly exercised under circumstances unfavorable to formality and exact expression; and that the court ought to have every aid that the conduct and declarations of the testator can give, to guide in ascertaining his intention.

84. *Reasons for its strict exclusion.*]—On the other hand, it is to be considered that the rules allowing parol evidence in aid of the interpretation of contracts are not fully applicable to wills, for they rest on several reasons that are foreign to these instruments. 1. A will is not a transaction *between parties*, but a silent and private act; and the principle of good faith which may bind a contracting party by what passed in conversation, does not justify disposing of the rights of heirs and next of kin by what may have fallen from their ancestor. 2. Nor is a will a grant or effective act during the testator's life, but a revocable expression of intention, made frequently under circumstances likely to involve secrecy, if not fickleness and change; and the law does not bind a man by his expressions of intention, much less by his oral declarations that he has expressed certain intentions in a revocable writing.[3] 3. It is a matter of common observation that testators are instinctively disposed to shroud their testamentary acts in secrecy, and disguise their intentions, and to baffle with equivocation or misrepresentation the importunities of the expectant and the inquisitiveness of the curious. The law regards this concealment as a right of the testator; and even positive deceit by him, however questionable morally, is not a legal wrong unless fraud is accomplished by it.[4] Therefore the testator's representations as to what he has or has not done, much more those as to what he intends, fail to afford any substantial presumption as to the testamentary act. 4. Besides this absence of reasons for admitting extrinsic evidence so freely as in cases of contracts, the objections to hearsay evidence apply in the strongest manner in many cases; and the fact that the controversy in which such evidence is offered usually arises between those who stood in very unequal degrees of personal intimacy with the testator, and that his own lips are sealed by death, render the resort to such evidence peculiarly liable to abuse, which it is the object of the statute to avoid by requiring every testamentary act to be expressed in a

[1] Redf. on W. 496; 1 Greenl. Ev. § 287. As a practical guide, this maxim would be very misleading. It would be less inexact to compare wills to statutes.

[2] See Maine's Anc. Law, 194.

[3] If the testator bound himself by a promise, it is to be enforced, if at all, as a contract. Ridley v. Ridley, 11 Jur. N. S. 475; and see 50 N. Y. 83; McGuire v. McGuire, 11 Bush, (Ky.) 142.

[4] See Stickland v. Aldridge, 9 Ves. 516.

written and authenticated will. Such considerations as these have led the courts in recent years to restrict the admission of extrinsic evidence within the limits I shall now endeavor to indicate.[1]

85. *Exceptional rule as to evidence in Rebuttal.*]—The considerations to which I have adverted, however, it will be seen do not militate against evidence impeaching or disproving the validity of the testamentary act; nor, on the other hand, against evidence tending to show that the intention was really just what is expressed on the face of the will; and hence, in this class of cases, there is peculiar practical importance in the principle of evidence, that when one party may and does attempt to prove a fact, the other party thereby acquires a right to adduce evidence to the contrary. It will be seen that the method of attack sometimes enlarges the scope of the defense, and admits evidence that the rule would exclude if offered in the first instance.[2]

86. *Extrinsic aid in Reading.*]—Whatever is necessary to possess the court with an understanding of the language or characters in which the will is written, may be supplied by extrinsic evidence;[3] and it will readily be seen that the principle is the same, whether the difficulty in reading the will arises from the fact that it was written in a foreign language, or a peculiar dialect, or from the fact that the testator habitually used words of the common language in a peculiar way, or used characters and hieroglyphics instead of the common notation of language. But the competency of the evidence consists not in its showing what testator intended in this particular case,[4] but in showing what his habitual speech and notation were, leaving the court, in the light of this fact, to read the will and ascertain thence what his intention was.[5] Accordingly, if a will is written in a foreign language or in short-hand or cipher, it may be translated by competent evidence;[6] if it contains terms which the writer habitually used in a peculiar sense, that habit can be shown;[7] if it contains terms

[1] Earlier cases, and not a few later ones founded on earlier rulings, admit such evidence more freely, and it will not be difficult to find cases to the contrary of some of the propositions stated in the text in this connection, but I confine myself to a statement of the rule, and a selection of cases illustrating it, as now administered in the courts of highest authority.

[2] Where one party proved the nature of a transaction with the testator to affect the construction or application of the will,—*Held*, that the other might give testator's declarations to the contrary, in evidence, by way of contradiction. Denio, J., Tillotson v. Race, 22 N. Y. 127.

[3] See Wigram's 4th proposition above, p. 130, note.

[4] Id.

[5] Hence neither the testator's declarations of what he meant, nor the testimony of the draftsman as to the meaning of the clause, is competent (1 Redf. on W. 535 § 50, and cases cited); nor is a letter to the testator from his solicitor (Wilson v. O'Leary, L. R. 7 Ch. App. 448, s. c. 2 Moak's Eng. 342.)

[6] Clayton v. Ld. Nugent, 13 Mees. & W. 200.

[7] Per Bradford, J., Hart v. Marks, 4 Bradf. 163; Doe *ex dem* Iliscocks v. Hiscocks, 5 Mees. & W. 363.

with which, as a member of a particular trade or calling, he was familiar, or language which has a provincial or local meaning,[1] persons acquainted with the meaning of the words may be received as witnesses to translate or define them. If he was accustomed to designate a person by a short name, such as the surname alone,[2] or the baptismal name alone,[3] or a pet name;[4] or habitually to misname the person through confusing several names,[5] or to use abbreviations or a cipher,—as, for instance, a private price mark for goods in his business,[6]—and such names or characters appear in his will, they may be explained by evidence of his usage. But extrinsic evidence of what testator intended by using initials or ciphers in a bequest, as distinguished from evidence of what it was his common habit of speech or writing to use them for, is not admissible.[7] Another important, but not very well defined qualification of this rule exists in respect to those technical legal words to which the law fixes a definite legal meaning, such as "next of kin." Such meaning cannot be varied by parol. And a contradiction in terms of legally settled import appearing on the face of the will, must be settled by rules of interpretation, without resort to extrinsic evidence.[8]

87. *Alterations.*]—When the question is not foreclosed by a conclusive probate,[9] extrinsic evidence is competent within certain limits, and sometimes necessary, to explain alterations in the original will. Unattested alterations in a will are not, as in case of a deed presumed to have been made before execution.[10] It has been usually said that in the absence of evidence there is a presumption that an unattested alteration appearing in a will was made after its execution.[11] It more accurately represents the present practice to say that the burden is upon him who asserts the alteration to be valid, to give some evidence from which it

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[1] Ryerss v. Wheeler, 22 Wend. 152, and cases cited.

[2] Clayton v. Ld. Nugent, 13 Mees. & W. 200, 207.

[3] Wigr. by O'Hara, 139.

[4] 1 Redf. on W. 630.

[5] Lee v. Pain, 4 Hare, 251, approved in Jarman, 3d ed. vol. 1, 392, but questioned by Redfield, 1 Redf. on W. 632.

[6] Viell v. Charmer, 23 Beav. 195.

[7] The distinction is well exhibited thus: A bequest to Lady ———, is void, and the blank cannot be supplied by extrinsic evidence (Hunt v. Hort, 3 Bro. C. C. 311). But a bequest to ——— Page may be sustained in favor of a person of that name on evidence that testator was accustomed to call him "Page" (Price v. Page, 4 Ves. 679, and see Miller v. Travers, 8 Bing. 244, and cases cited). Thus where the beneficiaries were only indicated by initials and blanks, and there was pasted into the will at time of attestation a slip referring to a card in his desk, as constituting a key to the significance of the initials, and the only card found was dated long after the will, and not proven to be a copy, but proven to have a general resemblance to a card seen lying with the will,—*Held*, that the key was not admissible and the bequests were void (Clayton v. Ld. Nugent, 13 Mees. & W. 200).

[8] Weatherhead v. Baskerville, 11 How. U. S. 329.

[9] See paragraph 60.

[10] 1 Redf. on W. 314–316 (23).

[11] Rosc. N. P. 160; 2 Whart. Ev. § 897; Steph. Dig. Ev. art. 89.

may be inferred that it was made before execution,[1] unless it may be inferred that such was the case from the face of the document.[2] The time when the alterations were made may be shown by proving the declarations of the testator, whether uttered at the execution of the will, or before it, even by way of expression of an intention which would be defeated by disregarding the alteration.[3] The testimony of a subscribing,[4] or other eye witness, is of course competent; and so is the opinion of an expert.[5] The testimony of an eye witness is of more weight than that of experts.[6] In the absence of other evidence as to when the alterations were made, the fact that dates prior to that of the will were affixed to some of them by the testator is not sufficient to show that they were made before execution.[7] Alterations may be effectual although made only in pencil.[8] But where there are both pencil and ink interlineations, and some of the penciled words are under the words in ink, but extend beyond them, with additional provisions, the inference may be drawn that as the ink superseded some, it was intended to supersede all of the penciled words, and that the latter were merely deliberative.[9] Where a testator has entirely erased the name of a legatee, and substituted another name in its place, with intent to revoke only by substitution, evidence will be received to show what the original name was.[10]

88. *Mistakes.*]—The court may correct obvious clerical mistakes appearing on the face of the will;[11] but the only case in

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[1] Goods of Sykes, L. R. 3 P. & D. 26, s. c. 5 Moak's Eng. R. 521, and cases cited.

[2] As, for instance, where an interlineation consists of words necessary to complete the sense, and apparently written at the same time and with the same ink. Goods of Cadge, L. R. 1 P. & M. 548. Another instance is the correction of an absurdity. If the question arises on the face of the paper alone, the question is usually for the jury. See Van Buren v. Cockburn, 14 Barb. 118.

[3] Goods of Sykes (above); 1 Wms. Exrs. 6 Am. ed. 411; Dench v. Dench, 25 Weekly R. 414. Compare 2 Whart. Ev. 252, § 1008.

[4] Charles v. Huber, 78 Pa. St. 448.

[5] *Re* Hindmarch, 1 L. R. Prob. 307, s. P. Dubois v. Baker, 30 N. Y. 355, aff'g 40 Barb. 556. Compare Sackett v. Spencer, 29 Barb. 180.

[6] Testimony of one who drew a will and saw it executed, that it has not been altered, outweighs testimony of many who speak only from an inspection of the paper, as produced. Malin v. Malin, 1 Wend. 625.

[7] Goods of Adamson, L. R. 3 Prob. & Div. 253, s. c. 14 Moak's Eng. 704. The presumption that sheets bound together and constituting a will, as found in the testator's desk, were so bound together at the time of the execution, is not necessarily rebutted by the fact that the numbering shows that one of the original sheets had been removed and another of them transposed into its place. Rees v. Rees, L. R. 3 P. & D. 84, s. c. 6 Moak's Eng. 365.

[8] Matter of Tonnelle, 5 N. Y. Leg. Obs 254; but see 12 Barb. 595.

[9] Goods of Adams, 2 Moak's Eng. R. 151.

[10] Goods of McCabe, L. R. 3 P. & D. 94, s. c. 6 Moak's Eng. 372 and cases cited.

[11] Thus "and" may be read "or," and conversely. Jackson v. Blanshan, 11 Johns. 54, and other cases in 2 Abb. N. Y. Dig. (2d ed.) 669; 6 Id. 178, 181. "May leave," may be read "may have." Dubois v. Ray, 35 N. Y. 162, s. P. in L. R. 16 Eq. 239, "Reviving," may be read "surviving." Pond v. Bergh, 10 Paige, 140. "Preparatory meeting," in the designation of the donee, may be read "preparative meeting," that being in the true name of the only claimant. Dexter v. Gardner, 7 Allen, 245.

which extrinsic evidence is clearly admissible to correct an error by substituting something necessary to be inserted, is in respect to an error of the date.[1]

89. *Extrinsic aid in Testing validity.*]—In practice, all the questions involved in the validity of the instrument are usually tested upon probate, as we have seen. It will suffice here to observe that when the question of validity is not concluded by the probate, the same evidence is competent as would be in a proceeding for probate; and also that when the instrument as a whole is not impeached, it is still competent to show that a particular part of it was not the testator's will; as, for instance, that a clause was interlined by another hand without authority,[2] or that a particular part was inserted through undue influence,[3] or that a sheet was not in the will at the time of its execution.[4] But due execution is presumptive evidence that the testator knew the contents of the will, and that it conforms to his intentions;[5] and it is not competent to show that he acted under a mistake or forgetfulness of fact as to persons or property, for the purpose of inferring that he would not have intended a certain express gift if he had been rightly informed.[6] Nor can it be shown that he gave different instructions as to the clause to be inserted, and executed the instrument in ignorance of the draftsman's mistake.[7] And even if it be admissible to show that he intended a clause not to take effect except in a certain contingency,[8] this cannot be done by proving that he gave instructions to have it drawn in one way, and that it was drawn and executed in another.[9] Unless words have been inserted in a will by fraud or mistake, without the testator's knowl-

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[1] Goods of Thomson, L. R. 1 Pr. & M. 8; Reffell v. Reffell, Id. 139. Where the attorney, drawing the codicil, intended to conclude the codicil with a paragraph, "in all other respects, I confirm my said will," but by mistake wrote "revoke" instead of "confirm," and in this State the codicil was executed,—it was *held* that parol evidence could not be received to correct the mistake. *In re* Davy, 5 Jur. N. S. 252, s. c. 1 Sw. & Tr. 262; 1 Redf. on W. 592, § 25. On the contrary, where the fourth codicil revoke the three previous codicils, and a fifth codicil purported to confirm the four codicils,—*Held*, that extrinsic evidence was admissible to show that four meant fourth. Goods of Thomson, L. R. 1 Pr. & M. 8. See Hart v. Tulk, 2 De Gex, M. & G. 300, where, on extrinsic evidence of the situation of the family and property, the court, in order to set right what appeared to them to be an obvious clerical error, held that the words "fourth schedule" in a will should be read as if they were "fifth schedule."

[2] Doe v. Palmer, 16 Q. B. Ad. & E. 747; Charles v. Huber, 78 Pa. St. 448.

[3] Ld. Trimlestown v. D'Alton, 1 Dow. & Cl. 85; Florey v. Florey, 24 Ala. 241.

[4] See Miller v. Travers, 8 Bing. 244.

[5] 1 Redf. on Wills, 3d ed. 536, § 57. The fact that a capable testator read or heard read the provision before attesting it, cannot be countervailed by the testimony of the scrivener that he inserted it by inadvertence, and without instructions. Guardhouse v. Blackburn, L. R. 1 P. & M. 109.

[6] Jackson v. Sill, 11 Johns. 201. See Gifford v. Dyer, 2 R. I. 99; Allgood v. Blake, L. R. 8 Eq. 160. Compare Crossthwaite v. Dean, 5 Id. 245.

[7] 1 Redf. on W. 604, n., 2 Whart. Ev. 240, § 995.

[8] Lister v. Smith, 3 Sw. & Tr. 282.

[9] Ordway v. Dow, 55 N. H. 12.

edge, the court cannot correct the error either by omission or insertion of words.[1]

90. *Rebutting evidence.*]—But wherever extrinsic evidence is admitted to negative the genuineness of the testamentary act, extrinsic evidence is admissible to affirm it; and for this purpose even the testator's declarations of intention may be received. They are not in this case adduced to eke out a testamentary act insufficient under the statute; but merely to show that the sufficient expression of intention contained in the will was genuine.

91. *Extrinsic aid in Applying.*]—It is a familiar rule that, in order to understand the intention of the testator, for purposes of construction, we must advert to his situation at the time of making the will, and consider such circumstances as the number of his family, the different kinds of property which he had, &c.;[2] and a general and pervading obscurity in a will drawn by an illiterate person, is justly regarded as strengthening the reason for receiving extrinsic evidence of the circumstances of the testator and his family, and the claims on him of a legatee whose gift is ambiguous.[3]

The principles which regulate the competency of extrinsic evidence for this purpose, are the same whether the question relates to the subject or to the object of the gift; and the decisions under either class of cases are applicable to the other.[4] But for greater practical convenience the competency of evidence to identify the object of the gift, that is to say the beneficiary, will first be explained.

92. — *in identifying the Person.*]—It is not essential that a legatee or devisee be *named;* a reference by which he may be ascertained when the time comes is enough; and then extrinsic evidence is competent to identify him.[5] If the whole designation used in the will to indicate the person, whether of a beneficiary or an executor, applies with exactness to one claimant, extrinsic evidence, no matter how persuasive, is not admissible for the purpose of showing that some other one, to whom it does not accurately apply, was the person intended.[6] And if a beneficiary is

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[1] Wallize v. Wallize, 55 Pa. St. 242. So held in a Court of Probate. Harter v. Harter, L. R. 3 P. & D. 11, s. c. 5 Moak's Eng. 508.

[2] Doe v. Provoost, 4 Johns. 61; Shulters v. Johnson, 38 Barb. 80.

[3] Terpening v. Skinner, 30 Barb. 373. See a further decision in 29 N. Y. 505; Doe v. Provoost, 4 Johns. 61.

[4] American Bible Society v. Pratt, 9 Allen, 11, and cases cited.

[5] Holmes v. Mead, 52 N. Y. 332.

[6] Tucker v. Seaman's Aid Soc. 7 Metc. 188; 1 Redf. on W. 613, § 41. Thus where the executor named was but twelve years old, the court refused to receive parol evidence that testator intended to name the lad's father, whose name was, with the exception of a part of the middle name, identical with the son's. Goods of Peel, L. R. 2 Pr. & M. 46.

once adequately and accurately named or described in the will, this is conclusive; and if the same name is mentioned a second time in the same instrument without any description other than "said," extrinsic evidence is not admissible to show that a different person was intended the second time.[1] Where the second reference is not thus identified, but is so expressed that it may be referred to either of two persons previously named, extrinsic evidence is admissible to remove the ambiguity, and for this purpose the testator's declarations are competent.[2]

93. — *in case of names of relationship.*]—*Prima facie* the word "children" means legitimate children.[3] There must be clear evidence to establish another application of the word.[4] Hence, under a bequest to testator's "children," "nephews," &c., without anything on the face of the will to show a different intent,[5] none but the testator's own and legitimate children or nephews can take, if such there are. But extrinsic evidence is admissible to show that there are none such, and that he was never married, but left illegitimate offspring, and that he recognized them as his children.[6] So, also, of illegitimate nephews. In like manner evidence is admissible that the only nephews and nieces in the family were those of testator's wife.[7] Where the words of relationship such as "children," "cousin," &c., are used with nothing in the will, read in the light of surrounding circumstances, to show that a broader meaning is intended[8] than the ordinary meanings, such as legitimate sons and daughters, first cousin, &c., independent extrinsic evidence, having no connection with the words of the will, cannot be received to enlarge the import.

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[1] Webber v. Corbett, L. R. 16 Eq. 515, s. c. 6 Moak's Eng. 841. Thus, where testator in one clause gave the personal property on his farm to "William, Samuel, *Benjamin* and James; in another clause gave the farm to Samuel, William and James" (not naming Benjamin), and in the next clause gave other lands "to the said last-named Samuel, William, *Benjamin* and James,"—*Held*, that the ambiguity, if any, was patent, and could not be aided by parol evidence of testator's declarations of intention to give a share of his farm to Benjamin, and his instructions to the draftsman to include him. Hyatt v. Pugsley, 23 Barb. 285.

[2] Doe v. Needs, 2 M. & W. 129; Doe v. Morgan, 1 C. & M. 235.

[3] Cromer v. Pinckney, 3 Barb. Ch. 466.

[4] Hill v. Crook, R. R. 6 H. of L. 265, s. c. 7 Moak's Eng. 1.

[5] Brower v. Bowers, 1 Abb. Ct. App. Dec. 214.

[6] Gardner v. Heyer, 2 Paige, 11; Laker v. Hordern, L. R. 1 Ch. Div. 644, s. c. 16 Moak's Eng. 672; 34 L. T. N. S. (Ch. D.) 88. Compare Lepine v. Bean, L. R. 10 Eq. 170.

[7] Sherratt v. Mountford, L. R. 8 Ch. App. 928, s. c. 7 Moak's Eng. 479. In such case evidence of his ill-feeling toward them, or other circumstances rendering it improbable that he intended them, was held not admissible. Id. If the bequest to children refers to those of another than testator, there must be evidence that he knew there were illegitimate children and none other, and that they, in their reputed character, would answer the description, in order to enable them to take. *In re* Herbert, 6 Jur. N. S. 1027; and see 1 Sm. v. Giff, 126.

[8] Redf. on W. 658; Brower v. Bowers, 1 Abb. Ct. App. Dec. 214.

94. — *in case of Corporate Designation.*]—It is not essential that a corporation be designated by its legal corporate name. It may be designated by the name by which it is usually or popularly called or known, or by a name by which it was known and called by the testator, or by any name or description by which it can be distinguished from every other corporation; and when an other than the corporate name is used, the circumstances to enable the court to apply the name or description to a particular corporation, and identify it as the body intended, and to distinguish it from all others and bring it within the terms of the will may, in all cases, be proved by parol.[1]

95. — *applying Erroneous designation.*]—If it be once shown by extrinsic evidence that there is no person in existence who exactly and fully corresponds with the designation or description used in the will to indicate the donee, extrinsic evidence is then admissible to ascertain to whom the designation points,[2] and for this purpose it is competent to adduce evidence of the circumstances and habits of the testator, and the state of his family at the time he made the will, so as to put the court in the position of the testator, in order to ascertain the bearing and application of the language which he has used, and whether there exists any person to whom the whole description given in the will can be with sufficient certainty applied.[3]

96. — *rejecting False Words.*]—Where a designation otherwise correct, contains words which are false or inapplicable to the

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[1] Lefevre v. Lefevre, 59 N. Y. 434, rev'g in part 2 Supm. Ct. (T. & C.) 330; First Parish in Sutton v. Cole, 3 Pick. 237, and cases cited.

[2] Hart v. Marks, 4 Bradf. 161.

[3] Charter v. Charter, L. R. 7 H. of L. 364, s. c. 12 Moak's Eng. R. 1, affi'g 1 Moak's Eng. 249; Thomas v. Stevens, 4 Johns. Ch. 607. Thus, by the aid of parol evidence, the American Bible Society, the American Tract Society, the General Synod of the Reformed Protestant Church, the New York State Colonization Society, and the American Seaman's Friend Society, respectively were allowed to take bequests of a residue expressed thus, to the treasurers of the following societies: "Am. Bible, Tract, Synods, Board of Missions, Domestic Missions, N. Y. Colonization, and Seaman's Friend." Hornebeck v. American Bible Society, 2 Sandf. Ch. 133. The "Boston Asylum and Farm School for Indigent Boys," was enabled to take a bequest expressed to be to the "Boys' Asylum and Farm School," there being no other claimant. Minot v. Boston Asylum, 7 Metc. 416. So the First Congregational Society in A. may take a bequest to "The Congregational Society of A.," it appearing that at the date of the execution of the will there was no other such Society in A., and there being no other claimant. Howard v. Am. Peace Soc. 49 Me. 297. So the "Preachers' Aid Society of the Maine Conference of the Methodist Episcopal Church," may take a bequest to "the Maine Methodist Conference Ministers' Aid Society," if the circumstances indicate that this and no other Society was intended, there being no other claimant. Preachers' Aid Soc. 45 Me. 552. The testator who lived in C., made bequests "to the Presbyterian Church in C.," "to the Methodist Church in C.," and "to the Baptist Church," not adding in C.: *Held*, that the former gifts were sufficient, there being one of each such churches in C., but in the absence of anything to identify the Baptist Church with that in C., the latter was void for uncertainty. Lefevre v. Lefevre, 2 Supm. Ct. (T. & C.) 341. In this case no evidence whatever was given on the trial as to the usage of the testator, in speaking of the Baptist Church or Society.

claimant, the false or inapplicable part may be rejected, if enough remain, in the light of competent extrinsic evidence, to identify the donee. The origin of the rule seems to have been in rejecting a false description added to a correct name, but the rule is not confined to this class of errors. It is not the rule that the name controls the description, in the absence of evidence.[1] The name may be rejected as false, leaving the description to control.[2] Upon the same principle evidence is competent that the testator was accustomed to call a person by the name used in his will, which is not the true name,[3] or even by a name which the scrivener mistook by similarity of sound for that written in the will, and to which no other person answers.[4] Evidence of other acts of beneficence shown to the claimant by the testator while living is competent;[5] so is evidence of a bequest to him in a prior will of the same testator,[6] and evidence of a general belief in the family[7] that the testator was his godfather.[8] Where one person answers to the name only, and another to the description only, without anything in the will to decide the question, there must be competent extrinsic evidence supporting the application to one in preference to the other, or the bequest will be void for uncertainty.

97. — *adverse claimants.*]—We have thus far been considering chiefly cases where there is but one claimant, the question being whether that claimant shall take, or the gift fail for uncertainty. Where the only claimant is a natural person, designated inexactly or incompletely by name, it is incumbent on him to give some evidence tending to show that no other person of the name is entitled; but where the only claimant is a corporate

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[1] Drake v. Drake, 8 Ho. of L. Cas. 178. In this case the draftsman's testimony to his instructions, was excluded as incompetent. Compare Gillett v. Gane, L. R. 10 Eq. 29; Doe v. Roast, 11 Jur. 99; Farrar v. St. Catherine's Coll. L. R. 16 Eq. 19; Nunn's trusts, L. R. 19 Eq. 331, Camoys v. Blundell, 1 H. of L. Cas. 786.

[2] Thus, in a bequest to "my brother John," the word "John" might be rejected on proof that the testator had but one brother, James. In a bequest to "my brother Cormac," described elsewhere in the will as the father of testator's nephew Cormac, the name Cormac was rejected, and the legacy awarded to testator's brother James, the father of the nephew Cormac, on proof of these facts, and that the only other brother of testator was dead, and so believed by testator to be. Connolly v. Parden, 1 Paige, 291.

[3] Hart v. Marks, 4 Bradf. 161.

[4] Beaumont v. Fell, 2 P. Wms 141; 2 Phil. on Ev. 729, n. 2. If there were a claimant answering the mistaken description such evidence would not be competent.

[5] Price v. Paige, 4 Ves. 679.

[6] *In re* Gregory, 11 Jur. N. S. 634.

[7] Id.

[8] Wagner's Appeal, 43 Penn. St. 102. And in New York it has been held competent to prove testator's declarations at the time of executing the will, and adduce the testimony of the draftsman to his instructions, and a mistake in engrossing which caused the inapplicability of the description. Exp. Hornby, 2 Bradf. 420. But see Charter v. Charter, above cited, where it was held that evidence of the declarations of a testator as to whom he intended to benefit, or supposed he had benefited, can only be received where the description of the legatee, or of the thing bequeathed, is equally applicable in all its parts to two persons, or to two things.

body, not precisely, but nearly, answering to the designation in the will, it cannot be assumed without some proof that there is or has been any other institution bearing a name or description similar,[1] unless the designation is matter of description, by words judicially known to be applicable to many such bodies.[2] But if the question is which of two adverse claimants are entitled, the rules of evidence differ materially. Where the name and description lead to a reasonable belief that they apply to some one person, and there is no other person to whom they can with any probability apply, then slight evidence will be sufficient to prove that that person was intended by the designation. But if, with such proof in favor of one, there is similar or stronger proof identifying another, then the claim of the former, though such that, if it stood alone, it would be *prima facie* proved, is controlled by the claim of the other, who is more precisely identified.[3] In the case of adverse claimants of the same gift, the following rules apply:

1. If one (being competent to take) alone precisely answers the whole designation of the will,[4] or is identified by the context,[5] extrinsic evidence that the other was intended is incompetent.

2. If both precisely answer the whole designation and indications of the will, a latent ambiguity or "equivocation" is presented, and extrinsic evidence is competent; and in this class of cases direct evidence of the testator's intention, even by proving his declarations of purpose, is admissible.

3. If neither precisely answers the designation and indications of the will, but both do so approximately, this is also a case of latent ambiguity, admitting extrinsic evidence; and in this class of cases, too, according to the better opinion, the testator's declarations of intent may be proved.

A latent ambiguity is made out within these rules, not only where there is a legal *name* which fits several, but equally where there is a description only,[6] or a name used in common parlance,[7]

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[1] SHAW, C. J., Minot v. Boston Asylum, &c. 7 Metc. 419.

[2] See Le Fevre v. Le Fevre, cited in note 3, p. 138.

[3] SHAW, C. J., Minot v. Boston Asylum, &c., 7 Metc. 418, a. p. Kilvert's Trust, L. R. 7 Ch. 170.

[4] Extrinsic evidence is admissible to show that the P. E. "church" in N., in a bequest, means the incorporated "Society" of that name, which is proven to be usually and popularly called the church, and not the "church" strictly so called, which is unincorporated, and consists of the communicants united in connection with the society. Ayres v. Weed, 16 Conn. 291. But, where testator's brother, Mark Ingle, had died, leaving a son of the same name, who was abroad, and in fact living, but whom testator had been led to suppose, shortly before making the will, was dead, and testator gave a share to the children "of my late nephew, Mark Ingle,"—*Held*, that evidence of intention to give to his late brother was not admissible. Ingle's Trusts, L. R. 11 Eq. 578.

[5] Per McCOUN, V. C., Smith v. Smith, 1 Edw. 191.

[6] Brewster v. McCall, 15 Conn. 292; Button v. Am. Tract Soc. 23 Vt. 350.

[7] Ayres v. Weed, 16 Conn. 300.

or a name which fits one claimant only, coupled with a description which fits the other only,[1] or a designation which without rejection of some terms is false in application.[2] But in applying these rules, the principle is to be kept in mind that if the one claimant is designated with substantial accuracy, and by extrinsic evidence it appears that there is another claimant answering less nearly to the designation, evidence of intention is not competent.[3] But, on the other hand, if the designation is substantially imperfect in its application to each, the court is not bound to determine in favor of the one that most nearly answers it, but extrinsic evidence is admissible.[4]

98. — *circumstantial evidence of intention.*]—For the purpose of identifying the intended donee, it is competent to prove the circumstances of his relations and dealings with the testator, and the testator's habits of conduct and kindness to him.[5] The fact that testator was intimately acquainted with one, and but little known to the other, of two who are equally near to a mistaken designation, sustains a presumption of fact, that he intended the former.[6] So of the fact that one was nearer of kin to him than the other.[7]

99. — *case of gifts to Charities.*]—To identify the society which the designation in the will intends, the appropriate evidence includes such facts as the testator's knowledge or ignorance of the society in question,[8] his visits to its institution or field of labor, and the fact that he conversed about it before making his will,[9] the facts that he expressed a strong interest in it in con-

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[1] Drake v. Drake, 8 Ho. of L. C. 178.

[2] See Still v. Hoste, 6 Madd. 192, well explained in 1 Redf. on W. 627, n.

[3] In such a case, evidence of testator's knowledge of the latter, and ignorance of the former, and that his instructions named the latter, but the draftsman, under mistake as to the true name, prevailed on him to insert the former name, meaning to designate the other, is not competent to establish the claim of the latter, even though the designation would enable the latter to take, if the former were not named. SHAW, Ch. J., Tucker v. Seaman's Aid Soc. 7 Metc. 209.

[4] Ld. PENZANCE, Charter v. Charter L. R., 2 P. & D. 315, 324, s. c. 1 Moak's Eng. 249, 259. Where, however, the designation is adequate for either of several societies, some of which are capable of taking, and others not, there is a presumption that the testator intended one of the former rather than the latter. Brewster v. McCall, 15 Conn. 294.

[5] Above, paragraph 96.

[6] Smith v. Smith, 1 Edw. 192; Careless v. Careless, 1 Merw. 384, s. c. 19 Ves. 601.

[7] Smith v. Smith (above).

[8] Howard v. Am. Peace Soc. 49 Me. 298. Thus, the "American Board of Commissioners for Foreign Missions" may take a bequest to "The Congregational Foreign Missionary Association," on proof that it was the only Foreign Missionary Society identified with the "Congregational" churches, and that the testator knew of, spoke of, and contributed to it, alone, and desired to make a bequest to it but did not know its corporate name; and although Baptist and Methodist churches had foreign missionary societies, and the Baptist churches are in organization congregational, and although there was also an American Missionary Association engaged in connection with Congregational churches in missions at the South. Id.

[9] This was in effect fully determined in Le Fevre v. Le Fevre, N. Y. Ct. of App. Cas. 1875.

versation[1] or in letters,[2] or expressed a preference for it over other similar agencies,[3] that he subscribed to its funds,[4] or had made a special gift to it,[5] or that the church he attended was accustomed to take a contribution for it;[6] that he had been an officer of the society or one of its auxiliaries,[7] or that his religious sentiments accorded with those of the society.[8]

100. — *or Misnomer.*]—Upon a question of misnomer, both the usage of the testator in speaking of the society,[9] his ignorance of its true name,[10] and the common usage of the public, are com-

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[1] Button v. Am. Tract Soc. 23 Vt. 349.

[2] Hornbeck v. Am. Bible Soc. 2 Sandf. Ch. 133.

[3] Button v. Am. Tract Soc. (above). It was there held that "The American Tract Society" might take, as against "The American Home Missionary Society," a bequest to "The American Home Mission Tract Society for our Western Missions," on extrinsic evidence that testator was acquainted with the objects and operations of the Tract Society; that those operations were mainly confined to the Western States; that he took a lively interest in it, contributed to its funds, and expressed a preference for it over other charitable institutions.

[4] Kilvert's Trust, L. R. 7 Ch. 170, modifying L. R. 12 Eq. 183; Am. Bible Soc. v. Wetmore, 17 Conn. 186.

[5] Hornbeck v. Am. Bible Soc. (above).

[6] Am. Bible Soc. v. Wetmore (above). In that case it was held that "The American Board of Commissioners for Foreign Missions" might take a bequest to "The Foreign Mission Society," upon extrinsic evidence that it was commonly known by that name to the testatrix and the members of the church to which she belonged, and that she was friendly to its objects and a contributor to it.

In Howard v. Am. Peace Soc. (49 Me. 298), to show that "The American Board of Foreign Missions" was intended by a bequest to the "Congregational Foreign Missionary Society," evidence was received and relied on by the court, that testator, before making his will, knew of its existence as a society gathering donations from Congregational churches and their members, for foreign missions, so far that a periodical collection was taken therefor in the Congregational churches in proximity to which he resided; that testator expressed a desire to make a bequest to it, speaking of it in contradistinction to certain Methodist and Baptist Societies; and he gave instructions for such bequest, but that neither he nor his draftsman knew its corporate name.

[7] Brewster v. McCall, 15 Conn. 294.

[8] Id.

[9] Evidence that the testator, in speaking of the affairs of the society (a religious corporation in contradistinction from the church in connection with which it was organized), always called it "the church," is admissible for the purpose of ascertaining which body should take a bequest to "the church." Ayres v. Weed, 16 Conn. 290.

[10] In The Trustees, &c. v. Peasley (15 N. H. 317), the bequest was to "The Franklin Seminary of Literature and Science, Newmarket, N. H.", and again "to said Franklin Seminary." It appeared that the school was at South Newmarket, in the town of Newmarket, and known by the name of "The Franklin Seminary of Literature and Science," but before the will was made the name was changed by incorporation to "The Trustees of the South Newmarket Methodist Seminary." There was only one public school at Newmarket, and this was taught by and under the control of Methodists, although it does not appear that it was a sectarian school. The testator was a Methodist clergyman, and once asked another Methodist clergyman to what institution he should make a donation, and was told "The Franklin Seminary at South Newmarket." This name was written down by the testator's wife, at his request, and placed by him in his pocket-book. The court say, "The evidence tends strongly to show that he did not know that the name of the school had been changed. He inquired how the school at South Newmarket prospered, and often spoke about it. Now, these facts clearly show that the testator had in his mind the school which was after-

petent; and for the latter purpose, it is competent to prove that correspondents of the institution frequently addressed it by the name used in the will; and an officer of the society or other witness cognizant of the facts may be asked to state generally how it is designated in their correspondence, circulars, and advertisements; and how it was commonly called by persons having dealings with it.[1]

101. — *direct evidence of intention.*]—Some of the English decisions[2] declare that direct evidence of intention is inadmissible, unless the two claimants whose description by extrinsic evidence creates the ambiguity answer the designation of the will with an *equal* degree of accuracy; and although the better opinion is as I have stated it above, yet, except in such cases, it is the safer practice, in jurisdictions where the rule is not settled, to rely on evidence of testator's situation and relation to the claimants, and his usages of speech in regard to them, if these are sufficient, rather than on direct evidence of his intention. Of course, where direct evidence of intention is admissible, any fact or circumstance which, from experience or observation, may fairly be presumed to have had an influence on his mind in inducing him to prefer one of the persons described by him to another, is admissible to prove his intention.[3]

102. —*aid in applying to the Property intended.*]—The same principles which regulate the resort to extrinsic evidence to aid in applying the language to the person, regulate it in applying the language to the property. Extrinsic evidence is not admissible to change a specific and explicit designation of the property given in the will, so as to substitute a different subject, although part of the description be equally applicable to either piece of property;[4] and it cannot be made admissible even by showing that the testator did not own the parcel designated in the will, and did own another, and that the draftsman made the mistake,—for instance, to show that he designated the west half instead of the east half, or section 1 instead of section 2.[5] Nor can an ex-

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wards incorporated by its present name. What its peculiar designation was, must have been indifferent to him, for it was the institution, by whatever name it was known, which he desired to patronize and benefit."

[1] Lefevre v. Lefevre, Cas. in N. Y. Ct. of App. 1875.

[2] See Doe *ex dem.* Hiscocks v. Hiscocks, 5 Mees. & W. 363; Charter v. Charter, L. R. 7 H. of L. 564, s. c. 12 Moak's Eng. 1, affi'g. s. c. 1 Moak's Eng. 249, and cases cited. The English cases are not, however, consistent in confining the admission of direct evidence of intention to cases where it fits both persons or subjects with precisely equal accuracy or appropriateness. Earlier cases held that in any latent ambiguity or misdescription, though there be only one claimant or subject, evidence of declarations of intent is admissible, especially if made at the time of making the will. Trustees v. Peaslee, 15 N. H. 330, and cases cited.

[3] Ayres v. Weed, 16 Conn. 200.

[4] Robinson v. Williams, 1 Weekly Notes (Pa.), 337.

[5] Fitzpatrick v. Fitzpatrick, 36 Iowa, 674, s. c. 14 Am. R. 538, and cases cited; Kurtz v. Hibner, 55 Ill. 514, s. c. 8 Am. R. 665, 669. But see criticisms on this doctrine in 10 Am. L. Reg. N. S. 94, 353, and see 1 Redf. on W. 584 (11), and cases cited. In some such cases, the false word or number may be rejected.

plicit and sufficient designation be enlarged by extrinsic evidence that the testator meant more than the words will bear; for instance, that by "moneys" he meant to pass choses in action, securities,[1] etc.

103. — *identifying the property.*]—If the subject of the bequest is indicated in the will by words which do not have a fixed legal meaning, and especially words which refer to extrinsic circumstances,—for example, a devise of "the home and garden I now live in,"—the meaning is to be ascertained by evidence explaining what were those extrinsic circumstances,[2] at the time referred to in the will,[3] and *a fortiori*, if the designation bears no sufficient signification to a reader unaided by extrinsic evidence—for example, a devise of "all my back lands,"—evidence is admissible of the declarations of the testator before and after the making of the will, showing his habit in the use of such expression, and what property he was accustomed to designate in this way.[4] Upon this principle, evidence that he and his steward were accustomed to call the estate by the name used in the will, and their entries of that name in their accounts, are competent.[5] And as a general principle, if the subject of the bequest is described by reference to an extrinsic fact, extrinsic evidence is competent to show what was intended.[6]

104. — *rejecting False Words.*]—When resort to extrinsic evidence has shown that the description is false in part, the false part may be rejected, if the residue, with the aid of the extrinsic evidence properly applicable, will be legally sufficient to indicate the gift. Thus a bequest of bank stock, describing it as stock in

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[1] Thus, where the testator gives his wife "all the rest, etc., of the moneys belonging to my estate at the time of my decease," extrinsic evidence is not admissible of his intention to leave securities to her; nor that he had been accustomed to support the family from the proceeds of such securities, and made an otherwise inadequate provision for her. Mann v. Mann, 14 Johns. 1, affi'g 1 Johns. Ch. 231; but compare Knight v. Knight, 30 L. J. Ch. 644.

[2] Doe *ex dem.* Clements v. Collins, 2 T. R. 498.

[3] Stanford v. Lyon, 8 Vroom (N. J.) 426, s. c. 18 Am. R. 736.

[4] Ryerss v. Wheeler, 22 Wend. 148.

[5] Ib. and cases cited. It was there said that evidence of such declarations *at the time* of executing the will would not be c mpetent. But see *Exp.* Hornby, 2 Bradf. 420. The sculptor Nolleken's will provided that "all the marble in the yard, the tools in the shop, bankers, mod. tools for carving," shall be the property of A. (a favorite and long employed workman). Extrinsic evidence was admitted that in the trade "*mod.*" would be understood as meaning models, and that there were no such tools known as modeling tools for carving; also of the relative value of the moulds and models, and of the personal relations between the testator and legatee. Goblet v. Beechey, 3 Sim. 24. Reversed, on the ground that the models were otherwise bequeathed. 4 R. & M. 624.

[6] Thus, where testatrix directed that a mortgage on her house be paid, and also "all debts now due to" certain persons named, to an amount specified, extrinsic evidence that the only mortgage on the house was the one made with her assent, by a person who owned it jointly with her; and that the same person owed debts of the amount specified to the persons named, was competent to show that these were intended. Pritchard v. Hicks, 1 Paige, 270.

the A. bank, will pass stock in the B. bank, if that was the testator's only bank stock; for after the name of the bank is rejected, enough is left to ascertain the thing by;[1] but this cannot be done where, after rejecting the false designation, the bequest is left uncertain.[2] If, however, all the words can be consistently applied, though some of them restrict others which alone would have been sufficient, the court will not reject the restrictive words.[3]

105. —*uncertainty as to Which of Two parcels.*]—As in the case of an equivocal designation of the beneficiary, so in the case of a similar ambiguity as to the property given, if it is shown that a designation in the will, which upon its face is unambiguous and sufficient, applies equally in all its parts to more than one

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[1] Roman Catholic Asylum v. Emmons, 3 Bradf. 144. But, there being a corporation in Dedham, entitled "The President, Directors and Company of the Dedham Bank," and generally called "The Dedham Bank," a bequest of "all moneys due me, *at the time of my decease*, from Dedham Bank, Dedham, Mass.," will not pass a deposit in "Dedham Institution for Savings," though generally known as the Dedham Savings Bank, and though, at the date of the will, testator had a deposit there. This is not a case of false description; for testator refers to what may be at the time of death. American Bible Society v. Pratt, 9 Allen, 109; approved in 1 Redf. on W. 665, n. Where testator gave a specified "part of my stock in the $4 per cent. annuities;" and it appeared that he had previously sold all such stock and re-invested the proceeds in long annuities. *Held*, that evidence of the situation of the funds was admissible; but direct evidence of testator's intent, and the scrivener's mistake in copying from an old will, was not. See Redfield's comments on Selwood v. Mildmay, 3 Ves. 306, in 1 Redf. on W. 597, and n.

[2] Thus, where the only description was "the farm I now occupy," it was held that the words, "I now occupy," could not be rejected, because no sufficient designation would be left. Hence extrinsic evidence that the testator intended by this to give all his real estate at W., including a farm occupied by a tenant, was not admissible. THOMPSON, J., Jackson v. Sill, 11 Johns. 201. But where the description was "the old homestead, whereon I lived at the time of making my will, containing 100 acres,—*Held*, that the property was identified by the designation "old homestead," there being evidence that this 100-acre farm had always been known by that name in the family; and that the words, "whereon I lived, &c.," did not let in parol evidence of the extent of testator's occupation, or of his declarations as to the boundary. Waugh v. Waugh, 28 N. Y. 94. So where the description was "my farm at B. in the tenure of J. S.," and part of the farm was not in his tenure,—*Held*, that the latter clause might be rejected. Ld. MANSFIELD, Goodtitle v. Paul, 2 Burr. 1089. So in a devise of "all the land I own, which lies along the S. Creek, and known by the name of T.'s Patent," the latter clause may be rejected on parol evidence that the farm lying along the creek was not in T.'s patent, and that the lot in T.'s patent did not lie along the creek. Doe v. Roe, 1 Wend. 541. In this case, the ambiguity being latent, the scrivener's testimony to the testator's instructions, and to his own mistake, was admitted. So a devise of the M. farm, containing eight fields, may pass nine fields, by extrinsic evidence that he occupied nine. This renders the restriction to eight void for uncertainty. Coleman v. Eberly, 76 Penn. St. 197.

[3] Thus by a gift of "all my lands in lot 25, in H. Patent, lying in the County of G.," such only of testator's lands in the lot and patent named, as lie in G. will pass. The court will not reject an intelligible and applicable restriction, merely because the general words are enough without it. Hunter v. Hunter, 17 Barb. 85, s. P. Pedley v. Dodds, L. R. 2 Eq. 819. But if, instead of "all my lands in lot 25, &c., lying in G.," testator had written "all my B. estate, which lies in G.," parol evidence would be admissible to show that he habitually called the whole property his B. estate, and the court might reject the partially inconsistent words, "which lies in G." Doe v. Earl of Jersey, 1 B. & Ald. 550; 3 B. & Cr. 870.

subject—as where a testator devises his manor of S., and it appears that he has two such, one of North S. and one of South S. —extrinsic evidence must determine which passes; and for this purpose the testator's declaration of intention may be proved.[1] This rule applies also where realty is described as personalty and *vice versa*. Thus a bequest of land will pass a mortgage on the land if testator had no other interest.[2]

The principles which contend for control in this class of questions are, that, on the one hand, where a devise is in general terms, subsequent words of description, restriction, exception, or limitation, should control the general terms; but, on the other hand, where the primary or larger description is sufficiently specific and certain to indicate the intent, words of identification inconsistent with it may be rejected as false or mistaken.[3]

106. *Nature of Estate given.*]—Where the words of the will are not ambiguous, and no latent ambiguity or "equivocation" is produced by extrinsic evidence, it is not competent to adduce evidence of the declarations of the testator or his instructions to the draftsman, for the purpose of showing that a different estate or interest from that indicated was intended,[4] as, for instance, that a gift so expressed as to vest in interest at testator's death, was intended to lapse if the beneficiary did not survive until it vested in possession.[5]

107. *Raising a Trust.*]—Extrinsic evidence to charge the apparent beneficiary as trustee for a third person is competent only when the intent is shown to have been communicated to the apparent beneficiary,[6] or when admissible on principles previously explained to aid in interpretation, or where the legatee is named

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[1] See paragraph 97 (above) for the limits of this rule. Where a devise is of lands described as being in a specified parish or town, and the expression does not indicate an exclusion of lands beyond its true limits, extrinsic evidence is admissible to show that the whole lands were, at the date of the will, by common repute and in the understanding of the testator, within the parish or town. See 1 Redf. on W. 650–4, and cases cited. Where usage differed as to the limits indicated by a geographical name used in the description, evidence of testator's usage of the term would be competent.

[2] Woods v. Moore, 4 Sandf. 579. But if the words of the will are insufficient to carry real estate, it is not competent to show, from the condition of the testator's property, or his own memoranda and declarations, that he must have so intended. Allen's Exrs. v. Allen, 18 How. U. S. 385; 1 Redf. on W. 606, note.

[3] For an illustration of the arguments, *pro* and *con.*, see Van Kleck v. Dutch Church, 20 Wend. 456, where the court, including BRONSON, BEARDSLEY, NELSON, COWEN, JJ., and others were equally divided on such a question.

[4] Hill v. Felton, 47 Ga. 455, s. c. 15 Am. R. 643, 654. And where the question was whether the devise was of a life-estate or a fee,—*Held*, that evidence that the lands were wild and uncultivated was inadmissible. Charter v. Otis, 41 Barb. 525. *Contra*, Sargent v. Tonne, 10 Mass. 303.

[5] Ordway v. Dow, 55 N. H. 11.

[6] Robotham v. Dunnett, 26 W. R. 530, and cases cited.

as a trustee, or where the probate court could afford no remedy, or where one name was fraudulently inserted for the other.[1]

108. *Aid in Executing the will.*]—There are several classes of cases where the language of each disposition of the will is clear, but extrinsic evidence is necessary to guide the administration in carrying them into effect. It will be seen that it is allowed in these cases, not to alter the meaning of the will, but to confirm and insist on it when, without such evidence, equity would in some way dispense with the literal fulfillment of the language. As a general principle, after extrinsic evidence to rebut such a presumption has been received, but not before, the like evidence is admissible to support the presumption, that is to say, to contradict the extrinsic evidence first given.[2]

109. — *as to the Administrative Character of the gift.*]—Extrinsic evidence is admissible to aid in determining whether a bequest of stock is a specific or a pecuniary legacy;[3] and where the will designates a specific fund which extrinsic evidence shows does not exist, extrinsic evidence is admissible to show that such fund formerly existed, and how the mistake arose; and, in a proper case, the legacy may upon such evidence be sustained as a general gift payable out of the estate.[4] But the necessary legal consequences involved in an expressed intention cannot be varied by extrinsic evidence. Thus since the gift of a specific legacy entitles the legatee to its income, not as an equitable presumption of intention, but as a matter legally included in the gift, in such case extrinsic evidence is not admissible to show the intention of the testator, as to the income of such legacies, where the will is silent.[5]

110. — *as to bequest to Creditor.*]—Where it appears that one to whom a legacy, expressed in terms appropriate to a pure gift, was a creditor of the testator, the court will not presume that the bequest was intended to satisfy the debt, if, by reason of the amount or the time for payment, the bequest would not be as

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[1] 1 Redf. on Wills, 60, citing 1 Ho. of L. Cas. 191; Gaines v. Chew, 2 How. U S. 619. Compare Irvine v. Sullivan, L. R. 8 Eq. 673; Collier v. Walters, L. R. 17 Eq. 252, s c. 7 Moak's Eng. 798; Duke of Cumberland v. Graves, 9 Barb. 595. It seems that a devisee may also, in some cases, upon parol proof of testator's agreement to devise to another, be held a trustee for that other. Howland Will Case, 4 Am. Law Rev. 661, and cases cited.

[2] Phillips v. McCoombs (below); 1 Redf. on Wills, 647; Hall v. Hill, 1 Dru. & War. 94, 116.

[3] Boys v. Williams, 2 Russ. & M. 689, rev'g 3 Sim. 563. And see Pierrepont v. Edwards, 25 N. Y. 128.

[4] Lindgreen v. Lindgren, 9 Beav. 358, 363. Compare 28 Id. 484, 520.

[5] Loring v. Woodward, 41 N. H. 391; 1 Redf. on Wills, 665, § 73. Whether parol evidence to show that testator intended to dispose of property not his own is admissible for the purpose of putting a beneficiary to an election,—see note to Dillon v. Parker, 1 Swanst. 402, 403; 2 Wms. Exrs. 6 Am. ed. 1550; Havens v. Sackett, 15 N. Y. 365.

beneficial as ordinary payment by the estate;[1] and in such case extrinsic evidence that the testator only intended to satisfy the debt is not competent.[2] Where the bequest and the debt are such that an equitable presumption arises that the bequest was intended in satisfaction, then extrinsic evidence, even by the declarations of the testator, is admissible to rebut the presumption, because it simply tends to show that he intended precisely what the will says.[3] The rule is in no case to admit extrinsic evidence against construction upon the words of the will.[4]

111. — *or to heirs or next of kin in Advance.*]—Where the will directs the mode of dealing with advances which the testator has made to children or others expecting to share in his estate, extrinsic evidence of his intent in making the advances referred to is competent for the purpose of determining what obligations are within the terms of the will.[5]

112. — *as to presumptively Cumulative gifts.*]—Where the same sum is given twice in the same will to the same legatee, courts of equity have recognized a presumption that the latter sum is a mere repetition or substitution; but where the two gifts are in different instruments,—*e. g.*, where one is given by will and the other by codicil,[6]—the presumption is that both were intended. In either case, extrinsic evidence is competent for the purpose of rebutting the equitable presumption,[7] so far as to enable the court to place itself in the testator's situation at the time of making the will; but his declarations cannot be proved to show an intent or motive in the will, against its legal construction.[8]

113. — *as to Ademption.*]—If a parent, or other person *in loco parentis*, bequeaths a legacy to a child or grandchild, and afterwards,[9] in his life-time, gives a portion or makes a provision for the beneficiary, even without expressing it to be in lieu of the legacy, it will, in general, be deemed a satisfaction or ademption of the legacy.[10] When a legacy is given for a particular purpose

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[1] See Fort v. Gooding, 9 Barb. 371, and cases cited.

[2] Phillips v. McCoombs, Oct. 1873, Cas. in N. Y. Ct. App., Opin. of Doolittle, J., approved in 53 N. Y. 494, overruling in part Williams v. Crary, 5 Cow. 368; 8 Id. 246; 4 Wend. 443.

[3] Id.

[4] Hall v. Hill, 1 Dru. & War. 115, and cases cited, Sugden, L. C.

[5] Tillotson v. Race, 22 N. Y. 122. Compare Chase v. Ewing, 51 Barb. 597.

[6] Or by separate instruments made at the same time. Whyte v Whyte, L. R. 17 Eq. 50, a. c. 7 Moak's Eng. 672.

[7] De Witt v. Yates, 10 Johns. 156, and cases cited; and see Russell v. St. Aubyn, L. R. 2 Chan. Div. 405, a. c. 16 Moak's Eng. 818.

[8] Martin v. Drinkwater, 2 Beav. 215, 218.

[9] A *previous* advance may be shown to be an ademption by extrinsic evidence. Rogers v. Prince, 19 Geo. 816.

[10] Langdon v. Astor, 16 N. Y. 9, 84; Hine v. Hine, 39 Barb. 507, and cases cited. Even though the amount is less. Richard v. Humphreys, 15 Pick. 136. And a republication of the will does not necessarily rebut the presumption. Paine v. Parsons, 14 Id. 320.

specified in the will, and the testator, during his life, accomplishes the same purpose, or furnishes the intended beneficiary with money for that purpose, the legacy is presumed to be satisfied.[1] The parental relation is evidence from which it may be inferred that payment, not a fresh gift was intended; but this presumption may of course be overcome by evidence that such was not the intention; and such evidence, when admitted, may be answered by other evidence of the same character.[2] But the extrinsic evidence is competent, in such cases, not to vary the terms of the will, but to establish, on behalf of the claimants, the acts and intents of the testator, so as to rebut the presumption of satisfaction arising in behalf of the adverse party; and it is only when such evidence has been received, that extrinsic evidence is competent in reply in support of the presumption of satisfaction.[3] For this purpose the declarations of the testator relevant to the question whether the bequest was made *in loco parentis*,[4] as well as those relative to the question of intent to addeem, are competent[5] (especially if not contradictory to the terms of a writing), both when made at the time of the transaction,[6] and when made before or after it;[7] but they are not competent, to construe the language of the will, except within the general rules previously explained, nor are they competent, to raise a presumption of ademption where none would arise on the face of the will, in connection with the writing relied on as constituting the ademption. The extrinsic evidence is only admissible in such cases for the purpose of showing what the testator meant by the act other than the will.[8] Extrinsic evidence is not competent to prove that a statement in the will that testator had made an advancement was a mistake, for the purpose of avoiding its deduction.[9]

114. — *as to Charging legacies.*]—If the language of the will is doubtful as to whether or not legacies are charged on real property, extrinsic evidence of the situation of testator and his property, and the surrounding circumstances, is competent to aid in determining the question.[10]

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[1] Hine v. Hine (above), and cases cited. At least, if the intent were made known to the beneficiary, see Langdon v. Astor, 16 N. Y. 37.

[2] Langdon v. Astor, 16 N. Y. 34, 35.

[3] Id.; Hall v. Hill (above); Richards v. Humphreys, 15 Pick. 139; 2 Wm. Exrs. 6 Am. ed. 1412, 1444; Miner v. Atherton, 35 Penn. St. 528. *Contra*, Sims v. Sims, 2 Stockt. Ch. (N. J.) 163.

[4] Powys v. Mansfield, 3 Myl. & Cr. 359, 370; Gill's Estate, 1 Pars. Eq. Cas. 139. And his acts also. 2 Wms. Exrs. 6 Am. ed. 1446.

[5] Whately v. Spooner, 3 Kay & J. 542.

[6] Richards v. Humphreys, 15 Pick. 139.

[7] See conflicting authorities cited in Gilliam v. Chancellor, 43 Miss. 437, s. c. 5 Am. R. 498.

[8] Hall v. Hill, 1 Dru. & War. 94, 116.

[9] Painter v. Painter, 18 Ohio, 247.

[10] Hensman v. Freyer, L. R. 2 Eq. 627; 3 Ch. 420; Paxon v. Potts, 2 Green Ch. (N. J.) 321, and cases cited; Dey v. Dey, 19 N. J. Eq. (4 C. E. Green), 137. Such evidence was not competent at law. Tole v. Hardy, 6 Cow. 333.

115. — *as to execution of Power.*]—The question whether a bequest is in execution of a power, is one of intention, and the intention cannot be proved by direct evidence of testator's intention extrinsic to the will; but evidence of the situation of the testator, the surrounding circumstances, and the state and amount of testator's property at the time of making the will is competent, both in respect to realty (as was always allowed) and in respect to personalty (as formerly was not allowed), for the purpose of comparing the dispositions of the will with the property owned and with that subject to the power, and thence deducing an inference of the intention to dispose of the latter rather than the former.[1] Upon the whole evidence the intention must be apparent and clear; if it be doubtful, the act cannot be deemed an execution of the power.[2]

116. *Time of Declarations Bearing on Intention.*]—Evidence of the language of the testator offered not as direct proof of intent, but to show his usages of speech, need not be confined to any particular time; it is enough that the declarations involve his use, in other ways, of the language used in the will, and in the same relation as there used. But the weight to be given to such declarations may, of course, vary much with remoteness in point of time from the making of the will. Where such declarations are competent as direct proof of intention in the will, their weight depends more immediately upon their proximity to its execution; but if competent for this purpose, they are competent, whether made before, at, or after the act.[3]

XI. Advancements.

117. *The general presumption.*]—The law recognizes the natural affection which prompts the parent (and in some degree any one standing in *loco parentis*) to make voluntary provision for children[4] by anticipating in favor of one or another, the distribution of the patrimonial estate before death, and which at the same time intends that the ultimate division shall equalize the shares of all.[5] Hence it is a legal though not a conclusive presumption, applicable in case of total intestacy, or, to speak more closely, wherever (will or no will) the division of the entire estate is subjected to the statutes of descent and distributions,[6] that a sub-

[1] White v. Hicks, 33 N. Y. 394; Ruding's Settlement, L. R. 14 Eq. 266.

[2] White v. Hicks (above). Otherwise by statute, as to real property. 1 N. Y. R. S. 732, § 126.

[3] This is now regarded as the better rule. Doe v. Allen, 12 Ad. & El. 451; though there are many conflicting cases.

[4] In many cases the language of the court extends the rule no farther than to provisions for *minors*, see Jackson v. Matsdorf, 11 Johns. 91; but minority is not essential to the presumption, and indeed, where the expenditure is for maintenance during minority, may indicate that it was made in discharge of parental duty. See Vail v. Vail, 10 Barb. 69.

[5] Parks v. Parks, 19 Md. 323.

[6] Camp v. Camp, 2 Redf. Surr. 141.

stantial provision, beyond expenditures for maintenance or education,[1] and not characterized as a mere gift nor as creating a debt on the part of the child,[2] was intended as an earnest of the inheritance, and to be deducted from the recipient's share of the estate on the parent's death. The court look to the substantial character of the provision.[3] But in all cases the question is one of intent,[4] the main element being the intent of the donor; and very slight evidence suffices to sustain the inference that the donee accepted the transfer upon the understanding, express or implied, that it should serve on the death of the donor, in lieu of so much of any share to come from his estate to the donee.[5] The intent shown once to have existed is presumed to have continued;[6] and neither a transaction by which a legal debt has been constituted,[7] nor a benefit once conferred and accepted as a gift,[8] can be converted into an advancement, by the act of the decedent, uncommunicated to the debtor or donee. The subject is usually regulated by statute, which should be carefully consulted; for a statute defining what shall be deemed to be or prove an advancement, may be construed to exclude other evidence in substitution for,[9] or in rebuttal of, the statutory evidence.[10] But if the statutory evidence is adduced, it is the better opinion that parol evidence in aid of its validity and interpretation is admissible upon the familiar principles generally applicable to statutory evidence.[11] To determine a question of advancement, attention should first be given to the statute definition; then, if the statute does not preclude such other tests, resort should next be had to the will, if any, to ascertain the testator's intent; next, to the terms of the gift or grant itself, if in writing, or to the written entries made in his accounts, &c., by the testator; or the written evidence taken from the donee; next, to the *res gestæ* at the time of the transfer, and, on the failure of these tests, or in aid of them, to the declarations of the

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[1] 1 N. Y. R. S. 754, § 23; 4 Kent Com. 417. In States where the statute does not exclude it, extrinsic evidence that such expenditures were intended as advancements, is proper. Riddle's Estate, 19 Penn. St. 431.

[2] Law v. Smith, 2 R. I. 244.

[3] Thus, where the father conveys the fee to his son, who reconveys for life, the advancement amounts only to the value of the remainder. Cornings v. Wellman, 14 N. H. 287. But where the consideration of a deed was pecuniary, except as to a specified fraction, which was the grantee's "hereditary portion from" the grantor, *held*, that as to the amount of that portion, it was an advancement. Miller's Appeal, 31 Penn. St. 337. So a conveyance for life, with remainder to the grantee's children, is presumptively an advancement only to the value of the life-estate. Cawthorn v. Coppedge, 1 Swan, 487.

[4] Weaver's Appeal, 63 Penn. St. 309, and other cases cited above and below.

[5] See the contractual nature of advancements well explained in Bing. on Desc. 347.

[6] Oller v. Bonebrake, 65 Penn. St. 338.

[7] Yundt's Appeal, 13 Penn. St. 575.

[8] Sherwood v. Smith, 23 Conn. 516.

[9] Barton v. Rice, 22 Pick. 508.

[10] S. P. as to revocation of will, paragraph 72, above.

[11] See Bing. on Desc. 397.

decedent and the admissions of the beneficiary; and lastly, to the character of the thing given, and the situation of the parties and their surrounding circumstances, from which a presumption may arise as to whether it was a gift, an advancement, or a loan.[1]

118. *Advancement by Deed of Real Property.*]—If the language of a sealed instrument will without violence bear either construction, equity will receive parol evidence to show the actual intent,[2] unless the statute[3] prevents. A deed from parent to child, expressed to be in consideration of "love and affection,"[4] or "good-will,"[5] or the like,[6] raises a presumption of advancement;[7] and the fact that a nominal pecuniary consideration is also expressed, does not alone rebut the presumption,[8] but is enough to let in parol evidence to rebut it,[9] and parol evidence in support of the presumption is then equally admissible.[10] If the deed expresses only a valuable consideration and acknowledges its payment, this by itself is presumed not to be an advancement,[11] but parol evidence is admissible to show that no such consideration was asked or received,[12] and such evidence raises the presumption that the gift was an advancement.[13]

119. *Purchase in Name of Child.*]—Extrinsic evidence is competent to show that the decedent procured securities[14] or a conveyance to be made, by a third person, to a child who claims to

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[1] Such, for instance, as the amount as compared with the estate of the parent and the number of the children, and the purpose for which the advance was made. It is always a natural and reasonable presumption that a parent means to treat his children equally. If his estate is large, a comparatively small sum raises the presumption of a gift or present. So, if it be shown that the purpose was education, it will be presumed to have been in discharge of the parental duty, until rebutted by other evidence. Weaver's Appeal, 63 Penn. St. 309.

[2] Phillips v. Chappell, 16 Geo. 16. As the question is not between the parties to the original instrument, the general rule excluding parol is, perhaps, not strictly applicable. See Parks v. Parks, 19 Md. 322; and ch. I, paragraph 16, of this vol.

[3] As in Vermont, Adams v. Adams, 22 Vt. 50, 64.

[4] Hatch v. Straight, 3 Conn. 31.

[5] Sayles v. Baker, 5 R. I. 457.

[6] Miller's Appeal, 31 Penn. St. 337.

[7] For the court presumes equal affection for the others. Parks v. Parks, 19 Md. 323. Proof that the son had rendered services under a contract, without anything to show that he had not received the contract compensation, will not disprove the intent of an advancement. And on the other hand, the statement in the deed, that the conveyance was partly in consideration of a contract for services or support, may be explained by parol testimony. Kingsbury's Appeal, 44 Penn. St. 460.

[8] Hatch v. Straight (above).

[9] Scott v. Scott, 1 Mass. 527.

[10] Kingsbury's Appeal, 44 Penn. St. 460.

[11] Newell v. Newell, 13 Vt. 24.

[12] Speer v. Speer, 14 N. J. Cn. (1 McCarter), 240; Meeker v. Meeker, 16 Conn. 383.

[13] Sanford v. Sanford, 5 Lans. 486, s. c. 61 Barb. 293.

[14] 2 Story's Eq. J. § 1204.

share in his estate, under the statute,[1] and that the decedent[2] paid the consideration, even though the deed recites payment by the grantee;[3] and these facts shown, without more, raise a legal presumption that the purchase was an advancement.[4] Extrinsic evidence is admissible in this as in other classes of *prima facie* advancements, to rebut or support the presumption of intent to make an advancement.[5] Each case has to be determined by the reasonable presumption arising from the facts and circumstances connected with it. Lapse of time, connected with continued acts of recognition of the right of the donee, are always potent, and frequently controlling circumstances in determining the intention.[6] If it be shown that the object of the parent or husband was to defraud his existing or future creditors, they may avoid it;[7] but the fact that the grantor adopted that form of conveyance in the fear of creditors, is not alone enough to preclude giving it effect as between the heirs, &c., as an advancement.[8]

120. *Other transfers.*]—Unless the statutes of the State[9] impose a different rule, both the fact and the character of an advancement, even of real property, may be established by parol,[10] and no particular form of words is required.[11] A sum of money given to enable the son to purchase a farm or the like, the amount being large and, perhaps equivalent to the apparent expectancy of the son, is presumptively an advancement if no security or promise is taken by the parent;[12] and if securities for repayment are taken by a parent on furnishing funds to the child, the subsequent surrender of them, or a part of them, may raise a presump-

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[1] See paragraph 117.

[2] Whether the father. Proseus v. McIntyre, 5 Barb. 424, 432; Taylor v. Taylor, 4 Gilm. 303; Mumma v. Mumma, 2 Vern. 19; or the mother. Murphy v. Nathans, 46 Penn. St. 508. As to grandparent, see Shiver v. Brock, 2 Jones L. (N. C.) 187.

[3] Dudley v. Bosworth, 10 Humph. (Tenn.) 9. So also where the child pays the consideration out of the parent's funds. Douglas v. Brice, 4 Rich. Eq. 322.

[4] Same cases.

[5] Jackson *ex dem.* Benson v. Matsdorf, 11 Johns. 91; Proseus v. McIntyre, 5 Barb. 424; Creed v. Lancaster Bank, 1 Ohio St. 1.

[6] Creed v. Lancaster Bank, 1 Ohio St. 1. The fact that the parent took and retained possession until his death, was held, in early cases, not to rebut the presumption of advancement. Taylor v. Taylor, 1 Atk. 386; Dyer v. Dyer, 2 Cox Eq. 92; especially if the child were a minor. Mumma v. Mumma, 2 Vern. 19. Recently it has been held that taking and keeping the beneficial possession may rebut the presumption, and will sustain a finding of a trust, notwithstanding a parol declaration of intent to constitute an advancement. Stock v. McAvoy, L. R. 15 Eq. 55; s. c. 5 Moak's Eng. 711; and see Dudley v. Bosworth, 10 Humph. (Tenn.) 9.

[7] Bay v. Cook, 31 Ill. 336; Guthrie v. Gardner, 19 Wend. 414; Creed v. Lancaster Bank (above); compare Kingsbury's Appeal, 44 Penn. St. 460.

[8] Kingsbury's Appeal, 44 Penn. St. 460; Proseus v. McIntyre, 5 Barb. 424, 434.

[9] As in Barton v. Rice, 22 Pick. 508, and Porter v. Porter, 51 Me. 376.

[10] Parker v. McCluer, 3 Abb. Ct. App. Dec. 454; Dugan v. Gettings, 3 Gill. 138.

[11] Bulkeley v. Noble, 2 Pick. 337; Bing. on Desc. 388; Brown v. Brown, 16 Vt. 197.

[12] Weaver's Appeal, 63 Penn. St. 309.

tion of advancement to that extent.[1] On the other hand, while a note given by a child to the parent is presumed to be not an advancement, but a debt, yet parol evidence is admissible to show that it was given as an admission of an advancement.[2] The mere delivery of money or chattels is not presumptively an advancement, but rather, in the absence of evidence tending to show it was intended as an advancement, is presumed to have been either a gift or loan;[3] or, if the parent was indebted to the child, it will be presumed to have been intended as payment.[4]

121. *Entries in account.*]—An account kept by the donor, in which he charges the sum in a manner indicating his intent that it is to take effect as an advancement, may be sufficient without evidence that the donee knew of the charge.[5] But where this is the only evidence of intent, it is the better opinion that the quality of advancement, that is to say the liability of the donee to have the gift deducted from his share of the estate, may be released by a cancellation or corresponding credit evincing a discharge, although not communicated to the donee,[6] as well as by conduct of the parties treating it as such. If the entry or other memorandum be made in a form indicating a gift, or a loan, or bailment,[7] parol evidence is admissible to explain that it was intended as an advancement.

122. *Declarations and admissions as to advancements.*]—Whether the advancement was by a conveyance made by the donor,[8] or made by a third person on a consideration moving from the donor,[9] or by transfers *in pais*, and by charges in account or other writings, or by parol,[10] the declarations of the donor made at the time are admissible as part of the *res gestæ*,[11] although not competent evidence as to intent if the statute requires written evidence.[12] Subject to the same statutory qualifi-

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[1] Hanner v. Winburn, 7 Ired. Eq. 142. But a mere declaration uncommunicated may not be enough. See Bing. on Desc. 392.

[2] Tillotson v. Race, 22 N. Y. 127.

[3] Bing. on Desc. 394, &c. The fact that the conveyance was of real property enhances the presumption, because it is more suggestive of the purpose of permanent settlement. Parks v. Parks, 19 Md. 323. On the other hand, it would take stronger evidence to show that the gift of a saddle horse was an advancement, than that of a stallion kept for purpose of profit. Ison v. Ison, 5 Rich. Eq. 15.

[4] Hagler v. McCombs, 66 N. C. 345.

[5] As to what form of charge has this effect, see Lawrence v. Lindsay, 68 N. Y. 108, rev'g 7 Hun, 641; Bigelow v. Pool, 10 Gray, 104; Bing. on Desc. 382, and cases cit. His credit of interest held competent evidence that it was a loan. Peck v. Peck, 21 L. T. N. S. 670.

[6] Compare Johnson v. Belden, 20 Conn. 322; Oller v. Bonebrake, 65 Penn. St. 338.

[7] Law v. Smith, 2 R. I. 244.

[8] Christy's Appeal, 1 Grant's Cas. 369; Parks v. Parks, 19 Md. 323; Speer v. Speer, 14 N. J. Eq. (1 McCarter) 240, 248.

[9] Compare Sayles v. Baker, 5 R. I. 457. [10] Oller v. Bonebrake, 65 Penn. St. 338.

[11] Woolery v. Woolery, 29 Ind. 254; Wilson v. Beauchamp, 50 Miss. 24; Fellows v. Little, 46 N. H. 37, 38; Bragg v. Massie, 38 Ala. 89, 106. And very freely if fraud or undue influence appears. Cook v. Carr, 20 Md. 403.

[12] Weatherhead v. Field, 26 Vt. 665; Bulkeley v. Noble, 2 Pick. 337.

cation, the declarations of the donor, made before the transaction, are competent on the question of his intent.[1] Whether his declarations made after the transaction are competent, depends on how they are invoked in evidence.[2] For the purpose of showing that the transaction was a gift, the donor's declarations are competent against the representatives, heirs, and next of kin, claiming it to be an advancement;[3] and for the purpose of showing either that it was a gift or advancement, they are competent against those claiming it to have constituted a debt; for in either case they are his admissions against interest, and bind those claiming under him and in his right. But for the purpose of showing either that the transaction was an advancement, or that it was a debt, his declarations, made after he had parted with all power of revocation, are not competent against those who claim it as a gift;[4] and for the purpose of showing that it was a debt, they are not competent against those who claim it either as a gift or as an advancement; for, in either case, they are the declarations in his own favor. The fact that such declarations were communicated to the donee, may, of course, render them competent;[5] and they may also be admissible on principles previously explained,[6] when necessary and proper to show his intent in a subsequent will referring to the advancements.[7] The donee's declarations or admissions, made as part of the *res gestæ*, or at any subsequent time, are competent against him and those claiming under him.[8]

123. *Value.*]—The burden of proving value is on those who claim that the provision should be deducted as an advancement;[9] but evidence that the advancement was accepted in full of the

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[1] Powell v. Olds, 9 Ala. 861.

[2] The cases may not explain the distinction here stated, but the distinction explains the cases.

[3] Phillips v. Chappell, 16 Geo. 16; Johnson v. Belden, 20 Conn. 322; Note in 18 Moak's Eng. 700. *Contra*, Bing. on Desc. 404.

[4] Sanford v. Sanford, 5 Lans. 486, s. c. 61 Barb. 293; Hatch v. Straight, 3 Conn. 31. *Contra*, Rollins v. Strout, 4 Nev. 150. Compare Law v. Smith, 2 R. I. 244; Peck v. Peck, 21 L. T. N. S. 670. A debt barred by the statute of limitations cannot, by the decedent's declarations alone, be converted into an advancement. Bing. on Desc. 363.

[5] Yundt's Appeal, 13 Penn. St. 575.

[6] Paragraphs 111 (above) and 124 (below).

[7] Tillotson v. Race, 22 N. Y. 126. A security which cannot, under the statute, be proved to represent an advancement, may be made such by a provision in the will. Bacon v. Gassett, 13 Allen, 337. Whether the decedent's transactions with the other heirs apparent are relevant on the question of his intention in the transaction with the one claiming a gift, compare Bulkeley v. Noble, 2 Pick. 337; Weaver's Appeal, 63 Penn. St. 309.

[8] Christy's Appeal, 1 Grant's Cas. 369; Speer v. Speer, 14 N. J. Eq. (1 McCarter) 240, 248; Law v. Smith, 2 R. I. 244. Debts by the husband of the decedent's daughter cannot be changed into advancements as against her, merely by her admission that "this we owe to father honestly." Yundt's Appeal, 13 Pa. St. 575. A judgment or decree, in a suit for settlement of the estate, fixing the character and amount of advancements, is conclusive in a subsequent action between the same parties, or those in privity with them, as to realty. Torrey v. Pond, 102 Mass. 355.

[9] See Bell v. Champlain, 64 Barb. 396.

donee's share throws on the donee the burden of proving that the value was less than his share.[1] The value may be conclusively fixed by an acknowledgment in writing,[2] or it may be made immaterial by a conclusive release of all interest in the estate, given upon receiving the advancement.[3] If the advancement was made by a deed expressing a pecuniary consideration, that sum may, by extrinsic evidence, be shown to be the value.[4] If the donor put a value on the advancement, in the transaction itself, it excludes evidence of greater value,[5] but not evidence of less value.[6] If, however, a value was fixed by agreement with the donee (the acknowledgment being in writing if the statute so require), it excludes evidence of less value. Where actual value is to control, value at the time of the transfer is to be proved, and without interest.[7]

124. *Testamentary clauses as to advancements.*]—Where the will refers to money bequeathed as being already in possession of the donee, the burden is upon those alleging satisfaction to show that the possession continued, at least if the beneficiary is one who might be presumed to have held possession as the testator's agent.[8] Where the will refers to entries or memoranda, or other unattested papers previously made or subsequently to be made, to ascertain the advancements, the documents so identified are competent evidence,[9] and so, also, if it releases securities taken from the beneficiaries.[10] If the entries or securities thus referred to do not bear evidence on their face that the sums were intended as advancements, extrinsic evidence is competent[11] and necessary,[12] to establish the donor's intent to make them such.

XII. Title, and Declarations, of Ancestor, Heir, &c.

125. *Ancestor's title, and Successor's election.*]—At common law the heir must produce evidence that the ancestor was actually seized,[13] that is to say had legal title, and also actual possession

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[1] Parker v. McCluen, 3 Abb. Ct. App. Dec. 454.
[2] 1 N. Y. R. S. 754, § 25.
[3] Quarles v. Quarles, 4 Mass. 680; Kenney v. Tucker, 8 Id. 143; Bing. on Desc. 891.
[4] Meeker v. Meeker, 16 Conn. 383.
[5] Meeker v. Meeker, 16 Conn. 383.
[6] See Marsh v. Gilbert, 2 Redf. Surr. R. 465.
[7] Bing. on Desc. 407, 408, and cases cited.
[8] Enders v. Enders, 2 Barb. 362.
[9] Whateley v. Spooner, 3 Kay & J. 542; and see Langdon v. Astor, 16 N. Y. 9, rev'g 3 Duer, 477.
[10] See Chase v. Ewing, 51 Barb. 597; Luqueer's Estate, 1 Tuck. 236; Tillotson v. Race, 22 N. Y. 122.
[11] Tillotson v. Race (above).
[12] Lawrence v. Lindsay, 68 N. Y. 108, rev'g 7 Hun, 641.
[13] Jackson v. Hendricks, 2 Johns. Cas. 214; Whitney v. Whitney, 14 Mass. 88.

or its equivalent[1] thereunder. If the title of the ancestor was acquired by "purchase" (including devise), proof of legal title raised a sufficient presumption of seizin in fact,[2] but if by descent some evidence of seizin in fact was required.[3] The present common law rule generally is that seizin in law is sufficient to establish dower, but that seizin in fact is necessary to establish curtesy.[4] The subject is now generally regulated by statutes defining descendible and devisable property in a way to dispense with the necessity of actual seizin;[5] and possession in the ancestor is not now usually an essential part of the evidence to prove mere title by descent, except in those cases where possession under claim of title is relied on as constituting the right or the evidence of it. No evidence of acceptance by the heir, of title to lands descended, is necessary. The law casts it upon him without his consent.[6] A title by deed or devise, requires the assent of the successor in interest, express or implied, to effect the transfer.[7] But the law presumes the acceptance of a beneficial devise, and it is doubted whether a parol disclaimer is binding.[8] Where the right of one entitled by succession depends upon an election, and no express election is shown, nor any positive act or declaration manifesting such election, an election may be presumed from the circumstances of benefit and silence.[9] Under the statute declaring the widow to be deemed to have accepted a provision in lieu of dower, unless she proceeds for dower within a year after the husband's death, it is not necessary that the devisees and grantees should prove that she had notice of the will.[10]

126. *Declarations and admissions of the Ancestor as to Title, &c.*]—Declarations made while in possession of real estate, by an ancestor, since deceased, indicating the source of his title, and the fact that the one under whom he claimed had been in possession, may be proved by witnesses who heard them, as evidence *against* his heirs and devisees.[11] Thus, admissions by a person, that the conditions upon the failure of which his title and right of action depended have been performed, are admissible in evidence in an action prosecuted by the heirs of the person making

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[1] Such as possession by a tenant of less than a freehold. Bushby v. Dixon, 3 Barnw. & C. 305; or possession of one of several parcels. Green v. Liter, 8 Cranch, 245.

[2] Wendell v. Crandall, 1 N. Y. 491.

[3] Id.

[4] 1 Bish. Man. W. § 496.

[5] 1 N. Y. R. S. 751, §§ 1, 27 (6th ed. vol. 2, p. 1136); 2 Id. 57, § 2 (6th ed. vol. 3, p. 57).

[6] 3 Washb. R. P. 4th ed. 6 (4); and see Mumford v. Bowman, 26 La. Ann. 413.

[7] 3 Washb. R. P. 4th ed. 6 (4).

[8] Id. 542, citing Tole v. Hardy, 6 Cow. 340; 2 Pet. 6557.

[9] Merrill v. Emery, 10 Pick. 507, SHAW, Ch. J.

[10] 1 N. Y. R. S. 742, § 14; Palmer v. Voorhis, 35 Barb. 479.

[11] Enders v. Sternbergh, 2 Abb. Ct. App. Dec. 31, rev'g 52 Barb. 222.

the admissions, by reason of the privity between them.[1] But the declarations of the ancestor in *favor* of his title, are not admissible for any one claiming under him,[2] unless brought within the rule of the *res gestæ*,[3] or brought home to the other party. Upon these principles the declarations made by a person in possession of land, tending to show the character of his possession, and by what title he claimed,[4] if made while both holding possession and title,[5] although it may be after he had contracted to convey,[6] are competent. But parol declarations or admissions, since they cannot confer or divest title,[7] are not admissible as evidence of title, either to sustain the burden of proof of title, or to rebut *prima facie* evidence,[8] but only to show the nature and extent of the possession and the character and quality of the claim of title under which it was held,[9] or other material facts resting *in pais*, such as may affect the question of title,—for instance, the time, or the absolute or conditional character, of the delivery of a deed,[10] or a disclaimer of title made at a judicial sale under circumstances constituting an estoppel,[11] or that the deed to the declarant was fraudulent,[12] or the existence and loss of a will,[13] or other facts inconsistent with his claim of title.[14] So to prove the ancestor's parol agreement to convey (which has been executed on the part of the purchaser) his parol declarations, may be proved by a witness.[15] A recital in the will, that the testator had executed a deed to the defendant, is evidence against his heirs, of a perfect execution of such deed, and of the title in the grantee.[16] But where a will is introduced in evidence as contain-

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[1] Spaulding v. Hallenbeck, 35 N. Y. 204; affi'g, 39 Barb. 79; compare Savage v. Murphy, 8 Bosw. 75, affi'd in 34 N. Y. 508.

[2] Smith v. Martin, 17 Conn. 399; Hurlburt v. Wheeler, 40 N. H. 73.

[3] As to what are competent within the rule of *res gestæ*, compare Meek v. Perry, 36 Miss. 190, 259; Baker v. Haskell, 47 N. H. 479; Hood v. Hood, 2 Grant Penn. Cas. 229; Fellows v. Fellows, 37 N. H. 78, 85, Smith v. Batty, 11 Gratt. 752, 761.

[4] 3 Abb. N. Y. Digest, 2d ed. 123.

[5] Vrooman v. King, 36 N. Y. 477.

[6] Chadwick v. Fonner, 15 Alb. Law J. 431. Testator's declarations made after executing the will, and adverse to his title, are held not admissible against those claiming under the will, upon this principle, because they do not affect his interest. Boylan ads. Meeker, 4 Dutch. 274; and see Jackson v. Kniffen, 2 Johns. 31; 1 Redf. on Wills, 3d ed. 539, note.

[7] Proof that an intestate stated in his life-time, that he did not own any interest in certain land, that he had sold out, and that he allowed others to deal with the land as their own, is not evidence sufficient to sustain an allegation in a complaint against the administrator, that the intestate executed and delivered deeds of the land. *It seems* such evidence is inadmissible until it be shown that a conveyance of the land had been in fact executed and lost. Thompson v. Lynch, 29 Cal. 189.

[8] See Jackson v. Cole, 4 Cow. 587; Walker v. Dunspaugh, 20 N. Y. 170.

[9] Jackson v. McVey, 15 Johns. 284.

[10] Keaton v. Dimmick, 46 Barb. 158; Varrick v. Briggs, 6 Paige, 323; 22 Wend. 543. Compare Baker v. Haskell, 47 N. H. 479.

[11] Mattoon v. Young, 45 N. Y. 696.

[12] Naughton v. Pettibone, 7 Conn. 319.

[13] Fetherly v. Waggoner, 11 Wend. (N. Y.) 599.

[14] Rogers v. Moore, 10 Conn. 13.

[15] Knapp v. Hungerford, 7 Hun, 588, and cases cited.

[16] Smith v. Wait, 4 Barb. 28.

ing such an implied admission of title in a stranger, the declarations of the testator, at the time of its execution, in relation to it, are admissible as part of the *res gestæ*.[1]

127. *Declarations of third persons.*]—Evidence of the acts and declarations of third persons, when in possession of the lands, are competent to prove the continued possession under the will.[2]

128. *Declarations of successors, representatives and beneficiaries.*]—The admissions or acts of the executor or administrator, unless made so by statute,[3] are not competent evidence against the heir or devisee.[4] A mere common interest will not make the confessions of one person evidence against another,—a joint interest in possession is necessary.[5] Hence the declarations of the executors or administrators are not competent against any other parties who have not a joint interest, and do not stand in a relation of privity.[6] Conversely, the admission of an heir cannot prejudice the executor.[7] And in the case of several heirs,[8] and equally in the case of beneficiaries under the same will, if their interests are several, not joint,[9] evidence of the admissions and declarations of one is not competent against the other. The principle is that a common interest is not enough, but a joint interest,—as where both claim under a contract naming them as beneficiaries,—may be.[10] The declarations and admissions of one

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[1] Testator devised lands to defendant, and, in the same will, gave legacies to plaintiffs, on condition that they release all their right, &c., to the lands devised. *Held*, that defendants could give parol evidence of testator's contemporaneous declarations, that the condition was not an admission of such title, but only by way of caution against an unfounded claim. The devisees were not a party to the legacy, nor did they claim under it within the rule. Clark v Wood, 34 N. H. 447, 452.

[2] Jackson v. Van Dusen, 5 Johns. 144. To raise a presumption that A. or his executors anciently conveyed away land, which his heirs sue to recover, from a mere possessor, after many years' neglect to claim, the defendant may prove deeds between third persons of adjoining land describing the land in question as the property of others than A., and may adduce the testimony of a witness that he had known the lands for upwards of 40 years, and the general repute as to their ownership, and that he never heard of any claim of title by or under A. Schauber v. Jackson, 2 Wend. 19, 20.

[3] Regan v. Grim, 13 Penn. St. 508, 513.

[4] Mooers v. White, 6 Johns. Ch. 360; Baker v. Kingsland, 10 Paige, 366.

[5] Osgood v. Manhattan Co. 3 Cow. 612.

[6] Shailer v. Bumstead, 99 Mass. 112. The declarations and admissions of the sole executor, he being a party in interest and a party to the record, were held admissible against him and those represented by him, on the question of fraud or undue influence, in Davis v. Calvert, 5 Gill. & J. 269.

[7] 2 Whart. Ev. § 1199, a. And it has been held that the declarations of the legatee against the validity of the will are not competent against the executor. Dillard v. Dillard, 2 Strobh. L. 89.

[8] Osgood v. Manhattan Co., 3 Cow. 612, rev'g 15 Johns. 162.

[9] 1 Bright. Penn. Dig. 962, and cases cited.

[10] P. 189. So. L. Ins. Co. v. Wilkinson, 53 Geo. 535. *Contra*, Milton v. Hunter, 4 Law & Eq. R. 336. The rule of exclusion stated in the text, while applicable unqualifiedly on probate where the issue is not as to the right of any one party, but as to the validity of the will, as an entirety, may be thought subject to qualification in civil actions affecting only the parties to the record and specific property. In such cases it may be proper to admit the evidence against the declarant, if none of the

of several *joint* legatees or devisees, showing fraud or undue influence by them, is competent against both.[1] In the case of a *combination* by several persons to procure the making of the will, the separate admissions of either are competent against the others,[2] unless made after they have ceased co-operation, in which case they are not.[3]

129. *Judgments.*]—A judgment or verdict for[4] or against[5] the ancestor is competent evidence for or against the heir in controversies relating to the inheritance. A judgment or verdict for[6] or against[7] an executor or administrator is never conclusive against the heirs or devisees; and a judgment or verdict against the heir or devisee is not conclusive against the executor or administrator.[8] A judgment or verdict against the executor or administrator is not even competent evidence against the heir or devisee, as evidence of the existence of the debt or other facts established thereby.[9] A judgment or verdict for or against the heirs does not bind the devisees,[10] nor conversely. A judgment in an action under the statute to charge an heir with the debt of the ancestor necessarily determines the title of the ancestor, as against the parties to the action and those claiming under them, and is conclusive on them as to that question.[11] A judgment in a suit by a legatee on behalf of himself and all others who might come in, &c., is not conclusive on infant legatees who did not come in.[12]

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others having an interest, who are parties to the record, are litigating the question, or if there is other evidence which, as matter of law, is sufficient to establish the fact as against them. This distinction may explain something of the conflict of the cases. Compare Nessar v. Arnold, 13 Sergt. & Rawle, 323; Clark v. Morrison, 25 Penn. St. 452; Morris v. Stokes, 21 Geo. Rep. 552; Blakey's Heirs v. Blakey's Executors, 33 Ala. 611.

[1] Horn v. Pullman, 10 Hun, 471.

[2] Lewis v. Mason, 109 Mass. 169.

[3] Shailer v. Bumstead, 99 Mass. 112.

[4] Lock v. Norbone, 3 Mod. 142.

[5] Freeman on Judgments, § 168.

[6] Dale v. Roosevelt, 1 Paige, 35.

[7] McCoy v. Nichols, 4 How. (Miss.) 31; Vernon v. Valk, 2 Hill Ch. 257; Collinson v. Owens, 6 Gill. & J. 4; Robertson v. Wright, 17 Gratt. 534; Early v. Garland, 13 Id. 1. Except, perhaps, where the executor is the sole devisee of the real estate. Stewart v. Montgomery, 23 Penn. St. 410; or where he represents him as trustee, within the settled principles of the law of trusts.

[8] Dorr v. Stockdale, 19 Iowa, 269; Combs v. Tarlton's Admr. 2 Dana, 464.

[9] Kent v. Kent, 62 N. Y. 560, and cases cited; Robertson v. Wright, 17 Gratt. 534; Laidley v. Kline, 8 W. Va. 218, 230. *Contra*, Harvey v. Wilde, L. R. 14 Eq. C. 438, s. c. 3 Moak's Eng. 811. Compare Early v. Garland, 13 Gratt. 1; Garnett v. Macon, 6 Call. 308, 337.

[10] Cowart v. Williams, 34 Geo. 167.

[11] Hudson v. Smith, 39 Super. Ct. (J. & S.) 452. A judgment for or against the heir not as such, but in his individual character, has been held not a bar against him when he appears "as heir." Jennings v. Jones, 2 Redf. Surr. 95. See, also, Rathbone v. Hooney, 58 N. Y. 463; Sharpe v. Freeman, 45 N. Y. 802, aff'g 2 Lans. 171.

[12] Brower v. Bowers, 1 Abb. Ct. App. Dec. 214; compare Kerr v. Blodgett, 48 N. Y. 62.

XIII. Action to Charge Heir, Next of Kin, &c., with Ancestor's Debt.

130. *Material facts.*]—In an action against heirs or next of kin, on a debt of the ancestor, the plaintiff must allege[1] and prove, affirmatively, a case within the provisions of the statute which creates the right of action.[2] His failure to prove everything that the statute demands, is sufficient to prevent a recovery.[3] He must show the granting of letters;[4] that his action is brought after three years from the grant of letters;[5] that defendant inherited real property by descent, or acquired real or personal property under the decedent's will, or the statute of distributions; and that the decedent left no personal property within the State, or that the same was insufficient to pay the debt, or that the debt could not be collected by due proceedings before the proper surrogate, and at law, from the personal representatives of the decedent, nor (if the action is against the heir) from the next of kin or legatees.[6]

131. *Mode of proof.*]—The lapse of time since administration granted cannot create any presumption as to the statute conditions.[7] The acts or admissions of executors, &c., of insolvency of the decedent, are not evidence against heirs or devisees, even to bind the lands descended or devised.[8] A judgment against the executor or administrator is not evidence in the statutory action against the decedent's heir, next of kin, or legatee, to prove the existence of the claim or demand;[9] but the claim being established by evidence *aliunde*, the record is evidence that an action has been brought within the time allowed by law, and a judgment recovered thereon, and is conclusive evidence that there is no bar, under the statute, of the claim as against the personal representatives, available to the defendant.[10] And if the judgment is less than the debt claimed, and there is evidence of the identity of the debt with the cause of action in judgment, the judgment is conclusive against the plaintiff as a limit of the amount of his recovery.[11] The return, unsatisfied, of execution against the executor or administrator, is not sufficient proof of want of assets, for there may have been a misappropriation of

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[1] Renard v. West, 48 Ind. 159.
[2] Mersereau v. Ryerss, 3 N. Y. 261.
[3] Selover v. Coe, 63 N. Y. 443.
[4] Roe v. Sweezey, 10 Barb. 251.
[5] Id.; Selover v. Coe (above).
[6] Armstrong v. Wing, 10 Hun, 520; 63 N. Y. 438; Roe v. Sweezey (above); Stuart v. Kissam, 11 Barb. 282.
[7] Armstrong v. Wing (above).
[8] Osgood v. Manhattan Co. 3 Cow. 612, rev'g 15 Johns. 162.
[9] Sharpe v. Freeman, 45 N. Y. 802. *Contra*, Steele v. Linebergher, 59 Penn. St. 308; Stone v. Wood, 16 Ill. 177, 182.
[10] Kent v. Kent, 62 Id. 560, rev'g 3 Supm. Ct. (T. & C.) 630.
[11] Rockwell v. Geery, 4 Hun, 611, s. c. 6 Supm. Ct. (T. & C.) 687.

assets, for which the remedy is by accounting.[1] But if it be shown that an accounting has been prosecuted, the fact that there are unrealized assets, or that assets have come to the hands of the representative since the commencement of the present action, is not a bar, nor does it necessarily reduce the recovery,[2] but may restrain enforcement of the judgment.

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[1] Wambaugh v. Gates, 11 Paige, 515; Stuart v. Kissam, 11 Barb. 282.
[2] Rockwell v. Geery (above).

CHAPTER VI.

ACTIONS BY OR AGAINST HUSBAND OR WIFE.

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I. General Principles.[1]

1. *Marriage.*]—In all civil actions and proceedings affecting only questions of property or torts, not involving any question

[1] The statutes of the State should be carefully consulted in connection with the statements in this chapter. Unless such a statute imposes a different rule, the general principle may be followed, that, except in divorce and crim. con., and in certain cases of confidential communication, the marital relation does not affect the competency of evidence, but it does often affect its weight, because it gives rise to certain presumptions as to matters within the sphere of marital influence; and, in consequence, affirmative evidence is in some cases necessary, when in the case of single persons, a presumption would be allowed without evidence: and, in some cases, evidence is inadequate which would be adequate in the case of single persons. In other words, to the extent in which modern statutes have removed civil disabilities of the wife, the same rules of competency apply to the transactions and the testimony of husband and wife, as apply to those of other persons. But the marital relation remains, and to the extent in which the conduct of either is had within its sphere, the

of marital infidelity, marriage may be proved either by direct evidence, or by evidence of cohabitation and repute, or cohabitation and declarations, in the manner stated in the last chapter.[1]

2. *Foreign Law.*]—The generally received rule is that the original title of husband or wife to movables is controlled by the law of place which was their domicile at the time of the acquisition; the validity of their transactions, except as to realty, may be sustained by the law, either of the place of the transaction, or of the place fixed on by the contract for its performance, or of their domicile at the time of the transaction, unless the act was forbidden by positive law of either place; and the title to realty and the validity of transactions affecting it, are controlled by the law of the place where the realty is situated. Domicile is to be proved in the mode stated in the last chapter.[2] The courts of a State do not take judicial notice of the law of husband and wife in other States; and a party who desires to rely on such law should be prepared to prove it as matter of fact. In the absence of such proof, if the question turns on the law of a State deriving its jurisprudence from England, the court may apply the rules of the old common law:[3] if on the law of any other State, the court will apply the law of the forum.[4] By whatever law the right is determined, the form of the remedy and the competency of evidence, are governed by the law of the forum.[5]

3. *Competency of Husband or Wife as Witness.*]—The New York statute provides that no person shall be excluded or excused[6] from being a witness because he or she is the husband or

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influence of that relation is recognized by the law as an element of great importance, in estimating the just weight of facts as evidence, and the natural presumptions resulting. Thus the law recognizes and draws presumptions from the natural disposition of a husband to make provision for his wife; her disposition to be silent, or even acquiescent, for the sake of peace, in the face of his wrongful conduct toward others, or toward herself or her separate property rights; the natural disposition of each, without claim or admission of transfer or compensation, to hold and allow the holding of the exclusive property of one, in the use or safe-keeping of the other; and the peculiar facility which the relation affords for undue influence, particularly over the wife, and for the transfer to her of property in fraud of the husband's creditors. The rules stated in the text are founded chiefly on these principles, which are almost universally recognized, although in their application some disagreement of authority still exists in the several States.

[1] Chap. V, paragraphs 14–23.

[2] Chap. V, paragraphs 51–57.

[3] For these rules, see 1 Bish. Mar. W.; Ewell's Cas. The traditional rule is that the courts must do so. See Waldron v. Ritchings, 9 Abb. Pr. N. S. 359, s. c. 3 Daly, 288. But the changes in the law on this subject are so general and so nearly uniform in substance in the States deriving their jurisprudence from England, that the courts sometimes hesitate to declare void transactions that are valid by the law of the forum, and naturally presumable to be so by the law of the sister State, but for this rule. See Worthington v. Hanna, 23 Mich. 530; Adams v. Honness, 62 Barb. 326.

[4] Savage v. O'Neil, 44 N. Y. 298, rev'g 42 Barb. 374.

[5] Stoneman v. Erie Rw. Co. 52 N. Y. 429, aff'g Buff. Super. Ct. (1 Sheld.) 286.

[6] The common law entire disqualification could not be legally waived by consent. 2 Kent's Com. 178; Parker v. Sir Woolston Dixie, C. T. Hardw. 264, 49 N. Y. 510; Dwelley v. Dwelley, 46 Me. 377; Bevins v. Cline, 21 Ind. 37; Barbat v. Allen, 16 Jur. 338, s. c. 10 Eng. L. & Eq. 596; Pedley v. Wellesley, 3 Car. & P. 558. But was frequently waived in practice. And in some later cases a waiver was held legal;

wife of a party, or of a person in whose behalf the action or special proceeding is brought, prosecuted, opposed, or defended.[1] The following exceptions, however are made:[2] "A husband or a wife is not competent to testify against the other upon the trial of an action, or the hearing upon the merits of a special proceeding founded upon an allegation of adultery, except to prove the marriage. A husband or wife[3] shall not be compelled[4] or, without consent of the other if living, allowed to disclose a confidential communication,[5] made by one to the other during marriage. In an action for criminal conversation, the plaintiff's wife is not a competent witness for the plaintiff, but she is a competent witness for the defendant, as to any matter in controversy; except that she cannot, without the plaintiff's consent, disclose any confidential communication had or made between herself and the plaintiff." Business transactions between them are not confidential communications within the policy of the statute,[6] nor are communications made in the presence and hearing of third persons.[7] But written as well as verbal communications, if confidential, are within the policy of the rule.[8]

4. *Their Admissions and Declarations.*]—When either husband or wife is strictly incompetent as a witness, either generally or as to a particular fact, evidence of his or her declaration of

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and the persons competent to waive it were the husband and wife—not the parties to the suit. Russ v. The War Eagle, 14 Iowa, 363; Blake v. Graves, 18 Id. 317, DILLON, J. dissented; Jordan v. Anderson, 19 Id. 565. Objection to wife's competency was not waived by permitting examination-in-chief. Schmidt v. Herfurth, 5 Robt. 124. But see Tappan v. Butler, 7 Bosw. 480; Boardman v. Boardman, L. R. 1 P. & M. 233.

[1] N. Y. Code Civ. Pro. § 828. General provisions of statute removing disqualification by reason of interest, and enabling parties to testify, do not abrogate the common law exclusion of husband and wife on grounds of public policy. Kelly v. Drew, 12 Allen, 107, 109.

[2] 2 N. Y. Code Civ. Pro. § 831, as amd. by L. 1880, c. 149, superseding L. 1879, c. 542.

[3] The marital privilege does not apply in the case of a void marriage. Bloomer v. Barrett, 37 N. Y. 434; Kelly v. Drew, 12 Allen, 107, 110.

[4] In Hebblethwaite v. Hebblethwaite, L. R. 2 Pr. & D. 29, holds the corresponding English statute, giving a privilege to the witness, to be secured by the judge; and that it is not competent to counsel to object to the testimony.

[5] At common law, for reasons of public policy, neither husband nor wife could testify to a communication of whatever nature, confidential or otherwise, which passed between them. O'Connor v. Majoribanks, 4 M. & Gr. 435, S. C. J. 6 Jur. 509; and even death or divorce did not break the seal. Monroe v. Twistleton, Peake's Add. Cas. 210; Southwick v. Southwick, 49 N. Y. 510, 518, affi'g 9 Abb. Pr. N. S. 109; Dexter v. Booth, 2 Allen (Mass.), 559. On the same ground neither was allowed to testify to matters to the detriment of the other, or of the character of the other. Southwick v. Southwick (above); Hasbrouck v. Vandervoort, 9 N. Y. 153, 158, 160, affi'g 4 Sandf. 596; People v. Mercein, 8 Paige, 47, 50; Burrell v. Bull, 3 Sandf. Ch. 15; Barnes v. Camack, 1 Barb. 392; Marsh v. Potter, 30 Barb. 506; Stein v. Bowman, 13 Pet. 209, 221; Scroggin v. Holland, 16 Mo 419. These rules were not mere rules of evidence, but part of the law of husband and wife.

[6] Southwick v. Southwick (above); Schaffner v. Reuter, 37 Barb. 44. Otherwise under the Massachusetts statute protecting "private conversations." Bliss v. Franklin, 13 Allen, 244; Drew v. Tarbell, 117 Mass. 90. Wife acting as messenger, not an "agent," within a statute rule allowing wife to testify for or against her husband only within the limits of her agency for him. Hale v. Danforth, 40 Wis 385.

[7] See Allison v. Barrow, 8 Coldw. (Tenn.) 414; State v. Center, 35 Vt. 378.

[8] See Williamson v. Morton, 2 Md. Ch. Dec. 94, Bradford v. Williams, Id. 1; Nelms v. Wrickell, Hayw. N. C. 19.

the fact is incompetent,[1] except in the following cases: The declarations of either are competent; 1. When the making of such declarations is the material fact.[2] 2. When the declaration is part of the *res gestæ* involved in an act properly in evidence.[3] 3. When it is merely matter of inducement or introduction to the language or conduct of another person, which the declaration offered called forth.[4] 4. When it is one which the declarant made, when authorized, expressly or impliedly, to speak as the other's agent, or as one to whom the other referred a third person.[5]

The privilege from testifying to confidential communications is personal, and does not preclude a stranger from testifying to them.[6] But, of course, all the rules excluding hearsay apply.

When a husband or wife is a competent witness, or would be if living, his or her admissions and declarations are competent *against the maker* of them, for the same purposes and within the same limits that they would be if the maker were unmarried,[7] with this exception, that those of the wife cannot be received to prove an act by her which the law does not authorize a married woman to perform. The existence of the marital relation is not enough to make admissions or declarations made by either competent *against the other*,[8] but some special ground for admitting them must be shown, as in case of other persons. For this purpose it is enough to show that the declarant was the agent of the other in the matter involved, and acting as such when the declaration was made;[9] or that the other claims as the representative or successor of the declarant.[10] In the case of silence or acquiescing admissions by the wife, in the face of her husband's conduct or declarations, the influence of the marital relation must be presumed, so far as to require very clear proof of her free assent,[11] or of estoppel in favor of an innocent third person,[12] in

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[1] Dawson v. Hall. 2 Mich. (Gibbs), 390; Gardner v. Klutts, 8 Jones L. (N. C.) 375; Karney v. Paisley, 13 Iowa (5 Withrow), 89. The incompetency of the witness enhances the reason for the exclusion of the declaration. Churchill v. Smith, 16 Vt. 560; Nelius v. Wrickell, Hayw. (N. C.) 19.

[2] Of this class of cases are proofs of demeanor as showing affection.

[3] Williamson v. Morton. 2 Md. Ch. 94.

[4] Boyles v. McEowen, Penningt. (N. J.) 499.

[5] Lay Grae v. Patterson, 2 Sandf. 338.

[6] Cook v. Burton, 5 Bush, 67.

[7] The Pennsylvania rule excludes the declarations of either, when offered against creditors, to prove title out of the declarant and in the other; if they might have the effect to bolster up a fraudulent conveyance (Parvin v. Capewell, 45 Penn. St. 89); but the better opinion is that they are competent, though not alone sufficient on such an issue. Compare Townsend v. Maynard, 45 id. 200; Musser v. Gardner, 66 id. 246.

[8] Owen v. Cawley, 36 N. Y. 600; Thomas v. Maddan, 50 Penn. St. 261, 265; s. p. Hanson v. Millett, 55 Me. 190; Livesley v. Lasalette, 28 Wisc. 41.

[9] Riley v. Suydam, 4 Barb. 222; Kelly v. Kelly, 2 E. D. Smith, 250; Rosc. N. P. 75.

[10] Day v. Wilder, 47 Vt. 584, 593; Smith v. Sergent, 2 Hun, 107.

[11] Rowell v. Klein, 44 Ind. 293.

[12] See Bodine v. Killeen, 53 N. Y. 96.

order to give any weight to them; and the weight of her admissions or declarations is generally impaired where there is not ground of estoppel, if it appears that they may have been made by his influence or for his benefit.[1]

5. *Agency of one for the other.*]—To prove an agency for the wife in a matter where she had not power to act at common law, the facts,—such as separate estate,—on which her power under the statute depends, must be proved.[2] In other respects, the fact of agency, whether of one for the other, or of a third person for either, is to be proved in the same manner as in the case of other persons.[3] The marital relation alone raises no presumption of agency between them; but its existence may aid or impair the significance of other evidence tending to show agency. Thus, when the agency of the wife is alleged against the husband, in matters of a domestic nature, slight evidence of actual authority is enough;[4] while if his agency is alleged against her to divest her of her estate without consideration, the existence of the relation is a reason for requiring unusually strict proof of authority.[5] The agency cannot be proved by the admissions or declarations of the one alleged to be agent.[6] In respect to the effect of *notice* to either, as binding the other, the fact that the one was agent for the other must first be shown; and then the rule well settled in the law of agency, applies.[7]

6. *Estoppel.*]—In respect to all matters within the limits and to the extent to which the law has conferred capacity on the married woman, she will be held, in favor of third persons, to be liable to the same equitable estoppels, and the same presumptions, and chargeable by the same indirect evidence of authority conferred on her husband or other agents, or by the same apparent holding out of him or them as authorized, as a *feme sole*.[8] But her silence or concessions, apparently prompted by the spirit of forbearance and acquiescence which a wife should foster toward her husband, and thus explained by her marital duty, do not bind her as an estoppel in his favor or in favor of his creditors, unless fraud or bad faith on her part is shown.[9] On the other hand, her conduct or silence under incapacity, without actual

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[1] Hollinshead v. Allen, 17 Penn. St. 275.

[2] Nash v. Mitchell, 3 Abb. New Cas. 171.

[3] See Bodine v. Killeen, 53 N. Y 96; Dillaye v. Beer, 3 Supm. Ct. (T. & C.) 218.

[4] Paragraph 21 below.

[5] Hoffman v. Treadwell, 2 Supm Ct. (T. & C.) 57. See also Schouler Dom. Rel. 99; 2 Bish. Mar. W. §§ 396, 407, 411; Bank of Albion v. Burns, 46 N. Y. 170.

[6] Deck v. Johnson, 1 Abb. Ct. App. Dec.

[7] Adams v. Mills, 60 N. Y. 539; R. R. Co. v. Brooks, 81 Ill. 293; Pringle v. Dunn, 37 Wisc. 468.

[8] Bodine v. Killeen, 53 N. Y. 96; Anderson v. Mather, 44 N. Y. 249, 262. Compare McGregor v. Sibley, 69 Pa. St. 388; Morris v. Ziegler, 71 Pa. St. 450. And see 2 Bish. Mar. W. § 488; Carpenter v. Carpenter, 25 N. J. Eq. 194.

[9] Bank of U. S. v. Lee, 13 Pet. 118; Sexton v. Wheaton, 8 Wheat. 233.

fraud, cannot raise an estoppel which will avail in the place of capacity when it did not exist by the law.[1]

7. *Judgments.*]—At common law, and apart from the statutes conferring capacity upon married women, a judgment at law against a married woman whose husband was not a party with her, is not, in general, binding upon her;[2] and a decree in equity in a suit brought by both as to her separate estate,[3] or in which their interests were in conflict,[4] is not conclusive against her. Under the modern statutes, a judgment against a married woman is competent and conclusive against her and those claiming under her, in the same cases and to the same extent that it would be against a *feme sole*, provided the case be one in which she might have capacity under the statute.[5]

8. *Evidence of Husband's title.*]—Evidence that the husband,[6] or husband and wife together,[7] or the wife,[8] were in possession of property, without other indication of ownership, is presumptive, but not conclusive,[9] evidence of title in the husband. Evidence that the property in question was purchased by her on her own credit, when she had no separate estate or other capacity to contract, is evidence of title in him.[10] And her purchase of articles for family use, partly with her own money and partly with his, tends, in the absence of anything indicating a different intent, to prove title in him.[11] But after it has been shown either that he received property to his wife's use, or that she had title to property in the possession of either or both, or that it was in her possession in a separate business belonging to her under the statute,[12] the burden is on those who claim it to be his to show his title. If the fund is the proceeds of her estate, it is hers, even as against his creditors, although realized by his labor as her servant upon her farm,[13] or in her business,[14] or his skill or ability as her agent in the purchase and resale of her property.[15]

It being shown that title to property was in either the wife

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[1] Big. on Estop. 444–446; 4 Central L. J. 507, 579.
[2] Bigelow on Estop. 48; Freem. on Judg. § 150, and cases cited.
[3] Stuart v. Kissam, 2 Barb. 493; Michan v. Wyatt, 21 Ala. N. S. 813, 833.
[4] Alston v. Jones, 3 Barb. Ch. 397.
[5] Freem. on Judg. § 150. *Contra*, Swayne v. Lyon, 67 Penn. St. 439.
[6] Keeney v. Good, 21 Penn. St. 354.
[7] Turner v. Brown, 6 Hun, 331.
[8] Black v. Nease, 37 Penn. St. 436.
[9] See paragraph 16 (below). See also Schouler's Dom. Rel. 214; 2 Bish. Mar. W. §§ 128–140; 1 Id. § 732.
[10] Glann v. Younglove, 27 Barb. 480.
[11] Kelly v. Drew, 12 Allen, 107.
[12] Peters v. Fowler, 41 Barb. 467.
[13] Vrooman v. Griffiths, 4 Abb. Ct. App. Dec. 505. As to what proves him a tenant under her, and what her servant, compare Albin v. Lord, 39 N. H. 205, and Hill v. Chambers, 30 Mich. 422.
[14] Kluender v. Lynch, 2 Id. 538.
[15] Merchant v. Bunnell, 3 Id. 280.

or the husband, no presumption of a transfer of the title to the other can be drawn from the mere fact of possession by the other; the burden of proof is on the one who asserts a change, to give some evidence beyond the mere possession.[1] The intimacy of the relation is such, and acting as agent for each other so habitual, that the possession by one of the movables of another is very slight, if any, evidence of a gift or transfer, and not enough to transfer the burden of proof.[2] The fact that they joined in conveying does not raise a presumption that he was the sole owner, but rather that they were equal owners in common.[3]

9. *Evidence of Wife's title.*]—The wife's separate property rights are still regarded as exceptional,—that is to say, the law requires her in each case to rebut the presumption that whatever she acquires belongs to her husband, or is subject to his control;[4] and this is to be done by establishing the facts necessary, to bring her case either within the enabling statutes, or within the common law or equity rules recognizing a married woman's right. She must give some evidence of her title, besides possession under the marital relation; for the mere fact of the wife's possession and control of property, if consistent with their common interest in and enjoyment of it as the husband's property, is no evidence of title in her, but is presumptive evidence of his possession.[5] This presumption, however, may be rebutted by his admissions that it belonged to her, or by his silence in the presence of her declarations of ownership.[6] She may even prove title by adverse possession, against a third person, although her husband lived with her, if he claimed no independent exclusive occupation in himself.[7] A *deed* containing the maiden name as that of the grantee may be shown to be to her, by parol evidence that she was the person to whom the grant was made, and was known to the grantor by that name, and that no other person claiming the name claims title under the deed.[8] If a deed to a married woman fails to express that it is to her separate use, extrinsic evidence of the intent is competent,[9] unless the statute of the State requires directions in the instrument, or only extends to

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[1] Wells Sep. Prop. of M. W. 224-226, and cases cited.
[2] Bachman v. Killinger, 55 Penn. St. 418; 1 Bish. Mar. W. § 732.
[3] Cox v. James, 45 N. Y. 557, aff'g 59 Barb. 144.
[4] Schouler Dom. R. 2d ed. 16; 2 Bish. Mar. W. § 82, &c.
[5] Farrell v. Patterson, 43 Ill. 52, 59; Johnson v. Johnson, 72 Id. 491. Where both are domiciled on her estate, it has been held that he is not presumptively responsible for the control of the premises in respect to negligent condition. Fiske v. Bailey, 51 N. Y. 150; but is in respect to illegal use. Commonwealth v. Carroll, 5 Reporter, 699.
[6] Turner v. Brown, 6 Hun, 331.
[7] Clark v. Gilbert, 39 Conn. 94.
[8] Scanlan v. Wright, 13 Pick. 523, 530.
[9] But not necessary if the conveyance was by a stranger. McVey v. Green Bay, &c. R. R. Co. 42 Wisc. 532.

property conveyed to her separate use.[1] Evidence that the property came to her from a third person, or a bill of sale running to her individually, is *prima facie* sufficient to go to the jury.[2] On the question whether a purchase made in her name was upon a consideration paid by her, evidence of her lack of means is competent against her;[3] but evidence that she had means is not sufficient, as against his creditors at least, without evidence tending to show that the purchase was made with her means.[4] Evidence that she had a separate estate or business before purchasing is not, however, essential, for she may commence such an estate or business[5] by a purchase on credit.[6] Evidence that the thing was a gift accompanied by delivery to both at about the time of marriage, raises a question of intent as to whether it was a gift to one or the other.

The declarations of the husband, at the time of his transaction, that the property delivered belonged to, and was delivered for the benefit of the wife, is competent, not only against him, but against the other party to the transaction.[7] In tracing the source of her title, the rule of *res gestæ* applies, not alone to the immediate transfer of the thing in question, but to the transactions by which she came to have a separate property. Hence, on the question of the title to property bought by her, the declarations of the third person who gave her the money with which she purchased the property, showing that the money was a gift to her,[8] or her correspondence with her business agent, showing the source of the fund,[9] is competent as part of the *res gestæ*. Her own declarations, if part of the *res gestæ*, are competent in support of her title.[10]

Parol evidence is competent to show that the husband paid the consideration for an estate conveyed to the wife; but this raises a presumption that he intended it as a provision for her,[11] and, in the absence of other evidence, establishes her title, except as against his creditors.[12] The fact that he caused or consented to

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[1] 2 Bish. Mar. W. § 92, and unless she is estopped. Id. § 104. Compare Hayt v. Parks, 39 Ct. 357.

[2] Wasserman v. Willett, 10 Abb. Pr. 63.

[3] Block v. Melville, 10 La. Ann. 784.

[4] Seitz v. Mitchell, 94 U. S. (Otto), 583.

[5] Harrington v. Robertson, N. Y. Ct. App. Nov. 1877; Frecking v. Rolland, 53 N. Y. 422, rev'g 33 Super. Ct. (J. & S.) 499; Dingens v. Clancey, 67 Barb. 566.

[6] *Contra*, Carpenter v. Tatro, 36 Wisc. 297; and see Huff v. Wright, 39 Geo. 41. The mere fact that he helped her with his credit, in making her purchase, does not render the property liable to his creditors. There should be evidence of fraud. 2 Bish. Mar. W. § 87.

[7] Crain v. Wright, 46 Ill. 107.

[8] Hall v. Young, 37 N. H. 134, 144.

[9] Hannis v. Hazlett, 54 Penn. St. 139; s. p. Bank v. Kennedy, 17 Wall. 19.

[10] Claussen v. La Franz, 1 Iowa, 226.

[11] So of a house built by him on her land. Caswell v. Hill, 47 N. H. 407; and see Tappan v. Butler, 7 Bosw. 480.

[12] Guthrie v. Gardner, 19 Wend. 414; chap. v. of this vol. paragraph 119; and cases cited in 13 Moak's Eng. 833.

the deed being taken in her name is very cogent evidence that he intended her to have absolute title.[1] He may rebut the presumption that he intended it as a provision for her, by proof of undue influence,[2] or of fraud effected by a misrepresentation as to a material fact, not equally ascertainable by both, as distinguished from mere statement of opinion;[3] or by proof that at the time of the transaction it was mutually understood and designed that she should hold for him.[4] And the amount itself may be so large, in relation to the circumstances of the parties, as itself to rebut the presumption of a provision exclusively for her benefit.[5] The fact that she afterward joined with him in a deed or mortgage of the land does not estop her from proving the intent, and that all his dealing with the property was as her agent.[6] If there be satisfactory evidence[7] that it was by her procurement and without his consent that the deed was made to her, or if it was the mutual understanding and purpose at the time, that she was to hold the land as his, and not as her own, the law raises a resulting trust in his favor, or in favor of his creditors.[8]

Parol evidence is also admissible to show that the consideration of a deed to him proceeded from her separate property at the time of the purchase,[9] and that, by fraud, duress, mistake, abuse of confidence, or other undue means, he procured or accepted the title.[10] Evidence that he permitted her to carry on *a farm or other business* on her own account, shows, as against him, her title to property purchased in course of the business, although he advanced money to her in aid of the purchase;[11] and to enable his creditors to reach the property so held by her, or property acquired by her through his skill and labor, the burden is on them to show her possession fraudulent.[12] If she shows title to a separate property or capital, not derived from him, the fact that she employs him,[13] or their minor son,[14] upon it, and supports him,

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[1] Smith v. Smith, 50 Mo. 262.

[2] As to the mode of proof of this, see paragraphs 67 and 68 of the preceding chapter. Compare Orr v. Orr, 8 Bush, 159.

[3] Jagers v. Jagers, 49 Ind. 428.

[4] Bent v. Bent, 44 Vt. 555; Welton v. Divine, 20 Barb. 10; and see Foote v. Foote, 58 id. 258.

[5] Adlard v. Adlard, 65 Ill. 212.

[6] Tappan v. Butler, 7 Bosw. 480.

[7] Sandford v. Weeden, 2 Heisk. 74, 76.

[8] Id.; 2 Bish. Mar. W. §§ 118–124. But see the statute as to resulting trusts, 1 N. Y. R. S. 728. §§ 51–53, and 48 N. Y. 218, and cases cited; Gilbert v. Gilbert, 2 Abb. Ct. App. Dec. 256.

[9] Robison v. Robison, 44 Ala. 227.

[10] Bancroft v. Curtis, 108 Mass. 47; 2 Bish. Mar. W. § 119; Methodist Ch. v. Jaques, 1 Johns. Ch. 450.

[11] Sammis v. McLaughlin, 35 N. Y. 647.

[12] Kluender v. Lynch, 2 Abb. Ct. App. Dec. 538; Merchant v. Bunnell, 3 id. 280.

[13] Buckley v. Wells, 33 N. Y. 518, rev'g 42 Barb. 569.

[14] Van Etten v. Currier, 4 Abb. Ct. App. Dec. 475.

does not raise a presumption of fraud; on the contrary, if she shows title to the main property, and that he was destitute of means, the current purchases will be presumed, in the absence of evidence to the contrary, to be made by her funds.[1] But his conduct in the business may be given in evidence on the question of fraud.[2]

The presumption of her ownership of property being once established, continues until alienation is shown; and though the property be kept in his house, the possession is presumptively hers[3] during cohabitation.

10. *Evidence of transfer by one to the other.*]—A gift by husband to wife may be proved by parol, unless other grounds than the relation require written evidence;[4] and it is enough to prove an executed intention to make the gift; and declarations made by him, at the time of giving his wife money, as to the purpose for which he gave it, and declarations as to the person for whom he was acting, made when he received a security in her favor, are competent in favor of her title.[5] So his express declaration may constitute him trustee for her,—as where he credits her in account with moneys given by him to her, but not actually delivered.[6] If her title was derived from him, his declarations made after the transfer are not competent in favor of creditors and against her title, to establish fraud in the transfer.[7] To prove a gift by him to her, the evidence must be clear.[8] The mere fact that a husband allows his wife to deal with, as if her own property, that which is, or might be, his by marital right, does not convert it or its proceeds into her separate property.[9] But if, while having such marital right, whether to property in possession or in action, he borrows it of her, agreeing to repay it, the agreement is valid[10] (unless perhaps, if made on the mistaken idea that by law it is her separate property[11]), and his payment to her is valid, even against his creditors.[12] So evidence of his dec-

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[1] Vrooman v. Griffiths, 4 Abb. Ct. App. Dec. 505. Compare 2 Bish. Mar. W. § 801, &c. Presumptively the avails of the husband's labor are his own; and to make them hers, there must be some understanding that they are not to be paid for. Id. § 456.

[2] O'Leary v. Walter, 10 Abb. Pr. N. S. 439.

[3] Hanson v. Millett, 55 Me. 189; 1 Bish. Mar. W. § 732.

[4] Mack v. Mack, 3 Hun, 325.

[5] Kelly v. Campbell, 2 Abb. Ct. App. Dec. 492.

[6] Crawford's Appeal, 61 Penn. S. 55.

[7] Gillespie v. Walker, 56 Barb. 185; s. p. Lormore v. Campbell, 60 id. 62. Whether they are competent, to negative fraud, is disputed, see paragraph 5, above.

[8] Shuttleworth v. Winter, 55 N. Y. 629; 1 Bish. Mar. W. § 732. Savings from house-keeping, allowance, &c., not readily presumed gifts. Schouler's Dom. Rel. 242. Compare Wells' Sep. Prop. M. W. 142

[9] Ryder v. Hulse, 24 N. Y. 372; Schouler's Dom. Rel. 236. So held also where he permitted it under the mistaken idea that the law entitled her to it. Sharp v. Maxwell, 30 Miss. 589.

[10] Jaycox v. Caldwell, 51 N. Y. 395, affi'g 37 How. Pr. 240.

[11] King v. O'Brien, 33 Super. Ct. (J. & S.) 49.

[12] Savage v. O'Neill, 44 N. Y. 298, rev'g 42 Barb. 374.

larations made in view of marriage, and after it,[1] or made at the time of receiving the property or afterward, are competent to disprove the intent;[2] and if they clearly evince an intent to receive it for her, are sufficient to repel the presumption of an effectual reduction to possession, and to charge him as trustee for her.[3] The fact that he received her property as a loan, so as to entitle her to payment among other creditors, may be proved by indirect or circumstantial evidence, without proving an express promise at or before the transaction.[4]

A mere preponderance of proof is not sufficient to show title derived by her from him, as against his creditors, especially to invoke the interposition of a court of equity; but, on the other hand, proof beyond all doubt is not necessary. Evidence which satisfies the conscience of the court beyond reasonable doubt is enough.[5]

11. *Tacit transfers.*]—Where one is tacitly permitted to deal with the property of the other, the question, as between them or between either and those claiming as assignees or successors of the other, is one of intent. Their express agreement, or their tacit understanding or usage, may determine whether the transfer of personalty by wife to husband, was a gift or a loan, or only a change of possession, under an agency,[6] or without authority. In the application of this test two rules contend for control.

12. *The old rule: Presumption in favor of Husband.*]—The rule applied in jurisdictions where the legal identity of husband and wife is still favored, is that upon the mere fact that she allows him to receive and keep her funds, the presumption is that he is authorized to use them as his own or for their common benefit;[7] and he is not to be required to account except from the time of her avowed revocation of permission,[8] or for the last year; and that the fact that she consents to his using her funds in purchasing land and taking title to himself, without insisting on any agreement to repay or convey, is sufficient evidence of her gift

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[1] Gackenbach v. Brouse, 4 Watts & S. 546.

[2] Such as his promise to give her his note for it. Moyer's Appeal, 77 Penn. St. 482, 485; and see Jaycox v. Caldwell, 51 N. Y. 395.

[3] Moyer's Appeal (above).

[4] Steadman v. Wilbur, 7 R. I. 481.

[5] Wells' Sep. Prop. of M. W., 287–293, 317, and cases cited; Flick v. Devries, 14 Wright, Penn. St. 267; Tipner v. Abrahams, 11 Wright, 228; Earl v. Champion, 65 Id. 194; Sandford v. Weeden, 2 Heisk. 76; Crissman v. Crissman, 23 Mich. 217. But compare, for the notion that preponderance of proof is enough in all civil cases, 10 Am. Law Rev. 642.

[6] 2 Bish. Mar. W. § 446. As to confusion by commingling, see 1 Id. §§ 611, 612; 2 Id. 125, 126, 446, 466; Schouler's Dom. Rel. 213, 214; Chambovet v. Cagney, 35 Super. Ct. (J. & S.) 486; Hall v. Young, 37 N. H. 134, 149.

[7] Jacobs v. Hessler, 113 Mass. 161; Kleine's Appeal, 39 Penn. St. 463.

[8] Lyons v. Green Bay, &c. R. R. Co. 42 Wisc. 548, 553, and cases cited.

to him.[1] But the presumption in either case may be rebutted by proof that he received the property in trust for her.[2] Evidence of his declarations is enough to establish such a trust, as against him and his personal representatives,[3] though not as against his creditors.[4]

13. *The new rule: Presumption in favor of Title.*]—The rule laid down by some courts as more in consonance with the modern doctrine, is that where she has a right to her property under the statute, as if sole, his dealing with her funds will be presumed, in the absence of proof to the contrary, to be in the character of agent for her, and they will not be deemed to have become his property, unless he affirmatively establishes a gift or other legal transfer.[5]

14. *Evidence of his application of her funds.*]—When called to account for the proceeds of her funds, evidence of written authority to him to apply them is not necessary; he may prove by his own testimony that she authorized him to pay them out, and that he did so.[6]

15. *Evidence of the Wife's Conveyance.*]—Where the statute requires the husband's written consent to her conveyance, oral consent is not enough.[7] Where the statute requires[8] a private acknowledgment by a married woman conveying, she passes no estate unless she makes the proper acknowledgment; and the officer's certificate is the only evidence permitted of the fact. Its absence cannot be supplied by parol;[9] and a substantial defect[10] in the certificate cannot be cured by parol, nor reformed in equity.[11]

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[1] Campbell v. Campbell, 21 Mich. 438, 443; and see Wells' Sep. Prop. M. W. 258.

[2] Jacobs v. Hessler (above).

[3] Moyer's Appeal, 77 Penn. St. 486.

[4] Alston v. Rowles, 13 Fla. 128. But see paragraph 5 (above).

[5] See p 169. Patten v. Patten, 75 Ill. 446, 449; Houston v. Clark, 50 N. H. 482.

[6] Southwick v. Southwick, 9 Abb. Pr. N. S. 109, aff'd in 49 N. Y. 510. When the husband, with her consent, has been in the habit of receiving the income of her separate estate, equity has heretofore usually regarded this as showing her voluntary choice thus to dispose of it for the benefit of the family; and while they regard him as holding as her tenant, and receiving as her trustee, they will not ordinarily require him to account beyond the income of the last year, presuming that everything previous has been settled by mutual agreement (2 Story Eq. Jur. § 1396; Albin v. Lord, 39 N. H. 204), or expended by her authority. Methodist Epis. Church v. Jaques, 1 Johns. Ch. 450.

[7] Schouler's Dom. Rel. 235, n.; Townsley v. Chapin, 12 Allen, 476. But see to the contrary, Wing v. Schramm, 13 Hun, 377, holding that a conveyance without the assent is valid, except against him; and subsequent assent makes it valid against him.

[8] By the New York statute of 1878, c. 300, married women may make powers of attorney in like manner and with like effect as if single.

[9] Elwood v. Klock, 13 Barb. 50; but see Richardson v. Pulver, 63 Id. 67, and cases cited. But it need not be alleged in pleading. Williams v. Soutler, 55 Ill. 130.

[10] The objection must specify the defect.

[11] Willis v. Gattman, 53 Miss. 721. As to what defects are "substantial," see

16. *Impeaching her Conveyance.*]—Equity does not require evidence of such actual fraud and duress in order to enable her to set aside her conveyance procured by the husband as is required against a stranger,[1] and may relieve her against a voluntary conveyance to him, under mistake or fraud, though intended by her in fraud of creditors.[2] Evidence of the state of her mind and of her health at the time, and that her acknowledgment had been preceded by threats and menaces of her husband, in case she should refuse it, is competent,[3] though it may not be sufficient against a *bona fide* purchaser for value.[4] A proper certificate of acknowledgment to the deed is *prima facie* evidence, not only of the facts certified, but of the freedom of her execution; but it is not conclusive.[5] It may be rebutted, and the testimony of a party to it is sufficient to raise a question for the jury.[6] Her voluntary signature for her husband cannot be avoided by mere proof of her neglect to read the instrument.[7]

17. *Evidence of Wife's Separate Business.*]—To prove that she had a separate business, within the statute, it is not enough to show an isolated transaction, nor several disconnected acts,[8] nor

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Deery v. Cray, 5 Wall. 806; Carpenter v. Dexter, 8 Id. 513; Secrist v. Green, 3 Id. 750; Angier v. Schieffelin, 72 Penn. St. 106, s. c. 13 Am. R. 659; Wright v. Taylor, 2 Dill. C. Ct. 23, and note p. 26; Merritt v. Yates, 22 Am. R. 128, s. c. 71 Ill. 636.

[1] Witbeck v. Witbeck, 25 Mich. 439. Compare pp. 120, 121, of this vol., and Block v. Melville, 10 La. Ann. 785. See also note to paragraph 1 (above), and 2 Bish. Mar. W. § 480. Ratification by wife, of deed forged by husband, not inferred from long silence after being informed. Ladd v. Hildebrant, 27 Wis. 135.

[2] Boyd v. De La Montaignie, 4 Supm. Ct. T. & C. 152.

[3] Central Bank v. Copeland, 18 Md. 305, 318.

[4] Rexford v. Rexford, 7 Lans. 6.

[5] 1 N. Y. R. S. 759, § 17; Jackson v. Schoonmaker, 4 Johns. 161; Williams v. Woodard, 2 Wend. 486.

[6] Williams v. Woodard (above). The New York rule, stated in the text, is embodied in the statute; but whether the idea of estoppel can suffice to preclude the wife from denying the truth of her acknowledgment, as held in Kerr v. Russell, 69 Ill. 666, s. c. 18 Am. R. 634, or its freedom, as held in White v. Graves, 107 Mass. 325, s. c. 9 Am. R. 38; or the absence of her husband, as held in Johnston v. Wallace, 53 Miss. 335, remains to be determined. The notion that the certificate has the force of a judicial determination is not tenable, for the examination is *ex parte*. Moreover, the officer does not certify that her execution *is* free; he has not adequate power to investigate that question. He certifies that, under due precautions of privacy, taken by him, she *acknowledged* that it was free. Even on the theory of a judicial determination, the certificate may be impeached by evidence that she did not appear before the officer, as held in Allen v. Lenoir, cited in Johnston v. Wallace, 53 Miss. 335, for this is the jurisdictional fact; or by evidence that, at the time of acknowledgment, the deed was lacking in any part essential to an effective grant,—such as having a blank for the grantee's name, as held in Drury v. Foster, 2 Wall. 34, and Burns v. Lynde, 6 Allen, 305, and her unacknowledged power to fill such blanks is void (Id.); or by evidence of fraud or imposition in obtaining the acknowledgment, coupled with notice to the grantee, as held in Hill v. Patterson, 51 Penn. St. 289. If it is to be held conclusive, notwithstanding these and similar infirmities, it must be on grounds of an estoppel allowed for reasons of public policy, peculiar to the security of titles. For other cases see 14 Moak's Eng. 500.

[7] Fowler v. Trull, 1 Hun, 411.

[8] 2 Bish. Mar. W. § 441; but compare Hart v. Young, 1 Lans. 417; and note to paragraph 9 (above).

the rendering of domestic service, such as the nursing of one person;[1] without evidence that it was intended by her and her husband as a separate business; but the management of real[2] or personal[3] property for profit, is a business, as distinguished from the rental of it, which is not.[4] The fact that she commenced to carry on the business before her marriage, is presumptive evidence of a separate business and stock;[5] all the stronger if it was continued in her maiden name after marriage.[6] Where a regular place of business is kept, the fact that the shop was hired, and notes for goods bought were given, by the husband, in his own name, is not always conclusive evidence that the wife is not the owner.[7]

II. Actions by or against Husband.

18. *Actions by him founded on marital right.*]—In his sole action for rents and profits of her land, he must prove that they accrued since marriage.[8] In respect to her choses in action, evidence that he received them, as husband, raises a presumption of intent to reduce them to possession, only to be rebutted by clear proof of a contrary intent.[9] But evidence that he collected interest or dividends on her stock or choses in action, does not necessarily show reduction of the principal to his possession, but only of the income so received.[10]

19. *Defenses.*]—To defeat his sole action for moneys due to her, it should affirmatively appear that the legal or beneficial interest is her separate property, or is otherwise within the statute or rules of equity, enabling her to sue alone.[11] Where they sue together on a chose in action, not her separate property or right, a release or other extinguishment of the claim, by him, will bar her equally.[12] And if, after her death, he sues in his marital right, as her survivor, her admissions are competent against him, because he claims in a representative capacity.[13] When he sues alone,[14] or they sue jointly,[15] for her services rendered during coverture, evidence of her admissions of payment is not compe-

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[1] Cuck v. Quackenbush, 13 Hun, 107, and cases cited.
[2] Such as carrying on a farm. Smith v. Kennedy, 13 Hun, 9.
[3] Such as employing the husband to run a canal boat. Whedon v. Champlin, 59 Barb. 61.
[4] Nash v. Mitchell, 3 Abb. New Cas. 171.
[5] Peters v. Fowler, 41 Barb. 467.
[6] Askworth v. Outran, 37 Law Times, N. S. 85.
[7] Mason v. Bowles, 117 Mass. 86.
[8] Decker v. Livingston, 15 Johns. 479.
[9] Moyer's Appeal, 77 Penn. St. 482. See paragraphs 8–13 (above).
[10] Hunter v. Hallett, 1 Edw. 388; Burr v. Sherwood, 3 Bradf. 85.
[11] Crolius v. Roqualina, 3 Abb. Pr. 114.
[12] Dewall v. Covenhoven, 5 Paige, 581; Beach v. Beach, 2 Hill, 260.
[13] Smith v. Sergent, 2 Hun, 107.
[14] Hall v. Hill, 2 Str. 1094.
[15] Jordan v. Hubbard, 26 Ala. 433, 439.

tent, without evidence of her authority to receive money for him.[1] But where there is a division of the labors of husband and wife, and she is employed at service, it is presumed to be with his consent, and the presumption would only be rebutted by his objection. Hence, declarations by her in the course of such service, and before any objection by him as to the terms of her employment, are competent against him as part of the *res gestæ*, when he sues for her wages.[2]

20. *Actions against him founded on Marital Obligation.*]—Evidence that he knew of and assented to purchases by her, which she had not legal capacity to make, renders him liable therefor.[3] Her post-nuptial admissions are not competent evidence in an action against him,[4] or against both,[5] for her ante-nuptial debt.

21. *Actions founded on her agency.*]—In applying the presumptions drawn from the marital relation, the agency of the wife, to order, on her husband's credit, articles reasonably suitable,[6] may be inferred from her being permitted to receive the articles in his house.[7] The housewife is presumed to be authorized to order domestic articles bought for their family.[8] If there is sufficient other evidence tending to show authority, to go to the jury, there need not be evidence that the things were necessaries.[9] The extravagant character of the order may be considered by the jury as tending to rebut a presumption of agency.[10] No such presumption arises as to transactions had after she has left him voluntarily and causelessly.[11]

Where a wife is allowed by the husband to act for him,—as in the case of a wife receiving and caring for boarders in the household,[12] or the wife of a tradesman or mechanic occupying the shop premises, or shown to have been seen there on more than one occasion, appearing to conduct the business in his absence,—she is presumed to have authority to answer for him in matters of the like nature there.[13]

22. *Defenses.*]—The presumption of his liability may be re-

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[1] Schouler's Dom. Rel. 112.
[2] Hachman v. Flory, 16 Penn. St. 196.
[3] Ogden v. Prentice, 33 Barb. 160; 2 Bish. Mar. W. § 82.
[4] Ross v. Winners, 1 Halst. (N. J.) 366; Churchill v. Smith, 16 Vt. 560.
[5] Lay Grae v. Peterson, 2 Sandf. 338.
[6] Lane v. Ironmonger, 1 New Pr. Cas. 105, s. c. 13 Mees. & W. 368.
[7] Rosc. N. P. 382, (13th ed. 535).
[8] 2 Whart. Ev. § 1256.
[9] Reid v. Teakle, 13 C. B. 627, s. c. 22 L. J. C. P. 161.
[10] Lane v. Ironmonger, 1 New Pr. Cas. 105, s. c. 13 Mees. & W. 368.
[11] Johnston v. Sumner, 3 H. & N. 261; Biffin v. Bignell, 7 H. & N. 877.
[12] Riley v. Suydam, 4 Barb. 222. Hence her admission that nothing is due from the boarder, is competent against the husband. Ib.
[13] Such as to offer to settle a bill for goods delivered there. Clifford v. Burton, 1 Bing. 199.

butted by evidence that the credit was given to her personally,[1] if she had capacity as a married woman to make such a contract.[2] Evidence that she said the articles were for herself,[3] and that she gave a note signed by herself,[4] or that the charge in plaintiff's books was against her only,[5] is not conclusive that the credit was given to her alone.

23. *Action for necessaries.*]—To hold the husband liable for necessaries furnished to his wife, unless the facts indicate her agency for him, his neglect or default must be shown.[6] The marriage is sufficiently proved by evidence of cohabitation, and holding out, or repute.[7] Agency is inferable from the nature of articles such as are suitable and necessary for the wife of one in his station, and from their delivery at his abode without his objection.[8] But if he shows that the credit was given against his express dissent and notice thereof to plaintiff, the burden is on plaintiff to show not only that the things furnished were, in their nature, suitable and necessary, but also that the husband neglected his duty to provide supplies, and therefore they were needed in the particular case.[9]

The appropriate character of the articles cannot be proved by the opinion of a witness;[10] nor by what the defendant had been accustomed to purchase of a particular dealer;[11] but the facts as to her condition, and his station in life, and the character of the articles supplied by plaintiff, must be laid before the jury.[12] His leaving the State without making provision for her, is sufficient evidence of desertion; and plaintiff is not bound to prove that a demand was made on the husband to provide for her; but his refusal to do so may be inferred from the fact of desertion.[13] If it appear that he actually provided an allowance to her, plaintiff must show that the allowance was insufficient.

24. *Defenses.*] The marriage and appropriate character of

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[1] Bentley v. Griffin, 5 Taunt. 356.

[2] See Ogden v. Prentice, 33 Barb. 160; Cropsey v. McKinney, 30 Id. 47.

[3] Gates v. Brower, 9 N. Y. 205.

[4] Id.

[5] Jewsbury v. Newbold, 26 L. J. Exch. 247.

[6] Supervisors of Monroe v. Budlong, 51 Barb 493; McGahey v. Williams, 12 Johns. 293, and cases cited. The legal theory of the action, however, is not negligence, but an implied promise to pay. See Cromwell v. Benjamin, 41 Barb. 558; Kelly v. Davis, 49 N. H. 176, s. c. 6 Am. R. 499. But see Mozen v. Pick, 8 Mees. & W. 481.

[7] See Ch. V, paragraphs 18 and 19. Cohabitation and holding out to plaintiff is conclusive (Johnstone v. Allen, 6 Abb. Pr. N. S. 306; 1 Greenl. Ev. § 27), and the fact that plaintiff knew there had been no formal marriage, is irrelevant. Watson v. Threlkeld, 2 Esp. 637.

[8] Rosc. N. P. 382, (13th ed. 535).

[9] Keller v. Phillips, 39 N. Y. 351, affi'g 40 Barb. 391.

[10] Merritt v. Seaman, 6 N. Y. 168.

[11] Scott v. Coxe, 20 Ala. 294.

[12] Lockwood v. Thomas, 12 Johns. 248.

[13] Usher v. Holleman, 5 N. Y. Leg. Obs. 99; Johnson v. Sumner, 3 Hurls. & N. 261, s. c. 27 L. J. Exch. 341.

the articles supplied having been shown, the burden is on defendant to rebut the presumption of agency of the wife;[1] general reputation is competent evidence[2] that they were living separate under articles providing for her support. But the receipts of third persons are not admissible in favor of defendant to show that he and his wife lived separate, and that he allowed her a separate maintenance, which was punctually paid. The persons who gave the receipts should be called.[3]

25. *Causes of separation.*]—On the question whether a separation of husband and wife was due to the wife's fault or the husband's, the declarations of the wife to any person, made in sufficiently immediate connection with the act of leaving to constitute a part of the *res gestæ* are admissible.[4] If the husband's previous cruelty is relied on as the cause of separation, the contemporaneous expressions of affection and regard used by either toward the other in the other's presence,[5] or to a third person, in the absence of the other,[6]—and, on the same principle, the wife's complaint to her physician of the effects of her husband's violent treatment, and his advice thereupon that she should leave him,[7]—are competent; and so are her letters manifesting an affection inconsistent with such cruel treatment.[8] But, in such case, there must be independent evidence, beside the apparent date of the letter, showing that it was actually written at a period that would make the declaration relevant.[9] Where her infidelity is relied on as explaining the separation, her admissions of guilt have been held competent.[10] If a divorce is relied on, the decree itself is the best evidence;[11] and a decree dismissing the suit for divorce for want of proof is competent but not conclusive evidence that the cause alleged did not exist.[12]

On the question whether the provision he had made for her was sufficient, her declarations made while she was in the enjoyment of it, are competent in his favor.[13]

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[1] Keller v. Phillips, 39 N. Y. 351, aff'g 40 Barb. 391.

[2] Baker v. Barney, 8 Johns. 72.

[3] Cutbush v. Gilbert, 4 S. & R. 551.

[4] Thus the reasons she gave to her father the day of her return to him on leaving her husband, are competent. Johnson v. Sherwin, 3 Gray (Mass.), 374. See, also, Snover v. Blair, 25 N. J. L. (1 Dutch.) 94; Aveson v. Lord Kinnard, 9 East, 188, Ellenborough, J; Cattison v. Cattison, 22 Penn. St. 275. As to letters written during the absence, see Rawson v. Haigh, 2 Bing. 99.

[5] See Edwards v. Crock, 4 Esp. 39.

[6] See Winter v. Wroot, 1 Moody & R. 404.

[7] See Gilchrist v. Bale, 8 Watts, 355.

[8] Houliston v. Smyth, 2 Carr. & P. 22.

[9] Id.

[10] Walton v. Greene, 1 Carr. & P. 621, disapproved in 1 Tayl. Ev. 673, § 695.

[11] Tice v. Reeves, 30 N. J. L. 314. As to the mode of proof, see page 101 of this volume.

[12] Burlen v. Shannon, 3 Gray, 387.

[13] Jacobs v. Whitcomb, 10 Cush. 255. The introduction of declarations by one party may justify the admission of declarations of the other in the same conversation. See Sherwood v. Titman, 55 Penn. St. 77.

showing her power must be affirmatively proved on the trial,[1] as well as the making of the contract itself, although they need not be alleged in the complaint.

31. *The making of the contract*]—The rules of proof, elsewhere stated as applicable to the contracts of other persons, generally apply to the fact of contract by a married woman, whether in respect to implied contracts,[2] parol agreements,[3] or to parol evidence to vary a writing.[4] To establish a contract made through the agency of the husband, it may, as in the case of other persons, be shown to be within his express power,[5] or within the authority implied from her having held him out,[6] or suffered him to assume the power, or from her having recognized his acts.[7] The presumption of agency derived from his possession of an instrument executed by her is limited by the terms of the instrument.[8] On the question whether the other party gave credit to her or to him, entries by such other party in account charging or crediting sums to either, are not evidence in his own favor, unless part of the *res gestæ* of an act properly in evidence.[9] They are competent as against him; but are not conclusive that the credit was given to the one charged.[10]

The appropriate evidence of her power to contract,—viz., the existence of separate business or estate,—has already been explained.[11] Whether anything more need be shown is disputed.

32. *The English Rule as to Charging Separate Estate.*]—The rule now applied by the English courts, and in several of our States,[12] is, that the separate estate of a married woman is answer-

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[1] Nash v. Mitchell, 3 Abb. New Cas. 171.

[2] See Bodine v. Killeen, 53 N. Y. 93; and paragraph 6 (above).

[3] See Fowler v. Seaman, 40 N. Y. 592.

[4] Galusha v. Hitchcock, 29 Barb. 193.

[5] Nash v. Mitchell (above).

[6] Bodine v. Killeen (above).

[7] Wilcox & Gibbs Co. v. Elliott, 14 Hun, 16.

[8] Thus a power to sign and indorse checks, &c., does not authorize him to charge her separate estate by a post-dated check, when she has not the funds in bank. Nash v. Mitchell (above). And her deed expressing a pecuniary consideration, he is not impliedly authorized to deliver, without payment of the consideration, and for his own benefit. Bank of Albion v. Burns, 46 N. Y. 170.

[9] Peters v. Fowler, 41 Barb. 467. But see pp. 241, 245 of this vol.

[10] Allen v. Fuller, 118 Mass. 402. On the question whether goods were bought by the husband, deceased, or the wife, who had a separate business, the executor cannot give in evidence that the wife, after the death, appropriated the goods to her own use. Johnson v. Hawkins, 5 Reporter, 184. So the fact that plaintiff had brought a prior suit for the same against the defendant and her husband jointly, which has been discontinued, is competent; but the plaintiffs may explain this by showing that the husband was joined through an error of their attorney. Andrews v. Matthews, 6 Cent. L. J. 156.

[11] Paragraphs 9 to 17.

[12] This rule has been to a greater or less extent, or with some qualification, recognized in *Kansas* (Deering v. Boyle, 8 Kan. 529; Wicks v. Mitchell, 9 Id. 80); *Maryland* (Hall v. Eccleston, 37 Md. 510; and see Conn v. Conn, 1 Md. Ch. Decis. 212); *Missouri* (Metropolitan Bank v. Taylor, 62 Mo. 338); *Ohio* (Phillips v. Graves, 20 Ohio St. 390); *Wisconsin* (Todd v. Lee, 15 Wisc. 365; 16 Id. 480).

able for all her debts and engagements, to the full extent to which it is subject to her own disposal;[1] and this rule, formerly regarded as matter of presumption, resting on the idea that the act of contracting is *prima facie* evidence of intent to charge her estate,[2] is now applied inflexibly to written obligations, as a rule of law; in other words, the making of a written contract by a married woman having power to charge a separate estate is deemed conclusive evidence of intent to charge it.[3]

33. *The New York Rule.*]—The rule adopted in New York and Massachusetts, and followed in several other States,[4] is, that to charge the separate estate of a married woman with a debt not contracted for its benefit,—as, for instance, where she contracts as surety,—there must be direct evidence of an intention to charge it. Her mere making of a note or other obligation is not enough; and if such obligation be made, the intent to charge must be expressed therein, or in a connected instrument;[5] and if not so expressed, parol evidence is not competent to prove the intent to charge.[6] Evidence that the husband received the consideration of the obligation, and used it in managing his and the wife's property, is not enough.[7] Where the contract is by parol, the intent to charge may be proved by parol, if no specific lien is claimed;[8] and it may be shown by such circumstances as her having an estate, on the faith of which she was trusted, and by

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In *Mississippi*, it has been held that the intent must appear, but need not be expressed (Boarman v. Groves, 23 Miss. 280). In *Alabama* (Brame v. McGee, 46 Ala. 170); *Arkansas* (Dobbin v. Hubbard, 17 Ark. 189, 196); and *Kentucky* (Lillard v. Turner, 16 B. Mon. 374; Burch v. Breckinridge, 16 Id. 482), the English rule has been applied in the case of bills in equity to charge a separate estate held under the rules of equity, and not under the statute.

[1] As stated by HOAR, J., in Willard v. Eastham, 15 Gray, 328, approved by REDFIELD, J., in 1 Am. L. Reg. N. S. 665, note.

[2] Johnson v. Gallagher, 7 Jur. N. S. 273; Schouler's Dom. Rel. 228.

[3] Metropolitan Bank v. Taylor, 62 Mo. 338; Wicks v. Mitchell, 9 Kan. 80.

[4] The New York rule has been recognized in *California* (Maclay v. Love, 25 Cal. 367); *Connecticut* (Platt v. Hawkins, 43 Conn. 139); *Illinois* (Williams v. Hugunin, 69 Ill. 214; Furness v. McGovern, 78 Id. 337); *Indiana* (Kantrowitz v. Prather, 31 Ind. 92; Smith v. Howe, 31 Id. 233; Hodson v. Davis, 43 Id. 258); *Massachusetts* (Willard v. Eastham, 15 Gray, 328); *New Jersey* (Armstrong v. Ross, 20 N. J. Eq. 109); *Tennessee* (Letton v. Baldwin, 8 Humph. 209; 10 Id. 552). In *Missouri*, where it was once approved (Miller v. Brown, 47 Mo. 504, s. c. 4 Am. R. 345), it has since been abandoned. In *Alabama*, the English rule has been held not applicable where the consideration was purely for the benefit of the husband (Nunn v. Givhan, 45 Id. 370, 375).

[5] Sherwood v. Archer, 10 Hun, 73.

[6] Yale v. Dederer, 18 N. Y. 265; 22 N. Y. 450; Willard v. Eastman, 15 Gray, 328; Manhattan Brass, &c. Co. v. Thompson, 58 N. Y. 80. It has been held elsewhere, that if there is a written contract by the married woman, parol evidence of her declarations at the time of its execution that it was not to bind her separate property is inadmissible (7 B. Mon. 293); and so of her testimony that she did not intend it to, and equally of that of the creditor that at the time he was ignorant that she had a separate estate. Kimm v. Weippert, 46 Mo. 532, s. c. 2 Am. R. 541.

[7] Yale v. Dederer, 68 N. Y. 329.

[8] Maxon v. Scott, 55 N. Y. 247; Baker v. Lamb, 11 Hun, 519. *Contra*, Shorter v. Nelson, 4 Lans. 114.

her promise to pay as soon as she received income therefrom.[1] But in the absence of other evidence of an intent to charge, it will not be inferred from her subsequent admissions of liability.[2]

34. — *direct Benefit to separate estate.*]—If it appears that she had a separate business, and the contract was made in the course and pursuit of it, this is enough. If it appears that she had a separate property, and the contract was made for its direct benefit, in the legal sense, this is enough. The fact that such kind of contracts may in the ordinary course of affairs be made for the benefit of an estate, is not enough, for the court cannot presume that a simple contract, with nothing on its face to indicate the fact, was made for the benefit of her separate estate;[3] but it must appear either that the consideration was actually applied to her estate,[4] or came actually to her hands, or to those of an agent authorized to receive it on her behalf.[5] The fact that the consideration came to her hands is presumptive evidence that the contract was for the benefit of the estate; and the production of her personal receipt,[6] or of her order to pay a third person, with proof of payment to him,[7] is presumptive evidence of this; and proof of payment to her husband, if he were shown to be her general financial agent, might also be *prima facie* enough.[8] Such evidence may be rebutted by her testimony, or other evidence, that the consideration neither came to her hands nor those of her authorized agent, nor was applied to the use of her estate.[9] But if once received by her, the fact that she handed it to her husband, who misappropriated it, does not impair her liability.[10] And, generally, the fact that in the particular case the contract proved the reverse of beneficial, in a business sense, is not material.[11] The circumstance that work was done or materials were used for the improvement of her estate, if shown to have been within her knowledge, does not raise a conclusive presumption against her,[12] but will sustain a verdict. Evidence

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[1] Conlin v. Cantrell, 64 N. Y. 217.
[2] Hansee v. DeWitt, 63 Barb. 53.
[3] Nash v. Mitchell (above).
[4] As, for instance, by exonerating it from an incumbrance, or by a purchase.
[5] See Williamson v. Dodge, 5 Hun, 497, 499; White v. McNett, 33 N. Y. 371.
[6] Treadwell v. Hoffman, 5 Daly, 210.
[7] Prendergast v. Borst, 7 Lans. 489.
[8] White v. McNett, 33 N. Y. 371. But a husband's declarations that she received it for the use of her separate estate, are not competent, in the absence of evidence that he was authorized to make such declarations. Deck v. Johnson, 1 Abb. Ct. App. Dec. 497.
[9] White v. McNett (above). Where the contract was her joint obligation with her husband, evidence that her authorized messenger received the money, but immediately delivered it to the husband, and that the wife never received it, is sufficient to rebut the presumption of benefit to her estate. Prendergast v. Borst, 7 Lans. 489.
[10] Smith v. Kennedy, 13 Hun, 9.
[11] Thus she is liable for her attorney's fees, though the litigation was unsuccessful. Owen v. Cawley, 36 N. Y. 600, affi'g 13 Abb. Pr. 13.
[12] Westgate v. Munroe, 100 Mass. 227; 2 Bish. Mar. W. § 218.

that the land belonged to her and her husband as tenants in common, does not impair her liability.[1] If such a claim rests on an allegation of ratification, it must appear,—1. That credit was not given to the husband alone. 2. That she, with full knowledge that the materials, &c., were received unpaid for, and used for her property to the enhancement of its value, acquiesced in such use.[2]

35. *Action against her for Necessaries.*]—To charge her or her separate estate for family necessaries purchased while residing with her husband, there must be evidence,—1. Of her separate estate or business. 2. That the credit was given to her. 3. That she intended to charge her estate. 4. That the goods were suitable and necessary.[3]

36. *Action against her for Fraud.*]—The wife can take no advantage by a contract fraudulently made by her husband as her agent, in the use of her separate property;[4] and such a fraud by her agent may be imputed to her, by the rules of evidence applicable to transactions of principal and agent.[5]

37. *Husband's Coercion of wife.*]—A woman sued for a tort is exonerated if she proves that she committed it by coercion of her husband. Physical compulsion need not be shown, but moral coercion, the immediate pressure of authority and intimidation; and in this two elements are involved,—1. His presence,[6] and 2. his direction.[7] His direction is not alone enough.[8] If his presence is shown, his direction or command is presumed, but this presumption is not conclusive.[9] The presumption of coercion may be rebutted by proof that she instigated the tort, or by other circumstances showing her independent and free concurrence.[10]

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[1] Burr v. Swan, 118 Mass. 588. But both may be held jointly liable. Verill v. Parker, 65 Me. 578.

[2] Miller v. Hollingsworth, 36 Iowa, 165.

[3] Wells' Sep. Prop. of M. W. 455; Demott v. McMullen 8 Abb. Pr. N. S. 335; Smith v. Allen, 1 Lans. 101. And see Schouler's Dom. R. 79.

[4] Adams v. Mills, 60 N. Y. 533, aff'g 38 Super. Ct. (J. & S.) 16.

[5] Vanneman v. Powers, 7 Lans. 181. Otherwise if the property was not her separate estate. Id. 56 N. Y. 42; Du Flon v. Powers, 14 Abb. Pr. N. S. 395.

[6] It must appear that he was present at the time or near enough to keep her under his immediate influence and control. Commonwealth v. Munsey, 112 Mass. 289, and cases cited. On the question of coercion in a particular act in his absence, evidence of similar acts done by her in his presence and for the same purpose, is competent. Handy v. Foley, 121 Mass. 259. If he was present at some, only, of a series of acts, the presumption that the influence extended to all may be negatived by the circumstances. State v. Cleaves, 59 N. H. 298; and see Schouler's Dom. Rel. 104.

[7] Both are necessary. Cassin v. Delaney, 38 N. Y. 178.

[8] Id. Contra, Reeve, Dom. Rel. 150; and see 2 Bish. Mar. W. § 257.

[9] Cassin v. Delaney (above); Schouler's Dom. Rel. 101. It is now regarded as a slight presumption, and may be rebutted by slight circumstances. APPLETON, C. J., State v. Cleaves, 59 Me. 298, s. c. 8 Am. R. 422.; Formerly it was held conclusive. 1 Greenl. Ev. § 28; 3 id. 3.

[10] 2 Whart. Ev. § 1267; citing Marshall v. Oakes, 51 Me. 308.

CHAPTER VII.

ACTIONS AFFECTING PARTIES IN A JOINT OR COMMON INTEREST OR LIABILITY.

1. The general principle.
2. Joint debtors.
3. Defendants absent or defaulted.
4. Admissions, &c., of persons not parties.
5. Admissions, &c., of parties having common interest or liability.
6. — joint interest or liability.
7. — joint promisees.
8. Notice.
9. Declarations of conspirators or confederates.
10. Preliminary question as to connection.

1. *The general principle.*]—Where there are two or more plaintiffs, or two or more defendants, alleged to have a joint or common interest or liability, the general principle by which the admissibility of evidence affecting a part of them is to be tested is this: If the action or proceeding is one in which a separate judgment can be given against one irrespective of his fellows, evidence competent as against him is admissible, irrespective of the state of the evidence as against his fellows;[1] and the court should instruct the jury if necessary, that it is competent only as against him, and will not sustain a verdict against his fellows, unless connection is shown. If the case is one in which a separate judgment cannot be had,[2] evidence competent against any one is admissible in the following cases: 1. Where the others have been defaulted,[3] or their liability is conceded on the trial.[4] 2. Where there is other evidence against them on the same point, sufficient to go to the jury,[5] or counsel undertake to adduce such

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[1] Thus, if the action is against maker and indorser, or on a several bond, or a joint and several bond, or against two for a tort, the admissions and declarations of either defendant are competent against him, if a separate judgment against him is sought. But if the action is unalterably joint, or an action *in rem*, or a proceeding in the nature of such an action,—as usually in case of probate of a will,—other evidence to connect the other parties in interest with the declarant may be requisite.

[2] Under the new procedure, separate judgment may be had in favor of one of two plaintiffs, if he has a good cause of action, and against the other who has not. Simar v. Canaday, 53 N. Y. 298, and see Quinn v. Martin, 54 Id. 660; and so also against one of two defendants sued, even on an alleged joint obligation, if he is proved to be alone liable, and in favor of the other who is not. Brumskill v. James, 11 N. Y. 294. But in such cases the evidence may be excluded on the ground of substantial variance and surprise.

[3] Paragraph 3 (below).

[4] If one defendant offers evidence charging the other with joint liability, the other must object if it is not competent against him. Hermanos v. Duvigneaud, 10 La. Ann. 114.

[5] The successive acts or declarations of each are equivalent to a joint declaration by all. Haughey v. Strickler, 2 Watts & S. 411. So, for another instance, where

evidence in due course.[1] 3. Where evidence of the acts, admissions or declarations of one party is accompanied with other independent evidence that his relation to the others was such as to render it just to impute his conduct to them.[2]

2. *Joint debtors.*]—Where plaintiff undertakes to prove a joint liability, if all the defendants are before the court, he must prove not only the contract, but the connection of each defendant in the tie which sanctions a joint liability; and this connection must be proved as to each defendant, by evidence competent as against him. The fact that they are co-defendants does not allow him to prove the connection of one, by the declarations of another. The declaration of one that he was a partner, or otherwise jointly connected with the others, is not to be excluded because it asserts the liability of the others;[3] but its only effect is as against him, and there must be other evidence with a similar effect against each of the others.

3. *Defendants, Absent or Defaulted.*]—Where some of the alleged joint debtors admit their individual and joint liability, either by pleading or otherwise, or are proceeded against as absentees so that no personal judgment can be rendered against them or their individual property, plaintiff is only obliged to produce evidence which will be sufficient, as against those who appear and defend the suit, to establish their joint liability with their co-defendants. In such cases, the acts and admissions of the parties who thus appear and defend are legal evidence against themselves, not only of their own indebtedness, but also of their joint indebtedness with their co-defendants.[4]

In an action for a tort, evidence of admissions or declarations by a defendant who has defaulted, if relevant to the measure of damages, is competent as against him, notwithstanding it may refer to the others;[5] but it should be offered for this purpose, and not as evidence against those who defend.[6]

4. *Admissions, &c., of persons Not Parties to the action.*]—The fact that one who is not a party to the action was a party to the contract sued on, does not alone render his admissions and declara-

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notice to both of two owners must be proved, evidence of actual service on one having been given, the admission of the other that he had notice would be competent.

[1] Thompson v. Richards, 14 Mich. 172, 187; Forsyth v. Ganson, 5 Wend. 558.

[2] See paragraphs 5, &c. (below). These rules are subject to some qualification and peculiar applications in case of such distinctive classes of persons as Heirs and devisees, Husband and wife, Partners, &c., elsewhere treated; and in all cases, of course, admissions and declarations may be competent against another than the declarant, by the rule of *res gestæ*, or if made in his presence, or if made in the course of duty, or against interest by a person since deceased, or may be received to discredit the declarant as a witness, or on other such special grounds.

[3] Lenhart v. Allen, 32 Penn. St. 312.

[4] Halliday v. McDougall, 22 Wend. 264, 270, and cases cited.

[5] Bostwick v. Lewis, 1 Day (Conn.) 33; Daniels v. Potter, M. & M. 501.

[6] Tenth Nat. Bk. v. Darragh, 3 Supm. Ct. (T. & C.) 138.

tions competent against those who sue or are sued.[1] It must first appear that he is the real party in interest,[2] or other special grounds must be shown for imputing his acts to the party against whom they are offered; and the rule is the same as to one named as a defendant on the record, but who has never been served nor appeared.[3]

5. *Admissions and declarations of parties having a Common interest or liability.*]—A *common* or several interest, or a common or merely several liability, does not render the hearsay of the one party admissible against the other. Tenancy in common, that is in fractional shares, whether of real[4] or personal[5] property, is not enough to render the admissions or declarations of one co-tenant, admissible against the other; but of course they may be rendered competent by showing that they were made in the presence and hearing of the other,[6] or otherwise brought to his knowledge.

6. — *joint interest or liability.*]—In case of *joint*[7] interest or liability, the principle upon which the admissions and declarations of one are admissible against the other, is that of agency. Where the one may be deemed to have been, at the time the words passed, the agent of the other in the matter, they may be proved against both. Formerly the common law courts applied a technical rule that a mere joint interest or obligation, without anything to indicate actual intent, raised a sufficient legal presumption of agency for this purpose;[8] and this rule is still applied in England[9] and in some of our States.[10]

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[1] Hamlin v. Fitch, Kirby (Conn.), 174; Abel v. Forgue, 1 Root, 502. Nor is the admission of such person, that he was jointly interested, competent in support of a plea in abatement. Storrs v. Wetmore, Kirby (Conn.), 203.

[2] Bucknam v. Barnum, 15 Conn. 68, 73.

[3] Peck v. Yorks, 47 Barb. 131.

[4] Dan v. Brown, 4 Cow. 483, 492.

[5] McLellan v. Cox, 36 Me. 95.

[6] Crippen v. Morse, 49 N. Y. 63. Evidence of a declaration by one, of what he had heard the other say, not competent. Quinlan v. Davis, 6 Whart. 169.

[7] As to the test of the distinction between joint and common interests in contracts, see 1 Addison on Contr. 78–88; 1 Pars. on Contr. 11; 1 Story on Contr. § 52, &c. A bill of parcels delivered on a sale, and mentioning several as the sellers, is not conclusive evidence that the sale was joint, but parol evidence is competent to show that one of those named was really the seller. Harris v. Johnson, 3 Cranch, 311.

On a doubtful question whether an account with plaintiffs was joint on the part of the defendants, evidence that one had a separate account at the same time, is competent. Quincey v. Young, 63 N. Y. 370, rev'g 5 Daly, 327.

A conveyance or mortgage made by one defendant is not competent evidence in favor of the other to show that the subject of the conveyance was the sole property of the other. Harris v. Wessels, 5 Hun, 645.

[8] 1 Pars. on Contr. 24; Shoemaker v. Benedict, 11 N. Y. 175, 181, and cas. cit.

[9] Steph. Dig. L. Ev. art. 17.

[10] Black v. Lamb, 1 Beasl. N. J. 108, 122. See also Cady v. Shepherd, 11 Pick. 400; Walling v. Rosevelt, 16 N. J. L. 41; Lowle v. Boteler, 4 Harr. & M. 346. The rule stated by PHILLIPS, is that, as a general principle, "in a civil suit by or against several persons, who are proved to have a joint interest in the decision, a declaration made by one of those persons, concerning a material fact within his knowledge, is ev-

Under the freer rules of evidence now applied, it is better to be prepared with some evidence, at least, beside the mere fact of a joinder in interest, to sanction the inference that one might speak for the other.[1] Joint possession alone, may be sufficient to admit evidence of the separate contemporaneous declaration of either possessor, as characterizing the joint possession;[2] but this is on the principle that it is part of the *res gestæ*. Joint possession is not enough to render other declarations of one binding on the other, except in some cases where the latter claims under the possession in the former. A joint business or adventure furnishes usually ground for inferring the agency of one to speak

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idence against him, and against all who are parties with him to the suit." He adds in effect, that a joint interest in the decision is not essential where there is a joint interest in the transaction (1 Phil. Ev. 491). And the American editor adds, that where this rule is applied, it is necessary that it should appear that the defendants had an existing joint interest when the admission was made. Id. n. 1.

Greenleaf states the rule more loosely: there must be "some joint interest, &c., * * * In the absence of fraud, if the parties have a joint interest in the matter in suit, whether as plaintiffs or defendants, an admission made by one is, in general, evidence against all. They stand to each other, in this respect, in a relation similar to that of existing copartners" (citing Whitcomb v. Whiting, 2 Dougl. 652). 1 Greenl. Ev. § 174.

Taylor more guardedly says: "When several persons are *jointly* interested in the subject-matter of the suit, the general rule is, that the admissions of any one of these persons are receivable against himself and fellows, whether they be all jointly suing or sued, or whether an action be brought in favor of or against one or more of them separately; provided the admission relate to the subject-matter in dispute, and be made by the declarant in his character of a person jointly interested with the party against whom the evidence is tendered." 1 Tayl. Ev. 655, § 674.

Starkie tersely indicates the true test. Stating that an admission against interest is deemed true against the one who made it, he adds: "The same rule it will be seen applies to admissions by those who are so identified in situation and interest with a party that their declarations may be considered to be made by himself. 1 Stark. Ev. 50.

Stephen says nothing of joint owners, and classes all joint contractors with partners, saying that "Partners and joint contractors are each other's agents for the purpose of making admissions against each other in relation to partnership transactions or joint contracts;" but not for the purpose of acknowledgment by promise or payment, to remove the bar of the statute of limitations when once operative, against a simple contract. Steph. Dig. Ev. art. 17.

Where the admission of one jointly interested is competent, the relative smallness of the amount of his interest cannot render it incompetent. Black v. Lamb, 1 Beasl. 108, 122.

[1] In Lewis v. Woodworth, 2 N. Y. 513, it was determined that an admission made by one joint promissor, although acted on by a third person, could not estop the other promissor; and it was put upon the ground that simple joint contractors are not, like partners, agents for each other. In Van Keuren v. Parmalee, Id. 528, and Shoemaker v. Benedict, 11 Id. 176, the same court more fully discussed the principle, and gave almost unanimous sanction to the doctrine that a joint debtor has not, merely as such, any authority to make admissions which will affect his fellows (2 N. Y. 528, 11 N. Y. 185); and the justice of their conclusion in repudiating the English doctrine is vindicated by the subsequent English legislation adopting, to a great extent, the rule in respect to acknowledgments by copartners after dissolution, to which this doctrine led them. 19 & 20 Vic. c. 97. Of the later New York cases on the point, Ellenwood v. Fults (63 Barb. 321, 330), seems in accordance with the rule stated in the text. Barrick v. Austin, 21 Barb. 241, 244, is contrary to it. In neither is the principle discussed.

[2] Dawson v. Callaway, 18 Geo. 573, 580.

and act for the other,[1] and where the agency is sought to be inferred from the course of business, evidence of former joint transactions in the same employment or business, even for several years back,[2] and with other persons,[3] is competent, for the purpose of aiding the conclusion that the transactions in suit were also joint; and an authority in one to speak for both may be inferred from the fact of his activity, and the knowledge and silence of the others;[4] but evidence that one advanced funds, or had an interest as a secured creditor, is not alone enough. The joint authority or agency must relate to the subject of the joint title or adventure.[5] Where an admission or declaration is received by virtue of such a relation, it must be shown to have been made during the continuance of the relation; and if it consists of a writing, the date is not, for this purpose, sufficient evidence of the time when it was made.

The admissions and declarations of one when thus admissible against others, are competent equally against both, but are not evidence against the others in exoneration of the declarant—as, for instance, to show that he was merely their surety;—and in all cases they are rendered incompetent by evidence of fraud.

7. *—joint promisees.*]—In so far as joint promisees[6] or obligees[7] are the agents of each other for the purpose of collection, the admissions and declarations of either are competent in an action by both against both.

8. *Notice.*]—Notice to one of two joint promisors[8] or joint tenants or purchasers,[9] is not notice to the other, unless agency is shown.

9. *Declarations of conspirators or confederates.*]—The familiar rule that where several persons are engaged together in the furtherance of a common illegal design, the acts and declarations of one confederate, made in pursuance of the original concerted plan and with reference to the common object, are competent

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[1] Thus where one of the several proprietors of a theatre made the contract in suit on behalf of all the proprietors, the declarations of one of them were held admissible against all. Kemble v. Farren, 3 Carr. & P. 623.

[2] Trego v. Lewis, 58 Pa. St. 463.

[3] Bowers v. Still, 49 Penn. St. 65.

[4] Bank of U. S. v. Lyman, 20 Vt. 666.

[5] Thus those who own part of a ship as copartners and another part as tenants in common, may bind each other as to the former interest by their admissions, but as to the latter interest they may not, without other evidence of agency than the common interest.

[6] Pringle v. Chambers, 1 Abb. Pr. 58.

[7] Cross v. Bedingfield, 12 Sim. 35; Black v. Lamb, 1 Beasl. (N. J.) 108, 122. Whether these cases are now to be deemed authority with us, for the doctrine that the joint interest alone is enough, see p. 189, n. If the rule goes farther than stated in the text, it should be only within the limits stated by Phillips and Taylor.

[8] See Lewis v. Woodworth, 2 N. Y. 513.

[9] Wade on Notice, 312, § 684. Compare Spencer v. Campbell, 9 Watts & S. 32.

evidence against the others, though made in their absence,[1] does not rest on the joinder of parties,[2] but rather on the principle of legally imputed agency; and the evidence is confined to that which the rule of the *res gestæ* admits,[3] and excludes narratives of past transactions.[4]

10. *Preliminary question as to Connection.*]—The connection between the parties which renders the declaration of one competent against the other, can never be proved by the declaration itself, but must be separately proved, as the foundation for admitting the declaration. Strictly it ought to be proved first, but it is in the discretion of the court to allow the declaration to be proved first on the promise of counsel to connect afterward,[5] and it is not error to allow this even in cases of conspiracy.[6] Where a joint judgment is sought, there is the more reason for requiring the connection to be first proved; and in this class of cases, as well as where the declaration is that of an alleged agent, it is the better opinion that the question of connection is a preliminary question for the judge,[7] who should exclude the evidence, or, when it has been admitted by anticipation, strike it out or direct the jury to disregard it, if it is not as matter of law sufficient to lay the foundation. In those cases where a separate judgment is sought, as well as in all cases in those courts where the question of connection is deemed one for the jury instead of for the judge, the evidence, if received against the declarant, should be accom-

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[1] The declarations of one not a party may be admitted under the rule. American Fur Company v. U. S. 2 Pet. 358, 364; Preston v. Bowers, 13 Ohio St. 1, 13.

[2] Lincoln v. Claflin, 7 Wall. 132; Cuyler v. McCartney, 40 N. Y. 221, rev'g 33 Barb 165. The objection of absence in such a case goes only to the weight of the evidence. Bushnell v. City Bank, 20 La. An. 464.

[3] Apthorp v. Comstock, 2 Paige, 482, 488.

[4] Clinton v. Estes, 20 Ark, 216; Patton v. The State, 6 Ohio St. 467.

[5] Bowers v. Still, 49 Penn. St. 65, a. p. Cobb v. Lent, 4 Greenl. (Me.) 503.

[6] Place v. Minster. 65 N. Y. 89; State v. Ross, 29 Mo. 32, 50. It is true, that it is of no consequence (on the question of error) in what order the testimony was introduced if it in the end proves relevant (Jenne v. Joslyn, 41 Vt. 478); but if it does not prove relevant, the judge's instructions will often fail to remove the unjust impression produced. In cases of confederacy, particularly, the foundation for the admission of the evidence should be scrutinized with caution, lest the jury be led to infer a conspiracy from the declarations of strangers. Burke v. Miller, 7 Cush. 547, 550.

[7] The sufficiency of the evidence of the necessary foundation is held a question for the judge, in *New York*, Jones v. Hurlbut, 39 Barb. 403; *Massachusetts*, Burke v. Miller, 7 Cush. 547, 550; *Missouri*, State v. Ross, 29 Mo. 32, 51; *Iowa*, State v. Nash, 7 Iowa, 347, 384; and see Dickinson v. Clarke, 5 W. Va. 280. But the ruling that it is sufficient usually means merely that it is sufficient to go to the jury, who may still pass on the sufficiency of the connection, as well as on the sufficiency of the admission or declaration, if the connection be shown. Commonwealth v. Brown, 14 Gray, 419, 432. But see Jones v. Hurlburt, 39 Barb. 403. Hence, if the necessary connection is shown by the testimony of a competent witness, the court will not question his credibility, but leave it to the jury. Commonwealth v. Crowninshield, 10 Pick. 497. It seems to be treated as a question for the jury, in the first instance, in *Pennsylvania*, Helser v. McGrath, 58 Penn. St. 458; *Kentucky*, Oldham v. Bentley, 6 B. Mon. 428, 431.

panied by instructions clearly pointing out the distinction between evidence admitted for the purpose of establishing the confederacy or other connection, and that which is to be considered only after the connection has been proved and found by them. The jury should also be instructed as to the persons who must be found united in the confederacy.[1]

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[1] Wiggins v. Leonard, 9 Iowa, 194. But if there is any evidence to connect, it is not error to omit such instructions when they are not asked for. Boswell v. Blackman, 12 Geo. 591. If connection is disproved, it is error to leave the question to the jury. Page v. Scranton, 39 Me. 400.

CHAPTER VIII.

ACTIONS BY AND AGAINST PUBLIC OFFICERS.

I. General principles.
1. Different proof of title, in different cases.
2. Legal title.
3. Contracts in official capacity.
4. Acts by part of board or body.
5. Demand and notice.
6. Former judgments.

II. Actions by officers.
7. Pleading by officer suing as such.
8. Proof of title.
9. Process as supporting a cause of action.
10. Return adduced in his own favor.

II. Actions by officers—*continued.*
11. Action for emoluments.

III. Actions against officers.
12. Plaintiff's pleading.
13. Plaintiff's proof of official character of defendant or his deputy.
14. Cause of action.
15. Return, as against the officer.
16. Public action for refusal to serve.
17. Pleading by officer defendant.
18. Defendant's proof of official character in justification.
19. Process as a protection to defendant.

I. General Principles.

1. *Different proof of title, in different cases.*]—There are three principal grades of proof of the official character of an alleged officer, adequate in different classes of cases: 1. That he was officer *de jure*, that is, with legal title. 2. That he was officer *de facto*, that is, that he acted as such, with color of title,[1] though it may be without legal title. 3. That he assumed to act as such in the transaction in question, though it may be without color of title. It will be seen, in this chapter, that: 1. On an issue directly between the officer and the public, whether in an action by the State, or by or against other public officers, strict proof of title is necessary.[2] 2. On an issue between third persons, or between them and the officer, or between them and the public, evidence that he was an officer *de facto* is always sufficient and conclusive against every party, and equally in favor of any party but the officer himself,[3] while, in his favor, it is commonly regarded as competent, for the purpose of raising a presumption that he was officer *de jure*. 3. On an issue between a third person and the alleged officer, evidence that he acted as such in the transaction is competent and usually conclusive evidence of his

[1] To constitute color of office there must be some color of election or appointment, or at least an exercise of the office, and a public acquiescence for a sufficient length of time reasonably to authorize the presumption of at least colorable election or appointment. State v. Carroll, 38 Conn. 449, s. c. 9 Am. R. 409, 427; Wilcox v. Smith, 5 Wend. 231.

[2] Paragraphs 8 and 13 below. *Contra*, 1 Greenl. Ev. 115, § 92.

[3] The English rule, embodied in Greenleaf's statement, allows this evidence to be conclusive in favor of the officer.

official character, as against him; and evidence that he was recognized as such by the other party, is competent and sufficient, though not conclusive evidence thereof, against such party.

2. *Legal title.*]—Where legal title is in issue, and strict proof is required, the certificate of election or commission coming from the proper source, is presumptive evidence of his right to the office;[1] but it is only matter of evidence, and its existence is not essential, unless made so by statute.[2] Thus, if the statute simply authorizes a judge to appoint without more, proof of writing, is not necessary, but proof of an oral appointment by some open, unequivocal act, is sufficient, and the subsequent failure to sign an order entered for appointment does not affect the title to the office.[3] If a writing exists, however, it should be produced as the best evidence, or should be accounted for, to lay a foundation for secondary evidence, in cases where strict proof of title is required. Where appointment must be proved, extrinsic evidence is inadmissible to show that Robert, the officer *de facto*, was the person intended to be appointed by the name of William, used in the commission.[4] Production of a certified copy of the appointment on file does not dispense with all proof of authenticity of the original.[5] If the statute requires a written oath to be filed, the taking of the oath cannot be proved by a memorandum at the foot of the commission, "sworn before me," with date and signature of the magistrate.[6] But a copy of the oath duly certified by the officer with whom it was duly filed, is competent.[7] Where it is necessary to show a vacancy to justify an appointment, it is enough to show that the office was, as matter of law, vacated by a prior incumbent, without proving that there was no other new appointment.[8]

3. *Contracts in official capacity.*]—A contract made by a public officer, connected with a subject fairly within the scope of his authority, is presumed to have been made in his official capacity.[9] If the other party was aware of his official character, this presumption arises, although he used language importing a personal promise,[10] and it is not necessary to show that he said he acted as

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[1] 2 Dill. Mun. C. 807, § 716, s. p. State *ex rel.* Leonard v. Sweet, 27 La. Ann. 541; Wood v. Peake, 8 Johns. 69.

[2] Marbury v. Madison, 1 Cranch, 137; People *ex rel.* Babcock v. Murray, 5 Hun, 42.

[3] Hoke v. Field, 10 Bush, 144, s. c. 19 Am. R. 58. As to mode of proving appointment by vote of municipal body,—see Canniff v. Mayor, &c. of N. Y. 4 E. D. Smith, 430.

[4] Bench v. Otis, 25 Mich. 29.

[5] Curtis v. Fay, 37 Barb. 67.

[6] Halbeck v. Mayor, &c. of N. Y. 10 Abb. Pr. 439.

[7] Devoy v. Mayor, &c. of N. Y. 35 Barb. 264, s. c. 22 How. Pr. 226.

[8] Canniff v. Mayor, &c. of N. Y. 4 E. D. Smith, 430. Compare Randall v. Smith, 1 Den. 214.

[9] Parks v. Ross, 11 How. U. S. 362.

[10] Olney v. Wickes, 18 Johns. 127.

officer.[1] The question is one of intent and credit, with a strong presumption against personal liability. Where he contracts under private seal, designating himself as one of the parties, yet if the deed appears on its face to be made on behalf of the State, the same presumption applies.[2] In an action against a public officer on a contract apparently made by him as such, it is not necessary to allege that he had authority to make it, for his making it is an admission.[3] But if the statute requires his contracts to be in writing, and makes it unlawful to contract otherwise, the other party cannot recover without proof of such a contract, or at least without proving part performance and a *quantum meruit*.[4] The government is not bound by the act or declaration of its officer or agent, unless it manifestly appear that he acted within the scope of his authority, or was employed, in his capacity as public agent, to do the act or make the declaration for it.[5]

To charge him personally there should be satisfactory evidence of an absolute engagement to be personally liable.[6] Even if his authority proves void, yet if he acted in good faith, and within his instructions, he is not necessarily personally bound.[7] When it is sought to charge him individually on his contract, his communications to the superior branches of his government, and their directions to him, are competent in his favor for the purpose of showing that he acted as such.[8] He may recover on an apparently personal contract, though made with his official addition,—such as a bank deposit, in his own name, with the addition of his title,—unless the defendants show that they are liable to the government.[9]

4. *Acts by part of board or body.*]—In cases where, by law,[10] a majority of a board or body[11] may act, provided all the members who are living and qualified,[12] are present and deliberate, or were duly notified, the act of a majority of the officers is presumed to have been upon a meeting and consultation of all.[13] But the presumption may be rebutted.[14]

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[1] Nichols v. Moody, 22 Barb. 611; Holmes v. Brown, 13 Id. 599.
[2] Hodgson v. Dexter, 1 Cranch, 345; Streets v. Selden, 2 Wall. 187.
[3] Shelbyville v. Shelbyville, 1 Metc. (Ky.) 54, 57.
[4] Clark v. United States, 95 U. S. (5 Otto), 539.
[5] Whiteside v. United States, 93 U. S. (1 Otto), 247; and see Noble v. United States, 11 Ct. of Cl. 608. Compare 4 Abb. New Cas. 450.
[6] Parks v. Ross (above), and see 7 Opin. of Atty.-Gen. 88. Compare Paulding v. Cooper, 10 Hun, 20.
[7] Hall v. Lauderdale, 46 N. Y. 70.
[8] Bingham v. Cabbot, 3 Dall. 19, 40.
[9] Swartwout v. Mechanics' Bank of N. Y. 5 Den. 555.
[10] 2 N. Y. R. S. 555, § 27; Green v. Miller, 6 Johns. 39. Compare Schuyler v. Marsh, 37 Barb. 350.
[11] Where the statute number was variable, the court presumed no more officers than the lowest number, in order to support the act of the majority of that number. Jay v. Carthage, 48 Me. 353.
[12] People *ex rel.* Kingsland v. Palmer, 52 N. Y. 83; People *ex rel.* Kingsland v. Bradley, 64 Barb. 228.
[13] Doughty v. Hope, 3 Den. 249, 594; 1 N. Y. 79.
[14] Doughty v. Hope (above).

5. *Demand and Notice.*]—A demand must be made in a reasonable and proper manner; and if accompanied by gross rudeness and insult, is not a legal demand; but such misconduct does not justify the refusal of a subsequent proper demand.[1] Proof of the mailing of a letter to a public officer is not alone sufficient evidence of notice of its contents.[2] Though, together with slight evidence of actual receipt, it may be sufficient.

6. *Former Judgments.*]—A former judgment does not necessarily bind the officer in a new action, unless he appeared in the same capacity in both.[3] Where an officer sues in his representative capacity, the estoppel created by the judgment is available in favor of those whom he represented, and the judgment is therefore conclusive against him when they put it in evidence in their action against him.[4]

II. Actions by Officers.

7. *Pleading by officer suing as such.*]—In an action by a public officer in his official capacity, if he is named personally, the pleading must indicate that he sues officially. A mere addition of his title, without anything to indicate that he sues as such officer, is not enough.[5] But if it appears from the title or the body of the complaint that he complains as officer, a cause of action accruing to him in his official capacity, may be proved,[6] even though it arises under a statute authorizing him to sue on behalf of another person or body, and there is not express allegation that he sues for their benefit.[7] Unless the regular legal title is directly involved in the action, he need not aver the mode of acquiring the office, but may prove his official character under a general allegation that he is, and was at the times in question, such officer.[8]

8. *Proof of title.*[9]]—An officer suing for moneys or property as to which his only title is by virtue of his office,—as where he sues for public funds which he is to administer,—must show a legal title to the office.[10] It is not enough that he is an officer *de facto*. According to the English doctrine, however, evidence that he was acting in the office is competent, and sufficient, at

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[1] Boyden v. Burke, 14 How. U. S. 575, 583.
[2] Huntley v. Whittier, 105 Mass. 391, s. c. 7 Am. R. 536.
[3] See Rathbone v. Hooney, 58 N. Y. 463.
[4] People *ex rel.* Knapp v. Reeder, 25 N. Y. 302, 304.
[5] Thus, "John Doe, supervisor," &c. in the title, is not alone enough. Gould v. Glass, 19 Barb. 179. But commencing the complaint as "the complaint of John Doe, as supervisor," &c. is; Smith v. Levinus, 8 N. Y. 472; so is "John Doe, supervisor, &c. complains." Fowler v. Westervelt, 17 Abb. Pr. 59, s. c. 40 Barb. 374.
[6] See Stilwell v. Carpenter, 2 Abb. New Cas. 240, and note.
[7] Griggs v. Griggs, 66 Barb. 291, 300, affi'd in 56 N. Y. 504.
[8] Kelly v. Breusing, 33 Barb. 123, affi'g 32 Id. 601.
[9] See paragraphs 1 and 13.
[10] People *ex rel.* Henry v. Nostrand, 46 N. Y. 375, 382.

least, to go to the jury (especially where he sues a private person), from which the jury may infer regular legal title, even although the title is put in issue.[1] But evidence that he has not taken the oath or given the bond required by law, is competent against him.[2]

9. *Process as supporting a cause of action.*]—An officer suing by virtue of process issued to him, and possession under it, sufficiently proves his authority under it by producing the process, if fair on its face,[3] and need not, in the first instance, prove the judgment or order on which it issued.[4] But the defendant may impeach the process for want of jurisdiction, and if he does this by evidence, the officer must establish the jurisdiction or his action fails.

10. *Return, adduced in his own action.*]—In an action by a public officer, founded on his own official acts,—as where a sheriff sues to recover goods levied on,[5] or to recover the purchase money of land sold by him,—his own return is competent *prima facie* evidence in his favor.[6] It is a general principle that the certificate of an officer, when, by law, evidence for others, is competent testimony for himself, provided he was competent, at the time of making it, to act officially in the matter. Subsequently acquired interest does not affect the competency of the certificate.[7]

11. *Action for emoluments.*]—In his action for salary or other emoluments belonging to himself, the officer sues in his individual capacity, and his regular legal title at the time for which he claims compensation, is in issue and must be directly proved,[8] except where he sues private persons for services which would be valid if rendered by an officer *de facto*, and which they have accepted.[9] Evidence of general usage may be competent to show the measure though not the right to compensation.[10] The official audit or taxation of his fees by the proper officers, such as a board of supervisors, having jurisdiction, is conclusive.[11]

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[1] McMahon v. Lennard, 6 Ho. of L. Cas. 970; Dexter v. Hayes, 11 Irish L. N. S. 106, affi'd in 18 Id. 22; Radford v. McIntosh, 3 T. R. 632; Doe *d.* Bowley v. Barnes, 8 Q. B. 1037. Having dealt with the officer as such, deemed an admission of his title. 2 Whart. Ev. § 1153.

[2] People v. Hopson, 1 Den. 579. Per BRONSON, J.

[3] See paragraph 19, and note.

[4] Earl v. Camp, 16 Wend. 562; Clearwater v. Brill, 63 N. Y. 627; Kelly v. Breusing, 33 Barb. 123, affi'g 32 Id. 601; Dunlap v. Hunting, 2 Den. 643.

[5] Cornell v. Cook, 7 Cow. 310. *Contra*, 8 Pick. 397.

[6] Hyskill v. Givin, 7 Serg. & Rawle, 369.

[7] McKnight v. Lewis, 5 Barb. 681. A return, contrary to the fact, if it has been canceled by leave of the court, does not estop him. Barker v. Binninger, 14 N. Y. 270.

[8] People *ex rel.* Morton v. Tieman, 8 Abb. Pr. 359 (ALLEN, J.); Dolan v. Mayor, &c. of N. Y. 68 N. Y. 278.

[9] See Sawyer v. Steele, 3 Wash. C. Ct. 464; Hunter v. Chandler, 45 Mo. 452.

[10] United States v. Fillebrown, 7 Pet. 28.

[11] Supervisors of Onondaga v. Briggs, 2 Den. 26, 40; but compare U. S. v. Smith, 1 Wood. & M. 184.

III. Actions against Officers.

12. *Plaintiff's pleading.*]—In an action against a public officer, for a wrong not involving the violation of any official duty he or his predecessor owed to plaintiff, the cause of action may be proved, although the complaint does not allege that he was such officer,[1] but where the breach of such a duty is involved, the complaint should designate him as such officer, and aver him to be such.[2] But an allegation that he collected plaintiff's money on process, need not add that he received it as such officer.[3] And even where defendant is not sued in his official capacity, evidence of moneys received in that capacity is admissible.[4]

13. *Plaintiff's proof of the Official character of Defendant or his Deputy.*]—In a private action against an alleged officer, parol evidence of his official character is admissible, notwithstanding there is a record.[5] And evidence that he assumed to act as such officer in the matter in question, is conclusive against him as an estoppel.[6] But to charge him with responsibility for a deputy or other subordinate, the appointment must be shown, either by producing the original on file,[7] or by evidence that the latter acted as such with his knowledge and assent.[8] Neither the appointment of the deputy, nor his relation to his principal, can be proved merely by his acts,[9] or his testimony that he acted as such.[10] Evidence that the subordinate appointment is irregular, does not render the principal or appointing officer liable for the acts of the subordinate as if they were done without authority, provided the subordinate was an officer *de facto*.[11]

14. *Cause of action.*]—The burden of proving affirmatively a breach of official duty complained of, is upon the plaintiff, who must show every fact necessary to constitute such breach, and without it damages will not be presumed.[12] To charge one officer, the court will not, without evidence, presume that the precedent duty of another officer was performed.[13] An officer, especially

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[1] Curtis v. Fay, 37 Barb. 64; Dennis v. Snell, 54 Id. 411.

[2] Formerly it was held that if title was averred and put in issue, the pleader might be held to prove legal title. 1 Greenl. Ev. 115, § 92. The better opinion under the new procedure is, that if the mode of acquiring title is not in issue, proof that he was an officer *de facto* is admissible under allegation of official character.

[3] Armstrong v. Garrow, 6 Cow. 465.

[4] Walton v. U. S. 9 Wheat. 651.

[5] Dean v. Gridley, 10 Wend. 254.

[6] 1 Greenl. Ev. 18th ed. 245, § 207; Lister v. Priestly, Whightw. 67; Rosc. N. P. 70.

[7] Curtis v. Fay, 37 Barb. 64. A certified copy, unless made evidence by statute, is inadmissible for this purpose, without excusing the absence of the original. Ib.

[8] Boardman v. Halliday, 10 Paige, 223, 230; Sprague v. Brown, 40 Wis. 612.

[9] Meyer v. Bishop, 27 N. J. Eq. 141. *Contra*, Briggs v. Taylor, 35 Vt. 57, 67.

[10] Curtis v. Fay, 37 Barb. 67.

[11] Hamlin v. Dingman, 5 Lans. 61. *Contra*, Cummings v. Clark, 15 Vt. 653.

[12] Craig v. Adair, 22 Ga. 373.

[13] Id. The presumption in favor of official acts is not to be pressed too far.

when acting under the sanction of an oath, or in whom government reposes trust, is presumed to have done his duty until the contrary be proved; and this principle applies in favor of the officer as well as in favor of strangers.[1] And when an officer is charged with fraud or conspiracy in the discharge of his duties, the presumption of innocence is strong in his favor, but it may be overcome by evidence of other similar delinquencies.[2] To charge an officer with neglect to execute process, the plaintiff cannot rely on the rule that process valid on its face, &c., is a protection. The officer is not bound to act, if the process or judgment is void for want of jurisdiction.[3] The admissions and declarations of a subordinate, who was not the general agent and representative of the defendant, are not competent against the defendant, unless within his authority,[4] or part of the *res gestæ*. It is not enough that they were made before his term expired,[5] nor that they were against interest, and he has subsequently died.[6]

The acts of a public officer, on public matters within his jurisdiction, and where he has a discretion, are presumed legal, till shown to have been unjustifiable. This presumption avails in his own favor when he is sued.[7] To sustain a private action against him, it must be shown that he exercised the power confided to him in a case without his jurisdiction, or in a manner not confided to him, as with malice, cruelty, or willful oppression.[8] In case of a judicial officer malice is not enough.[9]

15. *Return, as evidence Against the officer.*]—As against the officer, and those claiming in privity with him, his return[10] is conclusive[11] as to his acts[12] stated in it, within the scope of his duty, as evidence in favor of parties who claim an interest or

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When invoked in lieu of direct evidence, it cannot serve as a substitute for all other evidence of an independent and material fact. It aids general evidence by dispensing with proof of material circumstances and incidents. United States v. Ross, 92 U. S. (Otto), 281, 285.

[1] Hickman v. Boffman, Hard. (Ky.) 348. Thus, the fact that a sheriff made a levy, is presumed in support of his justification under process. Hartwell v. Root, 19 Johns. 345.

[2] Bottomley v. U. S. 1 Story C. Ct. 135. As to evidence of motives, see Gregory v. Brooks, 37 Conn. 365; Moran v. McClearns, 4 Lans. 288; Wilkes v. Dinsman, 7 How. U. S. 89.

[3] Cornell v. Barnes, 7 Hill, 35; Housh v. People, 75 Ill. 487.

[4] Green v. Town of Woodbury, 48 Vt. 5.

[5] Burgess v. Wareham, 7 Gray (Mass.) 345.

[6] Lawrence v. Kimball, 1 Metc. (Mass.) 524.

[7] It rests not merely on the presumption of innocence, but also on grounds of public policy. Wilkes v. Dinsman, 7 How. U. S. 130.

[8] Id.

[9] Lange v. Benedict, 8 Hun, 366, aff'd in 73 N. Y. 12.

[10] And the principle extends to his indorsement upon an execution, of the time of its receipt. Williams v. Lowndes, 1 Hall, 579. So also of a deputy's return, offered in evidence against the sheriff. Sheldon v. Payne, 7 N. Y. 453. That the power to return is a common-law power, see McCullough v. Commonw. 67 Penn. St. 30.

[11] Sheldon v. Payne (above).

[12] See Splahn v. Gillespie, 48 Ind. 397.

right under the return;[1] and when thus conclusive, not even the officer,[2] or his deputy,[3] can testify in contradiction to it. But returning that the goods were taken as property of A. does not estop him from showing that they were not in fact A.'s property,[4] or that plaintiff is not entitled to the proceeds.[5] And he may prove other facts relevant to his defense, which were not included in nor contradicted by his return.[6]

The plaintiff, although suing on a return, may contradict it, for instance, by denying that the acts were done by his special direction.[7]

When the return is adduced in evidence by one not deriving any right or interest under it,—as, for instance, when one sues for an alleged wrongful levy,—it is a mere admission, and only *prima facie* evidence against the officer.[8] When adduced in evidence by the officer himself in his own defense, whether in a direct action for a false return, or in an action for breach of duty, it is not conclusive in his favor.[9] And it is evidence in his favor only of such official acts as he is by it required to perform, and not of matters stated as an excuse for their non-performance.[10]

The return which is conclusive against the officer is not simply his indorsement upon the process, but it is the actual placing of it in the office from which it is issued. Until then he may change the indorsement, and afterwards only by permission of the court.[11] A return or indorsement made by him is, though not filed, competent against him as an admission, and, if made in pursuance of his duty, is competent in his favor,[12] even though made after suit is brought.[13]

16. *Public action for refusing to serve.*]—In a prosecution on behalf of the public, for refusing to accept office, or to continue its exercise, the best evidence of appointment must be pro-

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[1] As, for instance, the plaintiff, in an action against a sheriff for a false return; or an action for not paying over. Sheldon v. Payne (above); Armstrong v. Garrow, 6 Cow. 465.

[2] Freeman on Ex. § 364, n. 3.

[3] Sheldon v. Payne (above).

[4] Hopkins v. Chandler, 17 N. J. L. (2 Harr.) 299.

[5] Id.

[6] Evans v. Davis, 3 B. Mour. (Ky.) 346; Freem. on J. § 366.

[7] Townsend v. Olin, 5 Wend. 207.

[8] Baker v. McDuffie, 23 Wend. 291 (NELSON, Ch. J.); Boynton v. Willard, 10 Pick. 166. This distinction rests on sound principles and the highest N. Y. authority. It is not noticed by Wharton, who gives conflicting rules (2 Whart. Ev. §§ 833*a*, 837, 1155); nor by Freeman on Ex. § 366, who regards the officer as always concluded. See also Bullis v. Montgomery, 50 N. Y. 352, rev'g in part, 3 Lans. 255.

[9] Whitehead v. Keyes, 3 Allen, 495, s. c. 1 Am. L. Reg. N. S. 471, and note by Redfield.

[10] Browning v. Hanford, 5 Den. 586, rev'g 7 Hill, 120; and see Splahn v. Gillespie, 48 Ind. 397, aff'g 1 Wils. 228. *Contra*, Freeman on Ex. § 366.

[11] Nelson v. Cook, 19 Ill. 440, 455; and see Barker v. Binninger, 14 N. Y. 270. But once made, it may relate back to the return day. Armstrong v. Garrow, 6 Cow. 465.

[12] Glover v. Whittenhall, 2 Den. 638.

[13] Bechstein v. Sammis, 10 Hun, 585.

duced;[1] and it is not enough to prove that defendant was an officer *de facto*.[2]

17. *Pleading by officer defendant.*]—By the New York statute,[3] in every action against a public officer for his official acts, though not in actions for nonfeasance,[4] the defendant may give special matter in evidence, under the general issue, without notice. When he pleads his justification, however, he must do so strictly.[5]

18. *Defendant's proof of official character in justification.*—If defendant, justifying as an officer, produces the record of his appointment by an authority having apparent jurisdiction, this is conclusive;[6] and if there be no writing and none required by law, parol evidence is competent to prove the appointment.[7] But he need not prove that the appointing power was *de jure*.[8] Whether evidence that he himself was an officer *de facto* is enough, is disputed.[9]

19. *Process as a protection to defendant.*]—Where the person against whom, or whose property, process,[10] or a warrant,[11] or order,[12] has been issued by any tribunal or official body having jurisdiction of the subject, sues the officer for executing it,[13] the process, if fair on its face,[14] is a protection, and it is not necessary

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[1] Per SAVAGE, Ch. J., Dean v. Gridley, 10 Wend. 254.

[2] Bentley v. Phelps, 27 Barb. 524. S. P. Green v. Burke, 23 Wend. 490.

[3] 2 R. S. 353, § 15.

[4] Fairchild v. Case, 24 Wend. 380; Persons v. Parker, 3 Barb. 249.

[5] Lawton v. Erwin, 9 Wend. 233; Dennis v. Snell, 54 Barb. 441. So far as the latter case holds that new matter proved, though not pleaded, to avoid new matter in the answer, cannot be met by new matter not in the answer, it is perhaps of doubtful soundness.

[6] Wood v. Peake, 8 Johns. 69; State *ex rel.* Leonard v. Sweet, 27 La. Ann. 541.

[7] Hoke v. Field, 10 Bush (Ky.) 144.

[8] Stevens v. Newcomb, 4 Den. 437.

[9] Three rules are asserted on this point: 1. That he must aver and prove that he was legally an officer, duly elected or appointed and qualified to act (Conover v. Devlin, 15 How. Pr. 478, and cases cited). 2. That he must at least show color of election or appointment from competent authority (State v. Carroll, 38 Conn. 449, s. c. 9 Am. R. 409); and that this is *prima facie* sufficient for the protection of an officer *de facto* (Willis v. Sproule, 13 Kan. 257). 3. That he may *prima facie* establish his official character by proof of general reputation, and that he acted as such officer (1 Dill. M. C. 295, note, and cases cited; Colton v. Beardsley, 38 Barb. 29), in other matters besides those in question (Hutchings v. Van Bokkelen, 34 Me. 126).

[10] Savacool v. Boughton, 5 Wend. 170, 180; Parker v. Waldrod, 16 Id. 514.

[11] Chegaray v. Jenkins, 5 N. Y. 376, 380.

[12] Erskine v. Hohnback, 14 Wall. 613. If the proceedings and order of a board of public officers, such as a board of health, are relied on as a justification in an act which, if without such justification, is a serious wrong, strict proof of the proceedings may be required. Meeker v. Van Rensselaer, 15 Wend. 397. Compare Chap. III, paragraphs 56–65.

[13] The rule is the same as against voluntary assignees, who become such after a levy. Heath v. Westervelt, 2 Sandf. 110.

[14] What is requisite to make it fair on its face within the rule, see, as to direction, Russell v. Hubbard, 6 Barb. 654; name of party, Farnham v. Hildreth, 32 Id. 277, 281; 1 Abb. New Cas. 309; alterations, Wattles v. Marsh, 5 Cow. 176; amendable

to give other evidence of jurisdiction of the person than the production of the process or order.[1] If process or a warrant signed by public officers, and produced as a justification, lack their official additions, parol evidence is competent to show that they actually held the offices by virtue of which they acted. And where jurisdiction may be impeached, it will usually be enough, for the purpose of protecting the officer, to show that the jurisdictional facts were duly alleged in the application,[2] unless the officer was the applicant;[3] and that the process was issued by a person *de facto*, and with color of title, a magistrate such as has jurisdiction.[4] The process, even though it may not justify the taking, may be admissible in mitigation, to justify the entry for the purpose of taking.[5] Where the act is sought to be justified by instructions from the head of an executive department, the court may presume in the officer's favor that the proper direction was given by the chief executive. If the officer is sued for an act of subordinates, performance of which the facts show it to have been his duty to direct, the court may presume in his favor that the necessary request was duly given.[6]

Where a third person sues the officer for enforcing against him process, or a warrant or order against another, the officer must produce the judgment, or other foundation of the process.[7] The process itself, and the record of the judgment or decree, if any, on which it was issued, are primary evidence; and unless a foundation for secondary evidence is laid, they cannot be proved by testimony to their contents,[8] nor to an admission of their existence by the adverse party.[9]

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defects, seal, etc., Dominick v. Eacker, 3 Barb. 17; completeness, Prell v. McDonald, 7 Kans. 426; process *functus officio*, State v. Queen, 66 N. C. 615.

[1] Unless, perhaps, where he was the actor in promoting the illegal proceedings. Leachman v. Dougherty, 81 Ill. 324. As to necessity of return, see 2 Phil. Ev. by Edw. 366; Sheldon v. Van Buskirk, 2 N. Y. 473, 476; but it is, it seems, unnecessary, Id.; signature essential, Barbydt v. Valk, 12 Wend. 143.

[2] Whitney v. Shufeldt, 1 Den. 592.

[3] An officer justifying under a summary proceeding in his favor, taken by an inferior magistrate who was only authorized to act on complaint of a particular officer, must show that he was such officer. And plaintiff may prove that he was not. Walker v. Moseley, 5 Den. 102.

[4] Weeks v. Ellis, 2 Barb. 320; Wilcox v. Smith, 5 Wend. 233.

[5] Parker v. Waldrod, 16 Wend. 514; Paine v. Farr, 118 Mass. 74; Wilcox v. Jackson, 13 Pet. 498.

[6] Rankin v. Hoyt, 4 How. U. S. 327, 335.

[7] Parker v. Waldrod, 16 Wend. 514; Jansen v. Acker, 23 Id. 480. And if he seizes under an attachment, he must show the attachment regularly issued. Noble v. Holmes, 5 Hill, 194.

[8] Stebbins v. Cooper, 4 Den 191.

[9] Per THOMPSON, J., Jenner v. Joliffe, 6 Johns. 9.

CHAPTER IX.

ACTIONS BY, AGAINST, OR BETWEEN PARTNERS.

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I. Actions by Partners.

1. *Allegation of partnership.*]—An allegation of partnership between plaintiffs is unnecessary in their complaint, unless their right of action depends on the partnership. When a joint ownership or joint contract will enable them to recover, it is no objec-

tion to the complaint that the partnership is not pleaded.[1] If plaintiffs allege their partnership, it is well to be prepared to prove it,[2] unless admitted; and a general denial is not an admission, but puts the allegation in issue.[3]

2. *Proof of partnership.*]—Partners in a general partnership, suing as such, may prove their partnership by the testimony of a partner,[4] or by that of a witness who has done business with them,[5] or for them,—as a clerk, for instance;[6]—and a witness who knows that they have done business as such, at the time in question, or other times reasonably proximate,[7] may testify directly to the fact that they were partners, subject, of course, to cross-examination as to the details.[8] If he cannot testify that they were partners, he should not be allowed to state his opinion. The facts being brought out, the question of partnership or no partnership between plaintiffs is one of law for the court.[9] Evidence that the plaintiffs represented themselves to be partners,—as, for instance, where one introduced the other to witness as his partner,—is competent, for partnership may be proved, even in favor of the partners, by the acts and declarations of all,[10] but the declarations of one partner, or the testimony of a witness whose only information is by such declaration or hearsay, is not alone enough. Plaintiffs have the means of proving their own partnership; and, where the fact is material, may be held to strict proof.[11] If a written contract sued on runs to the plaintiffs in a firm style, its production is sufficient *prima facie* evidence of the existence of a partnership, as against defendants who have signed or indorsed it,[12] but unless it is admitted that the plaintiffs composed the firm, they must give some evidence of the fact beside that afforded by the correspondence of surnames and their production of the instrument sued on.[13] Articles of copartnership, even if shown to exist, need not be produced, unless some question is made as to their contents or scope.

3. *Parol evidence to vary the contract sued on.*]—Where part-

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[1] Loper v. Welch, 3 Duer, 644.

[2] Cooper v. Coates, 21 Wall. 105; Millerd v. Thorn, 56 N. Y. 404.

[3] Fetz v. Clark, 7 Minn. 217. The fact of partnership, though it may not be material in the sense of being essential to a recovery (Oechs v. Cook, 3 Duer, 161), may be material to a set off, &c., and as laying a foundation for admitting evidence of the acts and declarations of one plaintiff for or against both.

[4] See Gates v. Manny, 14 Minn. 21.

[5] Gilbert v. Whidden, 20 Me. 368.

[6] McGregor v. Cleveland, 5 Wend. 475.

[7] See Gilbert v. Whidden (above).

[8] Grew v. Walker, 17 Ala. 824.

[9] Id. As to proving partnership under foreign law, see Barrows v. Downs, 9 R. I. 446, s. c. 11 Am. R. 283; and pp. 22, 23 and 85 of this vol.

[10] Gilbert v. Whidden, 20 Me. 368. *Contra*, Lockridge v. Wilson, 7 Mo. 560.

[11] McGregor v. Cleveland (above).

[12] Griener v. Ulerey, 20 Iowa, 266.

[13] McGregor v. Cleveland, 5 Wend. 475; Barnes v. Elmbinger, 1 Wisc. 56.

ners sue on a simple contract made with a member of the firm in his own name, they may show by parol that the contract was made by him for the firm.[1] The fact that it was made in his name throws on them the burden of doing so. Evidence that the consideration proceeded from the firm assets, is not alone enough.[2] A sealed instrument cannot be thus varied by parol; even a partner who became such subsequent to the contract, cannot sue thereon,[3] unless upon evidence that he has been recognized as a joint contractor by the other party.[4] But if the sealed contract is made in the name of the firm or all the partners, evidence that the one who signed and sealed had authority from the others to do so, need not be proved for the purpose of sustaining their action.[5]

4. *Firm books as evidence in favor of the firm.*]—Where the books of a party are competent in his own favor,[6] the books of a firm are equally so in their favor, upon the same conditions, but in those States where the suppletory oath of the party is requisite, the partner who made the entries must be called for the purpose, unless he is dead or has gone beyond jurisdiction.[7]

5. *Declarations.*]—Evidence of the declarations of the partners is not competent in favor of the firm, except to establish the fact of partnership, or under the rule of *res gestæ*, or on other grounds of competency common to the declarations of other classes of parties.[8]

6. *Defendant's evidence.*]—Plaintiffs' allegation that they were partners is conclusive on them so far as to render evidence of the admissions and declarations of either of them, made while he sustained that relation,[9] competent against all, and under this rule, the declaration of one, that the cause of action was exclusively his own, is competent against the others.[10] An entry in partnership books is not, even against a member, conclusive evidence that the transaction was a firm transaction.[11]

7. *Matter in abatement.*]—An allegation of the non-joinder of copartners as plaintiffs is sustained by proof that some of those

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[1] Cooke v. Seely, 2 Exch. 745; s. p. Coleman v. First Nat. Bk. 53 N. Y. 388, 391.
[2] See Townsend v. Hubbard, 4 Hill, 351; Briggs v. Partridge, 64 N. Y. 362.
[3] Duff v. Gardner, 7 Lans. 165.
[4] Compare Cramer v. Metz, 57 N. Y. 659.
[5] Gates v. Graham, 12 Wend. 53.
[6] Vosburgh v. Thayer, 12 Johns 461; Tomlinson v. Borst, 30 Barb. 42; Stroud v. Tilton, 4 Abb. Ct. App. Dec. 324; 2 Phil. Ev. 370, note 108.
[7] New Haven Co. v. Goodwin, 42 Conn. 230.
[8] Crounse v. Fitch, 1 Abb. Ct. App. Dec. 475.
[9] A statement by one, who became partner after the cause of action arose, is not evidence against his copartner who sues on it. Tunley v. Evans, 2 D. & L. 747; Rosc. N. P. 75.
[10] Lucas v. De la Cour, 1 M. & S. 249; especially if part of the *res gestæ*. Atherton v. Tilton, 44 N. H. 452, 458. As to the effect of such evidence, see p. 186 of this vol. note 2.
[11] Langton v. Hughes, 107 Mass. 272. Compare Farner v. Turner, 1 Iowa, 53.

alleged were copartners; and the failure to prove that others were is matter of variance, to be disregarded unless defendant is prejudiced.[1] Under the new procedure, a dormant partner, although one of the real parties in interest, should not be held a necessary co-plaintiff;[2] and evidence showing that the partners who sue are "trustees of an express trust" for him, within the statute,[3] clearly dispenses with the necessity of joining him. So also would evidence that the contract was taken in the name of a part of the firm by assent of the others.[4] Neither evidence that a third person employed by plaintiffs has an interest in the profits and therefore in the recovery,[5] nor the fact that he was a nominal partner, under a stipulation that he was to have no interest, but to receive wages or a salary only,[6] is enough to prove him a partner.[7] If the existence of a partner who is not joined, does not appear in the complaint nor in the answer, evidence of the fact is not ground for dismissing the complaint.[8]

II. Actions against Partners.

8. *Allegation of partnership.*]—If it is substantially alleged in the complaint that the defendants contracted as partners, the fact of partnership will be put in issue by a general denial,[9] though not by a denial of the contract alleged.[10] Under a general allegation of partnership, plaintiff may prove a supposed special partnership under the statute, and the violations of the statute relied on as rendering the defendant liable as general partner.[11] Where a joint liability appears on the face of the contract, a partnership need neither be alleged nor proved;[12] and the chief effect of alleging and proving it, is to open the way for admitting more freely the acts and declarations of one partner against the others.[13]

9. *Proof of partnership.*]—Plaintiffs may prove defendant's partnership in the same way in which, as above stated, plaintiffs

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[1] See Fowler v. Atlantic Mut. Ins. Co. 8 Bosw. 332, 344. Compare paragraph 37.

[2] This was the common law rule, but the contrary was held in. Secor v. Keller, 4 Duer, 419. The soundness of this case is doubtful under the Code, as amended in 1851. See Moak's Van Sant. Pl. 90, 118. The better opinion is that the partnership relation is itself sufficient evidence of a trust. See also Chew v. Brumagem, 13 Wall. 497.

[3] N. Y. Code Civ. Pro. § 459.

[4] Mynderse v. Snook, 1 Lans. 488.

[5] Lewis v. Greider, 51 N. Y. 231, aff'g 49 Barb. 606.

[6] Beudel v. Hettrick, 35 Super. Ct. (3 J. & S.) 405.

[7] Compare paragraphs 11 to 19. See Law v. Cross, 1 Black, 537. Declarations of the omitted one are not competent to prove the partnership. McFadyen v. Harrington, 67 N. C. 29.

[8] Dickinson v. Vanderpoel, 2 Hun, 626.

[9] See paragraph 1.

[10] Anable v. Conklin, 25 N. Y. 470, aff'g 16 Abb. Pr. 286. Compare Oechs v. Cook, 3 Duer, 161.

[11] Stone v. De Puga, 4 Sandf. 681. See paragraph 36.

[12] Kendall v. Freeman, 2 McLean, 189.

[13] See paragraphs 23, 32, 52.

may prove themselves to be partners.[1] The existence of a firm may be inferred from the agreement of dissolution; but even a formal notice of dissolution signed by all the members, and published, stating a dissolution on a day named, is not conclusive evidence against them that the firm continued until that day.[2] The names of the members must be proved; but slight evidence is enough to go to the jury.[3] If the witness cannot recollect the names, a list of names may be read to him, and he may be asked whether those persons are members.[4] As the adverse party has not the same means of knowledge, he is not to be held to make so strict proof of the partnership as if proving his own.[5]

10. *Best and secondary evidence.*]—If the question involves the construction of written articles of agreement, they should be called for as a foundation for secondary evidence.[6] The proper certificates of acknowledgment or proof under the statute, render the instrument competent, without other proof of execution.[7] And the whole of the agreement must be taken together.[8] But even though the articles do not establish a partnership, it may be established by parol evidence.[9] Parol evidence is competent, even for the purpose of proving a partnership in transactions in real property.[10] And where written articles are proved, the prior existence of the relation may still be proved by parol.[11]

11. *Indirect evidence of partnership.*]—A partnership may be shown by the separate admissions, acts, declarations or conduct of the parties, or by the act of one, the declaration of another, and the acknowledgment or consent of a third;[12] and it matters not which declaration is offered first.[13] But it can never be proved in this way alone, unless the evidence fixes such a concession on each or all of those charged. The concession of one is evidence against himself, but not against another, unless shown to

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[1] Paragraph 2. Widdefield v. Widdefield, 2 Binn. (Penn.) 245; s. p. 37 Penn. St. 92, and cases cited.

[2] Emerson v. Parsons, 46 N. Y. 560, affi'g 2 Sweeny, 447.

[3] Varnum v. Campbell, 1 McLean, 313.

[4] Acerro v. Petroni, 1 Stark. 100.

[5] See McGregor v. Cleveland, 5 Wend. 475. Thus, if plaintiff proves that defendants were partners, and proves a contract made by one member signed with his own name and the addition "& Co.," this is enough to go to the jury without proving that defendants did business under that name. Drake v. Whittaker, 1 Cai. 184, KENT, J.

[6] Price v. Hunt, 59 Mo. 258. As to *subpœna duces tecum*, and notice to produce, see McPherson v. Rathbone, 7 Wend. 216.

[7] Mattison v. Demarest, 4 Robt. 161; and see page 6 of this vol. paragraph 11.

[8] Manhattan Brass Manufacturing Co. v. Sears, 1 Sweeny, 426.

[9] McStea v. Matthews, 50 N. Y. 167.

[10] Chester v. Dickinson, 54 N. Y. 1, 8, affi'g 52 Barb. 349.

[11] Id.

[12] Barcroft v. Haworth, 29 Iowa, 462.

[13] Edwards v. Tracy, 62 Pa. St. 374.

have been authorized or ratified by that other.[1] To admit such evidence generally, as if competent against all, where there is no other evidence against the others, is error.[2]

12. *Holding out to the public.*]—Without other evidence of a partnership in fact as between the defendants, liability of a defendant as if a copartner is established by evidence that he held himself out, or suffered himself to be held out to the world as a partner;[3] and for this purpose it is not necessary, at least in the first instance, to prove a representation to the plaintiff.[4] Where it is proved that they advertised that they were partners, it may be presumed that the plaintiff's subsequent dealings were on the faith of the partnership.[5] A nominal partner, held out as such, is liable though having no interest, and receiving only wages,[6] or a mere compensation for the use of his name.[7] But if it appear that plaintiff was ignorant of the representations, or did not deal on the faith of them, they are not conclusive,[8] and may be rebutted by evidence that there was no partnership whatever, active, nominal or constructive.[9]

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[1] See notes to paragraph 14, and also Chapter VII. Whether evidence of an admission of his own liability by one, coupled with evidence of an admission of liability as a partner by the other, is enough, compare Mitchell v. Roulstone, 2 Hall, 351; and Brahe v. Kimball, 5 Sandf. 237.

[2] Whitney v. Ferris, 10 Johns. 66. The usage of other persons is not competent. Foye v. Leighton, 22 N. H. 71.

[3] If the evidence is objected to, the offer should be explicit, and not susceptible of being understood as an offer to prove general repute. Bowen v. Rutherford, 60 Ill. 41, s. c. 14 Am. R. 25.

[4] For this purpose, evidence is competent that the defendant dealt as a copartner of the other defendants in their transactions with third persons. Bennett v. Holmes, 32 Ind. 108. That handbills, bearing their names as partners, were circulated by the defendant (Walcott v. Caulfield, 3 Conn. 195); or were so circulated that they must reasonably be presumed to have come to his notice (Tumlin v. Goldsmith, 40 Geo. 221; compare McNamara v. Dratt, 33 Iowa, 385); that merchandise on the premises was marked with their firm name (Penn v. Kearney, 21 La. Ann. 21); and that they suffered judgment by default when sued as partners in another action. Cragin v. Carleton, 21 Me. 493; compare Hall v. Lanning, 91 U. S. (1 Otto), 160. So a contract or conveyance made in the firm name, and signed by each, though foreign to the matter in suit, is competent as an admission. Crowell v. Western Reserve Bk. 3 Ohio St. 406, 414. So is their joint application for a license for their business. Conklin v. Barton, 43 Barb. 435.

[5] Kelly v. Scott, 49 N. Y. 595.

[6] See Beudel v. Hettrick, 35 Super. Ct. (J. & S.) 411.

[7] Poillon v. Secor, 61 N. Y. 456. The better opinion is that a general holding out is enough to raise a legal presumption of partnership, irrespective of whether the representation was brought to the dealer's notice. Poillon v. Secor, 61 N. Y. 456; Case of Wright, 26 Weekly R. 195, s. c. 5 Rep. 670. Some authorities hold that plaintiff must prove that he dealt on the faith of the representation: that mere representations to third persons are not competent. Teller v. Patten, 20 How. U. S. 125; Bowen v. Rutherford, 60 Ill. 41, s. c. 14 Am. R. 25; Heffner v. Palmer, 67 Ill. 161; and that a representation made to the particular creditor is not enough to take the case from the jury, unless made before credit given or contract made. Ridgway v. Philip, 5 Tyrwhitt, 131. These rulings are not well considered. But on a question of priority between individual and partnership debts, isolated statements to a stranger are not enough. Case of Wright (above).

[8] Bostwick v. Champion, 11 Wend. 582, NELSON, J.

[9] Fitch v. Harrington, 13 Gray, 468, 470.

13. *Representations to particular creditor.*]—Proof that defendants represented or conducted themselves as partners, and were trusted as such in the dealing in question,[1] or that the only one whose relation is contested did so,[2] is conclusive; and their own acts and declarations, showing that they were not partners, cannot then disprove their liability. Where such representations are proved, evidence of similar representations, made at about the same time to third persons, is competent in corroboration.[3] A representation made by one will bind the others, if he was authorized by them to make it;[4] and the fact of his authority may be proved by his own testimony.

14. *Admissions and declarations to prove partnership.*]—As against any one defendant, whether litigating the case, or not appearing,[5] or not even served,[6] evidence of his own [7] admission, whether made to the plaintiff,[8] or to third persons,[9] and whether made at or after the transaction in suit,[10] or within a reasonable time before it,[11] is competent for the purpose of proving the existence of the firm,[12] his own membership,[13] who were his copartners,[14] and what was the nature and scope of the business.[15] But such evidence is incompetent as against any other than the declarant, except in connection with other *prima facie* evidence that such other was a partner with the declarant,[16] or author-

[1] Johnston v. Warden, 3 Watts, 101; Kelly v. Scott, 49 N. Y. 601.

[2] Hicks v. Cram, 17 Vt. 449; Kelly v. Scott, 48 N. Y. 601. Even though he was actually a special partner. Barrows v. Downs, 9 R. I. 446. Where the question is which of two persons of the same surname was the partner, evidence that the one joined as defendant represented himself as such to plaintiff, and that the other person was unknown to plaintiff, is competent without anything to connect the other defendant with the holding out. Hicks v. Cram, 17 Vt. 449, REDFIELD, J. A letter saying that the writer is "interested" in a firm, and asking credit for them, is evidence to charge the writer as a member for credit given on the faith of the letter, until notice of dissolution. Carmichael v. Greer, 55 Geo. 116.

[3] Hicks v. Cram (above).

[4] Montgomery v. Bucyrus Machine Works, 92 U. S. (2 Otto), 257; Hinman v. Littell, 23 Mich. 484.

[5] Taylor v. Henderson, 17 Serg. & R. 453, 457.

[6] Grafton Bank v. Moore, 14 N. H. 145, 146.

[7] As to admissions made by an agent, see Campbell v. Hastings, 29 Ark. 512; Hoppock v. Moses, 43 How. Pr. 201.

[8] See paragraph 13.

[9] Bennett v. Holmes, 32 Ind. 108; and see other illustrations in note 4 to paragraph 12.

[10] Taylor v. Henderson, 17 Serg. & R. 453, 457.

[11] Bennett v. Holmes (above); Ralph v. Harvey, 1 Adol. & E. N. S. 845, 849, s. c 41 Eng. Com. L. 808.

[12] Johnson v. Warden, 3 Watts, 101.

[13] Edwards v. Tracy, 62 Penn. St. 374; Crossgrove v. Himmelrich, 54 Id. 203; Fleshman v. Collier, 47 Geo. 253.

[14] Taylor v. Henderson, 17 Serg. & R. 453, 457.

[15] Smith v. Collins, 115 Mass. 388, 399.

[16] Pleasants v. Fant, 22 Wall. 120; McPherson v. Rathbone, 7 Wend. 216; Robins v. Warde, 111 Mass. 244; Donley v. Hall, 5 Bush, 549. It is not alone enough to show that the others had previously been members with the declarant of another firm which meanwhile was dissolved. Kirby v. Hewitt, 23 Barb. 607. Compare Johnson v. Gallivan, 52 N. H. 143; Van Eps v. Dillaye, 6 Barb. 244.

ized him to make the representation,[1] or was aware of it and silent.[2]

15. *Hearsay.*]—Neither general reputation,[3] common rumor,[4] nor the opinion or belief[5] of a witness founded on such hearsay, is competent evidence of partnership. The question turns on the assent of the one to be charged.[6] Hence a business directory[7] or the reports of a commercial agency,[8] are not admissible, unless knowledge of the statement, or means of knowing it, is brought home to the party charged.

16. *Ownership.*]—The joint purchase or ownership of property,[9] whether real[10] or personal,[11] is not alone any evidence of partnership;[12] though coupled with participation in profits,[13] or evidence of agency for each other,[14] it may be equivalent.

17. *Dormant and secret partners.*]—To charge a dormant partner with the others, the knowledge or ignorance of those dealing with the firm, that he was such, is wholly immaterial. It is enough to prove that he was actually a partner,[15] unless the contracting party had knowledge of the relation, and dealt solely on

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[1] Paragraph 11.

[2] Bancroft v. Harworth, 29 Iowa, 462; and see Campbell v. Hastings, 29 Ark. 512. Strictly speaking, when there is *prima facie* proof of partnership as against the others, the declaration does not really corroborate it, as against the others; but it ceases to be error to receive it as against them. See Gardner v. Northwestern Mfg. Co. 52 Ill. 367.

[3] Bowen v. Rutherford, 60 Ill. 41, s. c. 14 Am. R. 25; Brown v. Crandall, 11 Conn. 93. Such evidence, if competent at all, is so only for two purposes: 1. In corroboration of previous evidence. 2. To show knowledge on the part of plaintiff. Not as direct and principal evidence. Turner v. McIlhaney, 8 Cal. 575. Even when admitted without objection, it is not alone enough to sustain a finding that partnership existed. But, if admitted without objection, it may be considered in connection with other evidence of partnership. Halliday v. McDougall, 22 Wend. 264. It may be competent, where the partnership is not directly in issue, but only incidentally in question; as, for instance, when relied on as an excuse for not giving notice. Gowan v. Jackson, 20 Johns. 176.

[4] Tumlin v. Goldsmith, 40 Geo. 221.

[5] Hicks v. Cram, 17 Vt. 449.

[6] Bowen v. Rutherford (above).

[7] Union Bank v. Mott, 39 Barb. 180.

[8] Campbell v. Hastings, 29 Ark. 512.

[9] For the distinction between partnerships and other associations, see Ebbinghousen v. Worth Club, 4 Abb. New Cas. 300, 308 note; Raisbeck v. Oesterricher, Id. 347; Story on Partn. ch. xvi; 1 Wood's Coll. 9–48.

[10] Thompson v. Bowman, 6 Wall. 316.

[11] Such as a patent. Boeklen v. Hardenberg, 60 N. Y. 8, affi'g 37 Super. Ct. (J. & S.) 110.

[12] And mere declarations of one that they "bought it in partnership," may not be alone enough, for he may have meant merely as tenants in common. Gregory v. Martin, 78 Ill. 38.

[13] Paragraph 18. Compare Davis v. Morris, 36 N. Y. 569, affi'g 35 Barb. 227; Reynolds v. Cleveland, 4 Cow. 282.

[14] Ebbinghousen v. Worth Club, 4 Abb. New Cas. 300; Phillips v. Nash, 47 Geo. 218.

[15] Lea v. Guice, 13 Smedes & M. 656, 669.

the credit and name of the others.[1] Generally, fraud in the purpose of forming the firm, is not relevant in support of the existence of partnership,[2] but to charge a secret or dormant partner, evidence of his declarations, even to third persons, that the partnership existed and was concealed,[3] is competent; and his offers to third persons to become a secret partner for the purpose of concealing his property, are competent, in corroboration of other evidence.[4]

18. *Community of profits; the common law rule.*]—At common law (both in courts of law and of equity) it is sufficient to establish the liability of an alleged partner, to show that by agreement[5] he had a right[6] in the entire net profits,[7] which entitled him to a definite share,[8] as profits. This rule, still commonly followed in our courts, though not in England, is regarded as a conclusive presumption, in the absence of evidence showing that he received it not as the profits of a principal, or of money, but in some other character not involving that of partner.[9]

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[1] Bigelow v. Elliott, 1 Cliff 28; Palmer v. Elliott, Id. 63.

[2] Thomas v. Moore, 71 Penn. St. 193.

[3] Bennett v. Holmes, 32 Ind. 108.

[4] Butts v. Tiffany, 21 Pick. 95.

[5] Even where the partnership was in a real estate transaction, the agreement need not be in writing. Chester v. Dickenson, 54 N. Y. 1, affi'g 52 Barb. 349.

[6] Pars. on Partn. 70. The right to an account has commonly been regarded as a decisive circumstance; but this is doubtful. See Bentley v. Harris, 10 R. I. 434, s. c. 14 Am. R. 695.

[7] Sharing in losses is not essential. Manhattan Brass Co. v. Sears, 45 N. Y. 797.

[8] A voluntary promise to pay an indefinite share is not even competent evidence of partnership. Pleasants v. Fant, 22 Wall. 116.

[9] Leggett v. Hyde, 58 N. Y. 272, affi'g 1 Supm. Ct. (T. & C.) 18, and cases cited; and see King v. Sarria, 69 N. Y. 35. The principle running through the well considered cases which apply this rule, is that on the one hand disavowals of the partnership relation in an agreement, or even the withholding of some of the usual powers of partners, cannot negative the obligation to creditors, if any substantial elements of the partnership relation exist in a joint adventure, for the sake of profit, as such; yet, on the other hand, a right to draw profits by way of compensation does not alone make a partner of one whose real relation is that of agent, servant, factor, landlord, annuitant, or co-tenant without agency, and the like. The court look at the real relation resulting from the engagements of the parties, and if it does not establish some other and subordinate tie, they give effect, in favor of creditors, to the doctrine that he who has a right in the profits as such must bear his share of the liabilities. And this is applied as a rule of law. It is not enough that the parties did not intend a partnership, nor that they intended there should be none. They must have intended and constituted a distinct and different relation excluding that of partnership. See Leggett v. Hyde (above); Eastman v. Clark, 53 N. H. 276, s. c. 16 Am. R. 192; Parker v. Canfield, 37 Conn. 250, s. c. 9 Am. R. 317; Connolly v. Davidson, 15 Minn. 519, s. c. 2 Am. R. 154; Owens v. Mackall, 33 Md. 382; Notes in 13 Moak's Eng. 839.

In the following cases participation in profits has been held not to prove partnership within the foregoing rule (2 Am. L. Rev. 1, 28, 193):

I. When the participant is legally incapable of contracting generally. (Id. 7; but see 1 Wood's Coll. 12.)

II. When his stipulations were to the effect that he should not be liable to creditors, and the creditor, at the time of the dealing, knew of such stipulations. (Alderson v. Pope, 1 Campb. 404 n.; and see Livingston v. Roosevelt, 4 Johns. 251, 266.)

19. — *the English rule.*]—The English rule, adopted also in some American States,[1] is that the test of liability is not merely whether there was a participation of profits, but whether there was such a participation as constituted the relation of principal and agent between the percipients and the actors in the business;[2] and therefore participation in profits is not conclusive evidence of partnership, but, at best, a circumstance to be considered, with others, in determining whether the relation of the parties was such as to create that agency between them in which partnership consists. It is a cogent circumstance, but the inference of partnership arising from it is susceptible of control by other circumstances of the case.[3]

20. *Evidence in respect to Date.*]—To charge one as partner, he must be shown to have been a member when the contract sued on was made,[4] or the tort committed,[5] unless his assumption of prior liabilities is shown. But a partnership shown once to have existed, is presumed to continue until the contrary is shown.[6]

III. When the participation is in profits derived from a contract of shipment on half profits, as is generally practiced in this country. (Story on Partn. 72, §§ 43, 44. Compare Eldridge v. Troost, 3 Abb. Pr. N. S. 20, s. c. 6 Robt. 518; Post v. Kimberly, 9 Johns. 470; Marsh v. N. A. Ins. Co. 3 Biss. 351.)

IV. When the profits are taken in lieu of rent (Holmes v. Old Colony R. R. Co. 5 Gray, 58; 3 Kent's Com. 33, 34. Compare Cushman v. Bailey, 1 Hill, 526; Catskill Bank v. Gray, 14 Barb. 471); or for other general benefits rendered a firm. (2 Am. L. R. 23.)

V. When taken by seamen in lieu of wages. (Story on Partn. 69, § 42.)

VI. When taken as compensation for labor or services performed, not as principal (Dob v. Halsey, 16 Johns. 34); but as agent, servant, factor, broker, &c. (Burckle v. Eckhart, 3 N. Y. 132.)

VII. When the participants are creditors, and participate to the extent of their claims, in the profits of a partnership carried on for their benefit, as creditors. (Brundred v. Muzzy, 1 Dutch. N. J. 268, 279; and see Cox v. Hickman, 8 Ho. of L. 268; 9 C. B. N. S. 47, rev'g 3 C. B. N. S. 523; 18 C. B. 617; and see 69 N. Y. 35.)

VIII. When the participant is an annuitant, and does not take the profits as profits, but relies upon them merely as a fund for paying an annuity to which he is entitled from the firm. (Story on Partn. 115, §§ 66–70.)

IX. When he is the devisee of a deceased partner, and receives the profits derived from funds left by the will of a deceased partner in the firm; and he does not go into the firm for the purpose of personally representing such funds. (Id; 2 Am. L. R. 17; Burwell v. Mandeville, 2 How. U. S. 560; Pitkin v. Pitkin, 7 Conn. 307.)

Whether one who has an interest in the separate share of a partner in the profits of the firm,—that is, a sub-partner,—is liable to creditors, with the partners, is disputed. (Neg. 1 Wood's Coll. 44, § 27. Affi. Fitch v. Harrington, 13 Gray, 468.)

[1] See Harvey v. Childs, 22 Am. R. 387, s. c. 28 Ohio St. 319, and cases cited.

[2] Cox v. Hickman, 8 Ho. of L. Cas. 268, 306.

[3] *Ex parte* Tennant, 37 Law Times N. S. 285. And see Holme v. Hammond, L. R. 7 Exch. 218, s. c. 2 Moak's Eng. R. 125; Mollevo v. Court of Wards, L. R. 4 P. C. 419, s. c. 4 Moak's Eng. 121.

[4] Fuller v. Rowe, 57 N. Y. 23, rev'g 59 Barb. 344. Proof of a stipulation that, as between the partners, the partnership shall be deemed to have commenced at a date prior to its actual commencement, will not alone charge them in favor of creditors. 2 Wood's Coll. 1113, n.; unless sufficient to show assumption of intermediate liabilities. Hengst's App. 24 Penn. St. 413.

[5] Chester v. Dickinson, 54 N. Y. 1, affi'g 52 Barb. 349.

[6] Walrod v. Ball, 9 Barb. 271; Cooper v. Dedrick, 22 Barb. 516; s. p. Wilkins v. Earle, 44 N. Y. 172; Fassin v. Hubbard, 55 Id. 465.

Hence evidence of its existence within a reasonable time prior to the date of the transaction in suit, is competent;[1] and in connection with such evidence, or any evidence tending to show a partnership at the time of the transaction, evidence of its existence within a reasonable period afterward is admissible.[2] The date in the articles is not sufficient evidence of the date of execution,[3] except as against a party to the articles. The creditor may prove the commencement of the partnership from the commencement of the agency or holding out, though that be before the commencement of the contemplated business of the concern,[4] and before the performance of conditions precedent in the articles,[5] or even before the date or execution of the articles.

21. *Assumption of debts by incoming partner.*]—In the absence of anything to indicate that an incoming partner assumed liability for outstanding debts, the presumption of law is that he did not.[6] But an agreement on his part to do so may be proved, either by his express contract, or by inference from its terms, or from the treatment of such debts, by the new firm, to the knowledge of the incoming partner, as the debts of the new firm.[7] If the new firm takes the assets and continues the business in the same place, slight evidence is sufficient to warrant the evidence that it has assumed the liabilities of the old firm.[8]

22. *Variance as to number of partners.*]—At common law, under a declaration alleging a contract by one person, if he interposed no plea in abatement, plaintiff might prove a contract by a firm of which defendant was a member;[9] and under the new procedure, a recovery against one or several may be had under the same circumstances. So, on the other hand, when several are alleged to be partners, and the evidence shows that only a part of them constituted the firm, plaintiff may recover against those who are found liable, and be non-suited as to the others;[10] whether the others were served or not.[11] So he may recover

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[1] Burnett v. Holmes, 32 Ind. 108.
[2] Fleshman v. Collier, 47 Geo. 253.
[3] Philpot v. Gruninger, 14 Wall. 570.
[4] Aspinwall v. Williams, 1 Ohio, 84, 94.
[5] Burns v. Rowland, 40 Barb. 368.
[6] Story on Partn. 273, § 152; 274, § 153.
[7] Updike v. Doyle, 7 R. I. 446, 463.
[8] Shaw v. McGregory, 105 Mass. 96; *Exp.* Peele, 6 Ves. 604.
[9] Barry v. Foyles, 1 Pet. 311; Smith v. Cooke, 31 Md. 174. As to variance in the case of limited partnership, where the sign required by the statute was not displayed, see the statute N. Y. L. 1862, p. 880, c. 476, § 1, am'd'g 1 R. S. 765, § 13; 2 N. Y. L. 1866, p. 1424, c. 661.
[10] Fielden v. Lahens, 2 Abb. Ct. App. Dec. 111, s. c. 6 Abb. Pr. N. S. 341, rev'g 9 Bosw. 486; Snelling v. Howard, 51 N. Y. 378, affi'g 7 Robt. 400; and see p. 186 of this vol. n. 2.
[11] Pruyn v. Black, 21 N. Y. 300; McKenzie v. Farrell, 4 Bosw. 192. *Contra*, Smith v. Halett, 65 Ill. 495.

against one only, on evidence that there was no firm, but that such one was solely liable.[1]

23. *Presumption of partner's authority.*]—Under an allegation that the partners did an act, evidence that one of them did it on their behalf is admissible.[2] If the act was within the scope of their business, or properly incidental to an act within the scope of their business,[3] and done in the firm name, and not requiring a seal, the existence of the partnership is sufficient evidence of authority,[4] and in favor of one who gave credit, is conclusive, in the absence of evidence of notice of actual lack of authority.[5] If the act be not of such character, there must be evidence, either direct or circumstantial,[6] tending to show authority or ratification.[7] Evidence that the partner, exercising a power not implied in the nature of the partnership, was the general manager, is not enough. If the authority sufficiently appear, either presumptively or by direct evidence, it is not necessary to show that the partnership had the benefit of the consideration.

24. *Evidence as to the scope of the business, &c.*]—To prove the scope of the business and the manner of transacting it, for the purpose of establishing the authority of a partner to bind the others, the creditor need not produce or call for the articles, unless restrictions in them are shown to have been known to him. Evidence of the previous dealings, the acts of the partners, and the length of time such a course of business has continued, &c.,[8] and of the common and usual dealings of persons engaged in the same trade or business at the same locality,[9] is competent.

25. *Evidence of express authority.*]—The admission or declaration of one partner as to authority, or the scope of business from which it is implied, is competent as against him,[10] but the partnership relation does not authorize him to exaggerate its scope, as against the others, by his declarations, and therefore such declarations are not competent for this purpose as against the others,[11] even if made as part of the *res gestæ* of the act in question,[12] un-

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[1] Stimson v. Van Pelt, 66 Barb. 151; Angel v. Cook, 2 Supm. Ct. (T. & C.) 175, 177.

[2] See King v. Fitch, 2 Abb. Ct. App. Dec. 508; Walton v. Dodson, 3 Carr. & P. 162.

[3] As, for instance, directing the levy of an execution when collecting a debt due the firm. Chambers v. Clearwater, 1 Abb. Ct. App. Dec. 341, affi'g 41 Barb. 200.

[4] Smith v. Collins, 115 Mass. 388, 399.

[5] Edwards v. Tracy, 62 Penn. 374; Hoskinson v. Elliot, Id. 393.

[6] Butler v. Stocking, 8 N. Y. 408.

[7] See paragraphs 28 and 29.

[8] Clayton v. Hardy, 27 Mo. 536.

[9] Smith v. Collins, 115 Mass. 388, 399. The usage must be that of the particular trade or business. Story on Partn. 202, § 113.

[10] Smith v. Collins, 115 Mass. 388, 399.

[11] 1 Wood's Coll. 736, § 459.

[12] Elliott v. Dudley, 19 Barb. 326.

less shown to have been authorized or permitted by such others, or to have been so open or continued that permission may be inferred.

26. *Question to whom credit was given.*]—The partnership having been proved, and the act not being beyond its scope, the declaration of any partner made at the time of the transaction,[1] or at any time during the continuance of the partnership relation,[2] is competent to show that the act was done on behalf of the partnership; and if the credit was obtained on the faith of such declaration, the falsity of the representation is not material.[3] To prove that the transaction was for partnership purposes, it is *prima facie* enough to show that it was in the firm name,[4] except where the name used by the firm was merely that of an individual partner. Evidence that the partner acting in the matter, signed the contract, self "& Co.," or self "and partners," is *prima facie* sufficient proof of the firm name, and throws on defendants the burden of showing that they had adopted a different name.[5] If they had not adopted a different name, such a signature will bind the firm, though they never received the proceeds.[6] If the partners had not, either by agreement or usage, adopted a composite name, the fact that they did business in the individual name of one partner, may be shown by evidence of their usage,[7] especially where their agreement charged him with the sole management of the business,[8] or of that part of it in which the transaction was had.[9] But even though their adoption of the individual name be shown, one seeking to charge the co-partners on a transaction in that name must give further evidence that the transaction was had in the business of the partnership, or upon its credit;[10] otherwise it will be presumed to have been an individual transaction.[11] Evidence that it was actually on their credit, is alone enough,[12] and, on the other hand, evidence that it was actually in their business, if the dealer did not expressly restrict himself to the individual credit, is alone enough, even though he was ignorant of the other partners, and of the partnership object.[13]

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[1] Oliphant v. Mathews, 16 Barb. 608.
[2] Smiths v. Cureton, 31 Ala. 653; *contra*, 1 Wood's Coll. 645, n. 3.
[3] Stockwell v. Dillingham, 50 Me. 442; U S. Bank v. Binney, 5 Mas. 176, 184.
[4] Wood's Coll. 678, n.
[5] Drake v. Elwyn, 1 Cai. 184, s. c. less fully, 3 Johns. Cas. 594.
[6] Aspinwall v. Williams, 1 Ohio, 84; Austin v. Williams, 2 Id. 61.
[7] Ontario Bank v. Hennessy, 48 N. Y. 545. In such case even the occasional drawing of a bill, &c., by one member in his own name, for partnership purposes, is competent to go to the jury as evidence of trading under that name, but does not alone raise a presumption of law. Le Roy v. Bayard, 2 Pet. 200.
[8] Id. Id.
[9] See Wright v. Ames, 4 Abb. Ct App Dec. 644.
[10] Story on Partn. 192, § 106; 199. § 106.
[11] Oliphant v. Mathews, 16 Barb. 608.
[12] Story on Partn. 253, § 139.
[13] Story on Partn. 253, § 139. Especially if the avails were applied to the firm use. Ontario Bank v. Hennessy (above). Compare Story on Partn. 250, § 136.

Where a partner carries on the firm business in his sole name, and also carries on a different kind of business of his own, in the same name, the fact that the dealer knew the transaction was in aid of the one kind of business or the other, will, in the absence of other evidence, determine the question;[1] and neither the fact that he was ignorant of the partnership, nor that the consideration was never actually applied in aid of its business, is then material.[2] The creditor's entry in his own book, charging exclusively an individual member[3] or the firm, is not conclusive against him when he seeks to hold the firm or the individual alone liable, but may be explained by evidence of his intent.

27. *Parol evidence to charge firm on individual signature.*]—Where a written contract not under seal, is made, not in the firm name, but in the name of an individual partner, parol evidence is competent to show that the transaction was in reality for firm account.[4]

28. — *of sealed instrument.*]—The general implied power of a partner does not extend to binding the firm by executory instruments under seal;[5] and a sealed instrument[6] executed in the name of a firm by one of its members, without the proper authority, where a seal is necessary, is the deed of such member only, and he alone is bound by it.[7] If the seal is unnecessary from the nature of the instrument, the act will bind the firm as a simple contract,[8] although it sets forth that the firm have set their hands and seals, and is signed on behalf of the firm, by one member with his seal. The seal may be rejected as surplusage. Hence a sealed note is competent in evidence of the precedent debt acknowledged thereby.[9] To render the deed of the firm, executed by one partner, valid as a deed by the firm, it is enough to show a prior authority or a subsequent ratification by the other partners, either in writing or by parol, either express or implied.[10] Proof that the firm actually received the consideration, is enough.[11]

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[1] Story on Partn. 253, § 139.

[2] Id.; 5 Pet. 529.

[3] Story on Partn 260, § 144; Smith v. Cooke, 31 Md. 174.

[4] Per COWEN, J., Lawrence v. Taylor, 5 Hill, 113; Brown v. Lawrence, 5 Conn. 399.

[5] Schmertz v. Schreeve, 62 Penn. St. 457, s. c. 1 Am. R. 439, and cases cited, SHARSWOOD, J.

[6] Other than a release.

[7] Gibson v. Warden, 14 Wall. 247.

[8] As, for instance, in the case of a chattel mortgage. Gibson v. Warden (above), or a contract of sale of goods under seal. Schmertz v. Shreeve, 62 Penn. St. 457. This rule cannot avail to sustain an action on a formal bond executed by a partner, without authority or ratification. Russell v. Annable, 109 Mass. 72; s. c. 12 Am. R. 665. As to a lease, compare Mason v. Brealin, 9 Abb. Pr. N. S. 427; s. c. 40 How. Pr. 436, 2 Sweeny, 386.

[9] Hoskinson v. Eliot, 62 Penn. St. 393.

[10] Story on Partn. 214, § 122; Gibson v. Warden (above). In an action for rent, on a sealed lease, one of the lessees who entered under the lease, is estopped to show that his copartner was not authorized to sign his name to it. Holbrook v. Chamberlin, 116 Mass. 155; s. c. 17 Am. R. 146.

[11] Daniel v. Toney, 2 Metc. (Ky.) 524.

A deed running to the firm name, even though conveying land, may be explained by parol evidence of who composed the firm.[1]

29. *Evidence of ratification.*]—To make an act, done by one partner, beyond the scope of his authority, binding on the others, a clear ratification must be shown, but it need not have been express; it may be inferred from circumstances.[2] The circumstances must be such that knowledge, and action thereon, or knowledge and expressed intent, can be inferred. Knowledge of the act of the partner, without knowledge of the facts making the act a fraud on them, is not enough;[3] and silence and inaction under full knowledge, is not enough,[4] unless made so by being known to and acted on by the other party as a reasonable indication of assent. Failure to give notice of dissent within a reasonable time after knowledge, especially if coupled with evidence of a like course of dealing continued, is sufficient to go to the jury.[5] Evidence of the consideration for the act is relevant to the question of implied ratification;[6] and evidence of mere expressions of assent is competent.[7] Where acts of ratification are shown, intent that they should have that effect is not material.[8]

30. *Evidence of Deceit or Fraud.*]—Evidence of fraud or deceit committed by one partner, in a transaction in the course of the partnership business, is competent against the others, and can not be rebutted by proving their ignorance or innocence.[9]

31. *Evidence of Other torts.*]—If the act itself was one within the scope of the business, and done as such, then it is not material that the other partners were ignorant and innocent;[10] nor that it was wilful;[11] otherwise if the act was wholly foreign to the business. If the act was presumptively a partnership act, because, though not in the line of the trade, it was incidental to the exercise of an implied power,—as where a partner in collecting a debt due the firm directs an officer to make a tortious levy,—then the act of one partner is presumptively that of all;[12] and evidence that they, with knowledge of the facts, received the benefits of it, is conclusive against them.[13]

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[1] Lindsay v. Hoke, 21 Ala. 542; s. p. Webb v. Weatherhead, 17 How. U. S. 576; paragraph 50 (below). *Contra*, Arthur v. Weston, 22 Mo. 283.
[2] 1 Wood's Coll. 677.
[3] Hayes v. Baxter, 65 Barb. 181.
[4] Elliott v. Dudley, 19 Barb. 326.
[5] Id.; Ferguson v. Shepherd, 1 Sneed, 256.
[6] Carter v. Pomeroy, 30 Ind. 438.
[7] Nichols v. English, 3 Brews. 260.
[8] Hazard v. Spears, 2 Abb. Ct. App. Dec. 353.
[9] Chester v. Dickinson, 54 N. Y. 1, affi'g 52 Barb. 349; Wolf v. Mills, 56 Ill. 360.
[10] Stockwell v. United States, 13 Wall. 531.
[11] Id. Compare Goldsmith v. Picard, 27 Ala. 142; 1 Wood's Coll. 724, § 449.
[12] Chambers v. Clearwater, 1 Abb. Ct. App. Dec. 341; Harvey v. McAdams, 32 Mich. 472.
[13] Murray v. Binninger, 3 Abb. Ct. App. Dec. 336.

32. *Admissions and declarations of partners.*]—After evidence of partnership, and of its scope as including the affairs in question, has been given, an admission or declaration made by one partner,[1] during the continuance of the partnership relation,[2] and concerning the partnership affairs[3] during the relation,[4] is competent against all, and has the same effect as if made by all.[5] If the admission relates to the partnership affairs, it is not necessarily incompetent because expressed rather as an individual than as a firm declaration.[6] The competency of the declaration is not affected by the fact that it was made to a stranger.[7]

If the admission, being made with apparent authority, is contractual, it is conclusive in favor of a person who acted on it in good faith. Otherwise it can be rebutted by proof of falsity..

The sufficiency of the proof of partnership, adduced as a foundation for proving, against one partner, an admission made by the other, is a preliminary question for the court.[8] But the court may, in its discretion, allow the admission to be proved first.

An entry in the firm books during the existence of the firm and relating to its affairs is competent evidence against all the partners, even though the books were kept exclusively by one member or by an agent, and the partner sought to be charged by the entry was not in fact privy to it.[9]

33. *Acts, Admissions, &c., after dissolution.*]—The collection of debts and the disposal of assets, by either general partner, though done after dissolution, are presumptively valid as against the others, in favor of third persons;[10] and this presumption cannot be rebutted by merely showing that the others forbade the

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[1] Any general partner, though dormant or silent. Kaskaskia Bridge Co. v. Shannon, 1 Gilm. (Ill.) 15, 25; 1 Greenl. Ev. 13th ed. 218. And though he was not served with process, and has been therefore dismissed. (Kady v. Kyle, 47 Mo. 346); or was never joined. Rosc. N. P. 75. Evidence which shows that the declarant was either the partner or the agent may be enough to render his declaration competent, though it be uncertain which he was. Chamberlain v. Fobes, 3 Supm. Ct. (T. & C.) 277.

[2] See next paragraph. Am. Iron Mountain Co. v. Evans, 27 Mo. 552.

[3] But not otherwise. Hahn v. St. Clair Savings, &c Co. 50 Ill. 456. The rule is the same in an action of tort. Fail v. McArthur, 31 Ala. 27.

[4] 1 Greenl. Ev. 217, n.

[5] Pollock's Dig. L. of P. 45, art. 21; Faler v. Jordan, 44 Miss. 283. The general principle is more fully stated at p. 187 of this vol.

[6] Toby v. Brigham, 9 Humph. 750. But compare Rogers v. Batchelor, 12 Pet. 221, 232, where it was held that a letter written by a partner in his own name, not in that of the firm, and relating partly to his private affairs, is not presumably within the knowledge of his copartners, and therefore statements in it referring to firm affairs cannot bind them.

[7] Grant v. Jackson, Peake's Cas. 203.

[8] Harris v. Wilson, 7 Wend. 57; McCutchin v. Bankston, 2 Geo. 241. Compare p. 191 of this vol. and note 7.

[9] Allen v. Coit, 6 Hill, 318; Walden v. Sherburne, 15 Johns. 409.

[10] Robbins v. Fuller, 24 N. Y. 570.

act,[1] or that the debts had been paid.[2] It may, however, be rebutted by showing that, to the knowledge of the party dealing, the partners had conferred the special power of liquidation upon another of their number.[3]

In other respects than as to the collection of debts and the disposal of assets, the agency of partners for each other terminates with dissolution;[4] and hence no executory contract or promise made or delivered[5] by one after dissolution binds the others, unless there is evidence from which special authority[6] or ratification may be inferred.

It is the better opinion that the same principle applies to admissions and declarations; and that no such concession made by a partner, after dissolution, even if he were authorized by the other members of the dissolved firm to adjust its business,[7] is competent evidence against a copartner, although relating to a contract which arose during the partnership.[8] In England,[9] and in some of our States,[10] the contrary rule is followed. Upon either view, however, the admission is competent against the one who made it.[11]

34. *Notice, tender and demand.*]—When it is necessary to prove that a firm had notice from a third person in a matter within the scope of the partnership business, notice to or knowledge on the part of any acting member is *prima facie* sufficient;[12] and if two firms have a common partner, notice which is imput-

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[1] Gillilan v. Sun Mut. Ins. Co. 41 N. Y. 376.

[2] Robbins v. Fuller, 24 N. Y. 570.

[3] Robbins v. Fuller (above).

[4] Thompson v. Bowman, 6 Wall. 316. Unless the dissolution was unknown, &c. See paragraphs 40–42.

[5] For legal purposes negotiable paper is deemed to have been signed at the time the partner delivers it to the third person. Gale v. Miller, 54 N. Y. 538.

[6] Graves v. Merry, 6 Cow. 701.

[7] Hackley v. Patrick, 3 Johns. 536. *Contra*, so far as to admit evidence of his liquidating the amount of a claim, the existence of which was proved by other evidence. Ide v. Ingraham, 5 Gray, 106; s. p. Feigley v. Whitaker, 22 Ohio St. 606, s. c. 10 Am. R. 778.

[8] Baker v. Stackpoole, 9 Cow. 420; Thompson v. Bowman (above); Miller v. Neimerick, 19 Ill. 172; Hamilton v. Summers, 12 B. Monr. (Ky.) 11; Flowers v. Helm, 29 Mo. 324. There is no distinction, under this rule, between the admission of an account and the admission of a fact. Baker v. Stackpoole (above); nor between the power to acknowledge a debt barred by the statute, and to make a new contract. Van Keuren v. Parmelee, 2 N. Y. 523; and see Winchell v. Hicks, 18 N. Y. 558. The death of the declarant held not to alter the case. Hamilton v. Summers, 12 B. Monr. (Ky.) 11.

[9] Both at common law (Whitcomb v. Whiting, Doug. 652, s. c. 1 Sm. L. Cas. 703) and in equity. Pritchard v. Draper, 1 Russ. & M. 191.

[10] Merritt v. Day, 9 Vroom, 32, s. c. 20 Am. R. 362; Beardsley v. Hall, 36 Conn. 270, s. c. 4 Am. R. 74, and cases cited; 1 Greenl. Ev. by Redfield, 138, n. As to the principle involved in this controversy, see p. 189 of this vol.

[11] Hanna v. McKibben, 10 Ind. 547.

[12] 1 Wood's Colly. 672, 715; Williams v. Roberts, 6 Cold. (Tenn.) 493. That knowledge of a trustee is sufficient to charge with notice a firm of which he is a member, though not an active member, see Weetjen v. St. Paul & Pacific R. R. Co. 4 Hun, 529.

able to one firm will sustain a finding of notice to the other. Upon the same principle a demand on or by one member, on behalf of the firm, is a demand on or by the firm;[1] and so of a tender;[2] and an allegation referring to all the defendants admits the evidence as to the one.[3]

Dissolution does not change the rights and obligations under existing contracts; so that, notwithstanding dissolution, notice to or demand on one partner is sufficient against the firm.[4]

35. *Defendants' evidence to disprove partnership.*]—It is rarely enough to prove that defendants were not actually partners as between themselves; but this fact is relevant, and is always competent in defendant's favor, unless plaintiff has given evidence sufficient to entitle him to an instruction that, as matter of law, the defendant is liable as if a partner,—as, for instance, where a community of profits, or a representation raising an estoppel, is proved. If the plaintiff's evidence on the point is circumstantial, or only sufficient to go to the jury, then defendant is entitled to give evidence, even by his own testimony,[5] explaining his intent in the equivocal acts alleged, and corroborating his denials of the admissions charged;[6] or even explaining his admissions.[7] But his testimony that he was not a partner does not countervail facts from which the law deduces the liability of a partner.[8]

36. *Proving a limited partnership.*]—To secure the exemption extended by law to the special partner in a limited partnership under the statute, it is sufficient to show a substantial compliance with the statute preliminaries in the formation of the partnership.[9] The fact that the partnership was a foreign limited partnership may be proved, with the foreign law, in exoneration of the special partner.[10] Where a violation of the statute in the formation is shown, it need not be shown to have been intentional. Where, however, the limited partnership is

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[1] Band v. Walker, 12 Barb. 298, s. c. 1 Code R. N. S. 329.

[2] 1 Wood's Coll. 665, § 414.

[3] See Geissler v. Acosta, 9 N. Y. 227.

[4] Hubbard v. Matthews, 54 N. Y. 43, 50, and cases cited.

[5] One who has made default and suffered judgment may nevertheless testify in favor of the others that they were not partners with him. Danforth v. Carter, 4 Iowa, 230, 236.

[6] Tracey v. McManus, 57 N. Y. 257. New member may defend on the ground of fraud inducing him to assume the debts. Hinman v. Bowen, 3 Hun, 192, s. c. 5 Supm. Ct. (T. & C.) 284. To show that one acting in the business was not a partner but a clerk, the contemporaneous declarations of admitted partners, made before difficulty arose, to inform dealers and the public, may be proved. Danforth v. Carter, 4 Iowa, 230, 235. *Contra*, Tomkins v. Reynolds, 17 Ala. 109, 118.

[7] Story on Partn. 268 § 146. As, for instance, where they were made under advice of counsel. Edgar v. McArn, 22 Ala. 796, 812. The contrary held of the admission resulting from a judgment against them as copartners. Cragin v. Carleton, 21 Me. 493.

[8] Rebould v. Chalker, 27 Conn. 114, 133.

[9] Van Ingen v. Whitman, 62 N. Y. 513.

[10] King v. Sarria, 69 N. Y. 24, affi'g 7 Hun, 167; and see parargaph 8.

shown to have been once regularly formed, evidence that the general partners departed from the statute, is not alone enough to charge a special partner who was not cognizant of the facts.[1]

All persons dealing with a limited partnership are chargeable with notice of the scope of the partnership business, as specified in the articles of copartnership, if the articles are duly filed and published pursuant to a requirement of law; and the limited partner cannot be charged as a general partner by evidence of departure from the articles, unknown to him.[2]

37. *Matter in abatement.*]—The omission to join a copartner as a defendant is not available, unless it appears by the pleadings; and an answer alleging a defect in this respect, must state precisely and truly who were the parties. An allegation that A. and B. were partners with defendant and should have been joined, is not sufficient to admit proof that only A. was a partner.[3] It is not enough to show that the one not joined was, in fact, a partner as between the defendants, nor that he participated in an advisory manner in regard to the conduct of the business, nor even that his name was on their cards, if it is not shown that the fact was generally known, or known to plaintiffs, and if the name and the apparent mode of transacting business indicated that others alone composed the firm.[4] In such a case, the objection is not sustained without proof that plaintiffs knew he was a partner, at the time of contract.[5] The fact that after the transaction and before suit brought, plaintiff became aware that the omitted person was a partner, is not enough.[6] On such a plea, the defendants may be held to strict proof,[7] and should produce their articles, if any.[8] To support such a plea, the fact that defendants signed a joint note, is not alone evidence of a partnership between them.[9] Neither the declarations of the third persons nor of the defendants are admissible in defendants' favor,[10] unless in some way brought home to plaintiff's knowledge. And upon the same principle, a judgment in an action by a stranger against such third person holding him to be a partner, is not competent.[11]

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[1] Van Ingen v. Whitman (above.)

[2] Taylor v. Rasch, 11 Bankr. Reg. 91.

[3] Wiegand v. Sichel, 4 Abb. Ct. App. Dec. 592.

[4] North v. Bloss, 30 N. Y. 380.

[5] N. Y. Dry Dock Co. v. Treadwell, 19 Wend. 525; s. p. 1845, Peck v. Cowing, 1 Den. 222.

[6] North v. Bloss (above).

[7] See paragraph 2.

[8] See Bonnaffe v. Fenner, 6 Smedes & M. 217; Kayser v. Sichel, 34 Barb. 84; affi'd without passing on this point, in 4 Abb. Ct. App. Cas. 592.

[9] Hopkins v. Smith, 11 Johns. 161

[10] Sweeting v. Turner, 10 Johns. 216; Nudd v. Burrows, 91 U. S. (1 Otto), 438; *contra*, see 14 N. H. 145, and cases cited.

[11] De Graff v. Hovey, 16 Abb. Pr. 120. In contradiction or impeachment of a witness who testifies that he was a partner, his schedules in insolvency containing no mention of his interest, were held admissible. Brigham v. Clark, 100 Mass. 430.

38. *Evidence of known want of authority.*]—If the public have the usual means of knowledge given them, and no acts have been done or suffered by the partnership to mislead them, the presumption of law is that those dealing with a partner, knew the extent of the partnership.[1] Evidence that the articles contained restrictions which were known to the party dealing with a partner is competent, although the transaction was within the general scope of the business.[2] If the answer contains an admission of the firm contract, a denial of consideration does not avail to admit the defense of want of authority or fraudulent diversion.[3]

39. *Transactions in the interest of one partner.*]—Evidence that a transaction with a partner was in a matter not within the scope of the business, raises a presumption of law, in the absence of countervailing circumstances, that the dealing was on his private account, notwithstanding the firm name was used.[4] But if, on the other hand, the subject-matter is consistent with the partnership business, the burden is on the firm to show that the contract was out of the regular course of their dealing,[5] unless the contract was in writing, and in the individual name of a partner. In general, if one takes from a partner in discharge of his separate debt, the obligation or funds of the firm, it is not necessary for the other partners to bring home to him conscious knowledge that this was a misapplication; the nature of the transaction is enough to charge him with the duty of inquiry.[6] The burden is on the dealer with the partner, to show assent of the other partner or circumstances from which assent may be inferred;[7] knowledge alone is not necessarily enough.[8]

40. *Burden of proving dissolution and notice.*]—One who defends on the ground of dissolution, has the burden of proof of dissolution; and also of notice, if the other party had knowledge of the partnership;[9] except that if the dissolution was caused by war, death or bankruptcy, there need be no evidence of notice.[10] If the retiring partner was a dormant partner, unknown

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[1] 3 Kent's Com. 43.

[2] Dow v. Saward, 12 N. H. 275; Chapman v. Devereux, 32 Vt. 619, 623.

[3] Harger v. Worrall, 69 N. Y. 370, 378.

[4] 3 Kent's Com. 43; approved in Story on Partn. 241, § 133, n.

[5] Id.

[6] Story on Partn. 241, § 133; 2 Greenl. Ev. 446, § 480; Rogers v. Batchelor, 12 Pet. 229; compare Purdy v. Powers, 6 Barr, 492. A mortgagee of property standing in the name of one partner, has, from the joint possession of it by the firm, constructive notice of their title and relative interests. Cavander v. Bulteel, L. R. 9 Ch. App. 79, a. c. 8 Moak's Eng. 743.

[7] Dob v. Halsey, 16 Johns. 34.

[8] Todd v. Lorah, 75 Penn. St. 155.

[9] See Story on Partn. 286, § 160; Wade on Notice, 234, § 530; Carmichael v. Green, 55 Geo. 116. Compare Goddard v. Pratt, 16 Pick. 412, 429.

[10] Griswold v. Waddington, 16 Johns. 438, affi'g 15 Id. 57; Seaman v. Waddington, 16 Id. 510; Dickinson v. Dickinson, 25 Gratt. (Va.) 321. Civil war does not, *ipso facto*, absolve, except from the time of unequivocal public notice of the illegality

to plaintiff, and his name was never used, evidence that he ceased to be a partner before the transaction is enough without evidence of notice.[1] If he was known as a partner to the person dealing with the firm, some evidence of notice of withdrawal is necessary.[2]

41. *Mode of proving dissolution.*]—A dissolution of partnership or withdrawal of a partner, may be proved by parol or partly by parol.[3]

42. — *notice.*]—Against those who at or before the time of their transaction did not know of the existence of the partnership or the membership of the retiring partner, evidence of notice of dissolution or withdrawal is not necessary.[4]

Against those who had previous knowledge of the partnership,[5] and claim that they were giving credit to all the defendants, but who had not previously given them credit,[6] there must be either evidence of reasonable publicity by advertisement in a newspaper[7] (and this is as matter of law sufficient),[8] or of such circulation of the information, as to fulfill the duty of the retiring partners to put the public on guard.[9] Evidence tending to show a public and notorious disavowal of further responsibility, though without newspaper advertisement, is competent,—such as the giving of actual notice to all who had previously dealt, the proper change of the firm name, the general notoriety of the change throughout the trade, and the fact that the firm had never transacted business in the place where the plaintiffs bought their paper.[10] It is not a question of actual notice, but of the reasonable fulfillment of duty and diligence in the public announcement of the change.[11] Where the creditor testifies that he had no notice, the jury may still infer actual notice from circumstances of general publicity.[12]

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of intercourse. Matthews v. McStea, 91 U. S. (1 Otto), 7, affi'g 50 N. Y. 166, 8 Daly, 349.

[1] Kelley v. Hurlburt, 5 Cow. 534; Davis v. Allen, 3 N. Y. 168; Phillips v. Nash, 47 Geo. 218.

[2] Park v. Wooten's Ex'r, 35 Ala. 242.

[3] Emerson v. Parsons, 46 N. Y. 560, affi'g 2 Sweeny, 447.

[4] Paragraph 40 and note; Wade on Notice, 215, § 490.

[5] The general notoriety of the existence of the firm, does not raise a presumption that the party dealing had knowledge of its existence. Wade on Notice, 215, § 490.

[6] The fact of having had cash dealings does not render evidence of actual notice necessary. Clapp v. Rogers, 12 N. Y. 283, affi'g 1 E. D. Smith, 549.

[7] City Bank of Brooklyn v. McChesney, 20 N. Y. 240; s. p. City Bank of Brooklyn v. Dearborn, Id. 244.

[8] Lansing v. Gaine, 2 Johns. 300.

[9] Wardwell v. Haight, 2 Barb. 549.

[10] Lovejoy v. Spafford, 93 U. S. (3 Otto), 441; compare Pitcher v. Barnes, 17 Pick. 364; Wade on Notice, 226, §§ 513, 519.

[11] Lovejoy v. Spafford, (above.)

[12] Id.

Against those who had given credit[1] to the firm in previous dealing, there must be evidence of actual notice,[2] or of circumstances from which it may be distinctly inferred.[3] Notice to an agent or servant whose business does not extend to the receipt of such communications is not enough, without evidence that it was communicated by him.[4] Proof that written notice was properly mailed to the person sought to be charged with notice, is not enough, even though accompanied by proof that the letter was not returned,[5] if the actual receipt be disproved;[6] but with slight corroborative evidence of actual receipt or knowledge, it may be enough to go to the jury.[7] Publication of notice in a newspaper is not alone enough,[8] nor is it made sufficient as matter of law by showing that the party sought to be charged took the paper or habitually read it,[9] but this is enough to go to the jury if accompanied by the slightest evidence of knowledge.[10] Information actually brought to the attention of the creditor is enough: if by published notice, it is not essential that the notice be signed by the partners.[11] A change in the firm name, made known to the party, though not conclusive, is sufficient evidence of the dissolution or withdrawal, if the change itself is significant of the retirement of the member in question;[12] otherwise not.[13]

III. Rules peculiar to Surviving Partners.

43. *Actions by survivor.*]—At common law, where it was sufficient to allege indebtedness, a surviving partner could prove a debt contracted to the firm, and the death and survivorship, under a declaration alleging indebtedness to himself, without

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[1] Those who deal on credit, even for small sums, and on a credit not defined in point of time, are entitled to notice. Clapp v. Rogers, 12 N. Y. 285, affi'g 1 E. D. Smith, 549.

[2] Deering v. Flanders, 49 N. H. 225.

[3] Austin v. Holland, 69 N. Y. 571, affi'g 2 Supm. Ct. (T. & C.) 253. It seems that the fact that the former partners carried on business separately, after dissolution, for years, at different places in the same town with their former dealers, would sustain a finding of notice to the latter. Per Bronson, J., Coddington v. Hunt, 6 Hill, 595.

[4] Stewart v. Sonneborn, 49 Ala. 178: Wade on Notice, 220, § 502.

[5] Kenney v. Atwater, 77 Penn. St. 34; Wade on Notice, 220, § 501.

[6] Austin v. Holland, 69 N. Y. 571, affi'g 2 Supm. Ct. (T. & C.) 253; where it is said that mailing is presumptive evidence. To the contrary, see Kenny v. Atwater (above).

[7] Kenny v. Atwater (above).

[8] Bank of the Commonwealth v. Mudgett, 44 N. Y. 514. Especially if the party testifies that he had no actual notice. Howell v. Adams, 68 N. Y. 315, affi'g 1 Supm. Ct. (T. & C.), 425; Austin v. Holland (above).

[9] Vernon v. Manhattan Bank, 22 Wend. 183. affi'g 17 Id. 524.

[10] Wade on Notice, 221, §§ 504, 507; 1 Whart. Ev. 641, § 675.

[11] Young v. Tibbetts, 32 Wisc. 79; s. p. Robinson v. Worden, 33 Mich. 316.

[12] Newcomet v. Bretzman, 69 Penn. St. 185. A change of partners in a banking house is sufficiently notified to the customers of the house, by a change in the printed checks. Barfoot v. Goodall, 3 Camp. 146.

[13] American Linen Thread Co. v. Wortendyke, 24 N. Y. 550.

noticing the partnership, and the death and survivorship.[1] So far as pleading in the same general form, by alleging defendant to be indebted to plaintiff on an account, &c., is sanctioned under the new procedure,[2] the like evidence is equally admissible now; but if the complaint alleges a contract with plaintiff, or a consideration proceeding from him, proof of one with or from the firm, is a variance,[3] the effect of which depends on whether defendant is prejudiced. An action to recover possession of partnership property may likewise be sustained in the name of the survivor alone.[4] Evidence tending to show the place of residence and death of one partner, with proof of the death at the same place of a person bearing the same name, establishes, *prima facie*, the title of the other partner as survivor.[5] The admissions and declarations of the deceased are not competent in plaintiff's favor to prove the existence and title of the partnership, unless defendant is shown to have been in privity with him.[6] The admissions and declarations of the surviving partner to the effect that he had no equity or interest remaining, but that the personal representatives were entitled, are not relevant, for the legal title is in him, notwithstanding the equities of the parties.[7]

44. *Actions Against Survivor.*]—The same principles apply in an action against a survivor. Under an allegation of indebtedness of the survivor, evidence of a contract of the firm, and of death and survivorship may be proved,[8] but if the joint contract, &c., are alleged, they should be proved;[9] both rules being subject to the present criterion as to variance.

45. *Actions against Representatives of Deceased Partner.*]—To maintain an action against the executor or administrator of the deceased partner, it is enough to show that the survivor is wholly insolvent. This may be shown by any common law proof;

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[1] Whether the contract was with the firm (Grant v. Shorter, 1 Wend. 151); or with the survivor, on a consideration proceeding from the firm. Holmes v. D'Camp, 1 Johns. 34.

[2] Allen v. Patterson, 7 N. Y. 476.

[3] See Ditchbum v. Sprachlin, 5 Esp. 31; Holmes v. D'Camp (above); Hess v. Fox, 10 Wend. 436. Unless the firm name and the survivor's name are the same. See Bank of Cooperstown v. Woods, 28 N. Y. 545.

[4] Murray v. Mumford, 6 Cow. 443.

[5] Daby v. Ericsson, 45 N. Y. 786.

[6] Such evidence would be competent against the administrator of the deceased, but is not as against a stranger, even on an issue raised by him that the title is in the administrator. Brown v. Mailler, 12 N. Y. 118; s. p. Hamilton v. Summers, 12 B. Mon. (Ky.) 11. Entries by partner since deceased, proven to be in his handwriting and made in the regular course of business, are presumptive proof. Thomson v. Porter, 4 Strobh. Eq. 64.

[7] Daby v. Ericsson, 45 N. Y. 786. Receipt by agent of new firm not expressed to be for survivors, held not competent. Adams v. Ward, 26 Ark. 135.

[8] Goelet v. McKinstry, 1 Johns. Cas. 405.

[9] Nelson, J., Mott v. Petrie, 15 Wend. 318, and cases cited.

exhaustion of the remedy at law is not essential;[1] but, on the other hand, evidence that the remedy at law was exhausted by execution returned unsatisfied is enough, although it be shown that the survivor has available property which was not discovered by the sheriff.[2]

IV. Actions between Partners.

46. *Allegation and burden of proof of partnership.*]—In an action for an accounting, the allegation of partnership is material, and plaintiff cannot recover on proof that he is a creditor,[3] not even on proof of a loan payable with share of profits.[4] And if he could, usury, though not pleaded, would be available as a defense.[5] If the existence of the partnership is denied in the answer, the burden of proof is on the plaintiff.[6]

47. *Proof of partnership.*]—Where the interest of no third person is involved, stronger proof is required to establish the partnership, than when the question arises as between the alleged partners and third persons.[7] If the agreement was embodied by the parties in a writing, it must be produced or accounted for.[8] If not written, it may be proved by parol,[9] notwithstanding it was to continue for more than a year;[10] and for this purpose the conduct and declarations of the parties,[11] and the entries in the firm books,[12] are competent, subject to the general qualification that the concession of one is not evidence against another.[13] The question of partnership or not, is to be determined

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[1] Van Riper v. Poppenhausen, 43 N. Y. 68.

[2] Pope v. Cole, 55 N. Y. 124, affi'g 64 Barb. 406.

[3] Salter v. Ham, 31 N. Y. 321.

[4] Arnold v. Angell, 62 N. Y. 508, rev'g 38 Super. Ct. (J. & S.) 27. Compare Marston v. Gould, 69 N. Y. 220.

[5] Arnold v. Angell (above).

[6] Gatewood v. Bolton, 48 Mo. 78.

[7] Chisholm v. Cowles, 42 Ala. 179.

[8] The attorney who drew the articles is privileged, if he acted for the party claiming the benefit of the privilege, and not for the adverse party (see Yates v. Olmsted, 56 N. Y. 632, rev'g 65 Barb. 43); if he acted for both, he is not (see Whiting v. Barney, 30 N. Y. 330).

If deceased, his contemporaneous entries in his accounts, and his drafts of the articles and of other papers connected therewith, are competent, for the purpose of corroborating other evidence as to the date and contents of the lost articles. Moffat v. Moffat, 10 Bosw. 468, 493.

The intentional destruction of the articles by the interested party, if unexplained, is competent to go to the jury against him in corroboration of evidence of their contents; but the fact of spoliation does not alone raise a legal presumption that their contents were as alleged by the other party. Id. 501.

[9] Randel v. Yates, 48 Miss. 685. As to the case of partnership in lands, compare Fairchild v. Fairchild, 64 N. Y. 471, affi'g 5 Hun, 407; Levy v. Brush, 45 N. Y. 589, rev'g 8 Abb. Pr. N. S. 418, s. c. 1 Sweeny, 653; Smith v. Burnham, 3 Sumn. 435.

[10] Smith v. Tarleton, 2 Barb. Ch. 336.

[11] Shelmire's Appeal, 70 Pa. St. 281.

[12] Frick v. Barbour, 64 Pa. St. 120.

[13] See paragraphs 11 and 14, where the principle is more fully stated.

chiefly by ascertaining what were the intentions of the parties, as manifested in the transactions shown.[1] Mutual intention and assent to the relation is enough; but the absence of them does not necessarily disprove partnership, because the contract that was entered into may conclusively manifest an intent to create the relation, although they were at the time in fact unaware of the legal effect.[2] Hence, the facts being proved on uncontradicted testimony, the question is one of law for the court.[3] The intention of the parties, together with the facts, must, as between themselves, be decisive of the question as to the existence of the partnership and as to its extent. The parties should not be permitted to testify as to whether they regarded each other as partners, for the reason that the construction of contracts, whether written or verbal, is for the court, and cannot be expounded by witnesses. Parties may become partners without their knowing it, the relation resulting from the terms they have used in their contract, or from the nature of the undertaking; and the testimony of either as to whether he regarded the other as his partner is incompetent as against the other,[4] though competent against himself.

As between the parties, equity allows the admission of parol evidence of the course and business of the partners, either by general acquiescence or positive acts subsequent to the articles, for the purpose of showing the practical construction they have put on the articles, or even of inferring that they have abandoned disused provisions.[5] On the continuance of the business by the same parties after the expiration of the time fixed in the articles, the natural presumption is that the old articles are adopted, except the provisions as to term or termination.[6]

48. *Order of proof.*]—In taking the final accounts, ascertain: 1. How the firm stands as to non-partners (including co-adventurers); 2. What each partner is entitled to charge against the other for everything he has advanced or brought in as a partnership transaction, and also to charge against him what that other has not brought in as he ought, or has taken out in excess of what he ought; and then, 3. Apportion between them the profits to be divided or losses to be made good, and ascertain what, if anything, any partner should pay to another, in order that all cross claims may be settled.[7] Partnership transactions are not

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[1] Salter v. Ham, 31 N. Y. 321; Phillips v. Phillips, 49 Ill. 437; Groves v. Tallman, 8 Nev. 178. Agreement to execute a deed of partnership held to constitute a partnership as between the parties. Syres v. Syres, L. R. 1 App. Cas. 174, s. c. 15 Moak's Eng. 52.

[2] Lintner v. Milliken, 47 Ill. 178.

[3] Chisholm v. Cowles, 42 Ala. 179. And see Bitter v. Rathman, 61 N. Y. 512.

[4] Lintner v. Milliken (above).

[5] Story on Partn. 326, § 192.

[6] U. S. Bank v. Binney, 5 Mas. 176, 185; Story on Partn. 332, § 198.

[7] Neudecker v. Kohlberg, 3 Daly, 410; West v. Skip, 1 Ves. Sr. 242.

excluded from the accounting because not alleged in the complaint.[1]

49. *Evidence of firm or individual transactions.*]—To bring in a transaction had by a partner, but not in the firm name, it is not enough to show merely that it was in violation of the express or implied agreement of the partner to devote his attention, &c., to firm business;[2] but it is enough to show that it was in a business in rivalry with that of his firm;[3] or that it was by the partnership relation that he was enabled to make the contract[4] (as, for instance, where the consideration was drawn from,[5] or the liability chargeable upon or assumed by,[6] the firm), or by means of use of the firm property or credit,[7] or that he made a secret arrangement for an individual profit from their transactions,[8] or took any unfair advantage of his connection with the firm. And in such cases it is not necessary to prove that any loss accrued to the firm.[9] Assent by the copartner to the carrying on of a transaction in the name of the other is not necessarily an assent to the claim of the other to the profits of the transaction.[10]

50. *Title to real property.*]—Real property the legal title of which is in a member, is presumed to belong to him, although occupied and used by the firm, until it is shown to be partnership property, either by evidence that there was an agreement to that effect, or that it was acquired with partnership funds for partnership purposes.[11] For this purpose parol evidence is admissible as between the partners and their representatives, to show that a conveyance to a partner was for the benefit of the firm.[12] And where the statute forbids a resulting trust unless the conveyance is so taken without the knowledge of the party paying the consideration, the court will not presume knowledge; but in support of a clear equity, the court may, from the fact that those paying intended the conveyance to be taken in the grantee's name, presume that he intended it to recognize his equity, and was ignorant of the

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[1] Boyd v. Foot, 5 Bosw. 110.

[2] Dean v. McDowell, 26 Weekly R. 486; and see Clements v. Norris, 38 L. T. N. S. 591.

[3] Somerville v. Mackey, 16 Ves. 382; Locke v. Lynam, 4 Ir. Ch. 188.

[4] Russell v. Austwich, 1 Sim. 52; Mitchell v. Reed, 61 N. Y. 123, rev'g 61 Barb. 310.

[5] See Cox v. McBurney, 2 Sandf. 561; but compare Campbell v. Mullett, 2 Swanst. 551; Comegys v. Vasse, 1 Pet. 193.

[6] Nichols v. English, 3 Brews. 260.

[7] Herrick v. Ames, 8 Bosw. 115.

[8] Manuf. Nat. Bank v. Cox, 2 Hun, 572; affi'd without further opinion in 59 N. Y. 659.

[9] Id.; Mitchell v. Reed (above).

[10] Bast's Appeal, 70 Penn. St. 301.

[11] Hogle v. Lowe, 5 Reporter, 118.

[12] Fairchild v. Fairchild, 64 N. Y. 471, affi'g 5 Hun, 407. *Contra*, as against creditors, purchasers, &c., Le Fevre's Appeal, 69 Penn. St. 122; Ebbert's Appeal, 70 Id. 79.

fact that it did not.[1] The fact that land is held in the names of the several persons alleged to be partners, or in the name of one for the benefit of all, is not alone evidence of copartnership between them with respect to it.[2] But where partnership is shown to exist, and land is conveyed to the several partners, evidence of actual use for partnership purposes, or of a positive agreement making it partnership property, is not essential. If paid for with partnership funds, it is then a question of intention whether the property is held by the partners as tenants in common, or whether it is partnership property. In the absence of other evidence, the manner in which the accounts are kept, whether the purchase-money was severally charged to the members, or whether the accounts treat it as they do the other firm property, as to purchase-money, income, expenses, etc., are controlling circumstances in determining such intention,[3] and from these circumstances an agreement may be inferred. The same evidence which would make it partnership property, for the purpose of paying debts and adjusting the equity between the copartners, establish it for the purpose of final division.[4]

51. *Evidence to charge member with assets.*]—Partners who are not shown to have had exclusive management, are not to be charged with income, &c., without evidence that they actually received it.[5] And those who had exclusive management may be charged with the whole capital; but not with uncollected debts, without evidence of actual receipt or negligence,[6] or of refusal to give account.[7]

52. *Evidence to credit member with payments or share.*]—The interest of each is presumed equal in the absence of proof.[8] Profits of a continuous enterprise may, for the purpose of equable division, be presumed to have accrued ratably as the work progressed.[9]

53. *Partnership books, &c., as evidence.*]—*Prima facie* the books of a partnership are, as between the partners, evidence for them all and against them all.[10] Entries made during the continuance of the firm, in the books to which a partner had access

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[1] Fairchild v. Fairchild (above).
[2] Thompson v. Bowman, 6 Wall. 317.
[3] But not necessarily conclusive. Grubb's Appeal, 66 Penn. St. 117, 128.
[4] Fairchild v. Fairchild (above).
[5] Richardson v. Wyatt, 2 Dess. 471, 481.
[6] See Gunnell v. Bird, 10 Wall. 304, 308.
[7] Gillett v. Hall, 13 Conn. 426, 435.
[8] Fox Dig. L. of P. 59; Gould v. Gould, 6 Wend. 267. Whether difference in contributions is alone sufficient evidence of intent to share unequally, compare Neudecker v. Kohlbergh, 3 Daly, 407; Story on Partn. 35, § 24. See also Whitcomb v. Convers, 119 Mass. 38, s. c. 20 Am. R. 311.
[9] Clark v. Gilbert, 26 N. Y. 279, rev'g 32 Barb. 576.
[10] Lodge v. Prichard, 3 De Gex, M. & G. 906.

when the entries were made, or immediately afterwards, are presumptive evidence against him,[1] in the absence of evidence of his dissent.[2] If it be shown that the account was kept by the partner, in whose favor the entry is, evidence may be required that the book was a partnership book, had been fairly kept, and was accessible to the other.[3] The evidence drawn from the entries may be rebutted, by aid of proof that the partner against whom they are adduced had no knowledge of the entries; and any circumstances, such as distance, course of business, &c., are relevant.[4] In case of entries made after dissolution, the party adducing them must show that the other had the books, and an opportunity of examining them at the time, and did not dissent.[5]

54. *Evidence of voluntary settlement.*]—Evidence of an oral agreement for accounting and settlement, executed by a statement and settlement accordingly, though subsequent to a written agreement for dissolution, is competent.[6] But an account rendered and not shown to be acquiesced in, is not enough to bar an action for an account.[7]

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[1] Heartt v. Corning, 3 Paige, 566; s. p. Caldwell v. Lieber, 7 Id. 483. But in case of a dormant partner, it should appear or be presumable that he not only had access to the books, but actually inspected them. Taylor v. Herring, 10 Bosw. 447.

[2] Dunnell v. Henderson, 23 N. J. Eq. 174.

[3] Adams v. Funk, 53 Ill. 219; Wheatley v. Wheeler, 34 Md. 62.

[4] U. S. v. Binney, 5 Mas. 188.

[5] Pratt v. McHatton, 11 La. Ann. 262.

[6] Wiggin v. Goodwin, 63 Me. 389.

[7] Wood's Coll. 461, § 298.

CHAPTER X.

ACTIONS BY AND AGAINST RECEIVERS.

1. Allegation of appointment, and right of action.
2. Evidence of appointment.
3. Leave to sue.
4. Evidence of transactions of defendant.
5. Action against receiver.

1. *Allegation of appointment, and right of action.*]—In those jurisdictions where a receiver sues in his own name, as such, an allegation of his due appointment is necessary, if the right of action was vested in him by the appointment; and the allegation, if not admitted, must be proved.[1] If, on the other hand, the right of action is not derived through his appointment,—as, for instance, where he sues on a contract with him as receiver,—he need not allege his appointment, but he may sue, simply describing himself as receiver.[2] And in those States where a foreign receiver is not recognized by the courts,[3] he may still sue if he can prove a cause of action not directly dependent on his title as receiver. Thus any action which may be sustained by proof of possession without proof of title,[4] or by proof of a contract made with himself,[5] or a transfer to him,[6] he may maintain; and the fact that he is named on the record in his official capacity should not alone defeat the suit.

2. *Evidence of appointment.*]—If appointed by a court of general jurisdiction, it is enough to produce the decree,[7] (when appointed in a cause), or the petition and order[8] (when appointed in a special proceeding), with his bond or other qualification, without producing the proceedings at large. The appointment of a receiver of a national bank is proved by a certificate of the comptroller of the currency, approved and concurred in by the secretary of the treasury, and reciting the existence of all the

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[1] Bangs v. McIntosh, 23 Barb 591; and see Manley v. Rassiga, 13 Hun, 288.
[2] White v. Joy, 13 N. Y. (3 Kern.) 83, rev'g 11 How. Pr. 36.
[3] See Willits v. Waite, 25 N. Y. 584; Cagill v. Woolridge, 4 Centr. L. J. 6, and note; High on Rec. 156, § 239.
[4] Graydon v. Church, 7 Mich. 36. So his assignee may sue. Hoyt v. Thompson, 5 N. Y. 338.
[5] Helme v. Littlejohn, 12 La. Ann. 298.
[6] Palmer v. Clark, 4 Abb. New Cas. 25.
[7] Id. It seems that the oath and bond may be presumed. See Dayton v. Johnson, 69 N. Y. 419. Compare Rockwell v. Merwin, 45 Id. 168.

statutory facts.[1] The record, while it remains a subsisting order or decree, is conclusive.[2]

3. *Leave to sue.*]—Leave to sue need not usually be proved,[3] but in those jurisdictions where an allegation and proof of it is required, the court may, after long delay to object, presume that it was duly had, from the making by the court of orders facilitating the progress of the suit.[4]

4. *Evidence of transactions of defendant.*]—In general, the same evidence is admissible that would be admissible in an action between the defendant and the corporation or person of whose property plaintiff is receiver. In an action by the receiver of a corporation against its stockholders, the fact that the name of defendant appears on the stock-book as a holder of stock, raises a presumption that he is its owner, and throws on him the burden of giving evidence to the contrary.[5] In the case of a national bank, the certificate of the comptroller of the currency is, as against stockholders, conclusive evidence of the regular organization and existence of the corporation,[6] and of the extent to which the individual liability of stockholders shall be enforced.[7] But the ordinary account books of the corporation, containing their entries of the dealings of the defendant with the corporation, are not competent against defendant,[8] any more than those of an individual, except on some special ground such as would make them competent if the action were by the corporation,—as, for instance, that defendant actually had access to the books so as to raise an implied admission of the correctness of entries not objected to at the time.[9]

5. *Action Against receiver.*]—A receiver, acting within his authority, is not liable personally, except on proof of personal misconduct, even if he do not object that leave to sue him was not sought;[10] but when sued for interfering with property which the decree by which he was appointed did not authorize him to meddle with, plaintiff need not show leave to sue, for in such case the receiver is merely a trespasser.[11] A foreign receiver may, if jurisdiction be acquired, be sued here, and without leave, if it be shown that he would, by the law of the State where appointed, be held liable in its courts, on the facts of the case.[12]

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[1] Platt v. Beebe, 57 N. Y. 339.
[2] Vermont & Canada R. R. Co. v. Vermont Central R. R. Co. 46 Vt. 792.
[3] 4 Abb. N. Y. Dig. 2d ed. 428.
[4] Jerome v. McCarter, 94 U. S. (4 Otto), 734, 737.
[5] Turnbull v. Payson, 95 U. S. (5 Otto), 418, 421, and cases cited.
[6] Casey v. Galli, 94 U. S. (4 Otto), 673.
[7] Id.
[8] White v. Ambler, 8 N. Y. 170. See Chapter on CORPORATIONS.
[9] See Rockwell v. Merwin, 8 Abb. Pr. N. S. 330, 45 N. Y. 166.
[10] Camp v. Barney, 4 Hun, 373. See further p. 52 of this vol.
[11] Hills v. Parker, 111 Mass. 508.
[12] Paige v. Smith, 99 Mass. 395.

CHAPTER XI.

ACTIONS BY AND AGAINST TRUSTEES.

1. Express trusts.
2. Demand before suit, and notice.
3. Trustees' receipts.
4. Compromises.
5. Justification of dealings with the estate.
6. Admissions and declarations of the *cestui que trust*.
7. — of the trustee.
8. Judgments.
9. Presumption of conveyance by trustee.
10. Constructive and resulting trusts.

1. *Express trusts.*]—Under the statute of frauds,[1] a trust need not be created by writing, but it must be manifested and proved by writing, and where there is no explicit declaration, the nature of the trust, and the terms and conditions of it, must sufficiently appear so that the court may not be called upon to execute the trust in a manner different from that intended.[2] Such a trust manifested by writing not intended for the purpose, cannot be established by resorting to parol evidence to supply defects or omissions in the written evidence.[3] No particular form of words is necessary. It is enough if the creator, having the property, conveys it to another in trust,[4] or admits the trust in a writing, whether addressed to the *cestui que trust* or to a third person,[5] or, the property being personal, if he unequivocally declares either orally or in writing, that he holds it *in præsenti* in trust, or as a trustee for another;[6] and the creation of a trust in writing, if otherwise unequivocal, is not affected by the fact that the creator of the trust retains the instrument declaring it.[7] Knowledge

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[1] 2 N. Y. R. S. 135, §§ 6, 7, as am'd by L. 1860, ch. 322.

[2] Steere v. Steere, 5 Johns. Ch. 1, 11.

[3] Cook v. Barr, 44 N. Y. 156, 161. *Contra*, Kingsbury v. Burnside, 58 Ill. 310, s. c. 11 Am. R. 67, where it is held that if the writing affords evidence of the existence of a trust, the terms may be supplied *aliunde*. If there be written evidence of the existence of the trust, the danger of parol declarations, against which the statute was directed, is effectually removed. Whether a deed to one as "trustee," but without declaring for whom or what purpose, can be aided by parol, compare Dillaye v. Greenough, 45 N. Y. 438; Railroad Co. v. Jandon, 95 U. S. (5 Otto), 576, 579.

[4] Ray v. Simmons, 11 R. I. 266, s. c. 23 Am. R. 447, and cases cited.

[5] Any writing may be used for the purpose, though not intended as a declaration of trust. Kingsbury v. Burnside, 58 Ill. 310, s. c. 11 Am. R. 67. Thus, admissions in a pleading in an action with third persons will be sufficient. Cook v. Barr, 44 N. Y. 156.

[6] See Walker v. Walker, 9 Wall. 754.

[7] Especially where he himself is the trustee. Ray v. Simmons, 11 R. I. 266, s. c. 23 Am. R. 447, and cases cited; Witzel v. Chapin, 3 Bradf. 386.

in the *cestui que trust*, at the time, need not be proved. If the writing in which the parties embodied the declaration is clear and positive as to the terms of the trust, it cannot be varied or altered by parol evidence,[1] but if loose and ambiguous, parol evidence is competent to show what was their understanding.[2] In ascertaining the purposes of a trust, the language of the conveyance, if clear and unequivocal, is conclusive.[3] If the language is indefinite, extrinsic evidence, such as the tenets held by the donor, or the faith then actually taught by the donees, and the circumstances under which the gift was made, and the denominational name of a religious corporation or society to which a donation is made, and the doctrines actually taught therein at the time of the gift, may be resorted to in order to limit and define the trust in respect to doctrines usually considered fundamental, but not as to lesser shades or points of doctrine not deemed fundamental.[4] To prove the acceptance of a trust, any act of the trustees under the instrument creating the trust is competent evidence.[5] Parol evidence is equally competent to disprove acceptance by the one named as trustee, or by one of several so named.[6] But if it was accepted, though for a moment, parol proof of a release is not competent.[7]

Where the action is not against the trustee, but brought by him against those who have dealt with him, or strangers, much slighter evidence is enough to show him a trustee of an express trust within the statute allowing such an one to sue in his own name.[8]

2. *Demand before suit, and notice.*]—Before a suit can be brought against a trustee, he must have had notice of the duty he is required to perform, and must have had an opportunity to perform it.

But where the trustee is himself an actor in the transaction, and has full knowledge of his duties, such notice and de-

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[1] Steere v. Steere, 5 Johns. Ch. 1. So held even where the writings were merely accounts and letters. Compare Brabrook v. Boston Five Cents Savings Bank, 104 Mass. 228, s. c. 6 Am. R. 222.

[2] Steere v. Steere (above). The tendency of later decisions is to insist on clear and cogent evidence. See Lantry v. Lantry, 51 Ill. 458, s. c. 1 Am. R. 310; and U. S. Dig. tit. Trust.

[3] Miller v. Gable, 2 Den. 492, 548.

[4] Hale v Everett, 53 N. H. 9, s. c. 16 Am. R. 82. Compare Happy v. Morton, 33 Ill. 398, 413; see also, rules as to extrinsic evidence to interpret wills, p. 128, &c., of this vol.

[5] Lewis v. Baird, 3 McLean, 56; and see 3 Wms. Exr. 6 Am. ed. 1896, and note.

[6] Armstrong v. Morrill, 14 Wall. 139; Burritt v. Silleman, 13 N. Y. 93, rev'g 16 Barb. 198.

[7] Id. and cases cited.

[8] Any declaration, however informal, which evinces the intention of the party with sufficient clearness, will have that effect as to personalty. Chew v. Brumagen, 13 Wall. 497, and cases cited.

mand are not required.[1] If there are several trustees, a demand on the one against whom personal recovery is sought should be proved.[2] Where the trustees are not chosen by nor the agents of the *cestui que trust*, notice to one of several co-trustees is not notice to the *cestui que trust* for the purpose of depriving him of the character of *bona fide* holder.[3]

3. *Trustees' receipts.*]—All of several trustees of an express trust must join in receipts, conveyances and actions,[4] and the receipt of one is not alone competent evidence to charge or bar the others. If two trustees join in a receipt for money, it is presumptive evidence that the money came equally into the possession or under the control of both; and there must be direct and positive proof to rebut the presumption.[5] In such case the burden is on the trustee to prove that his acknowledgment of the receipt of the money was merely for conformity, and that in fact he received none of the money, and that his co-trustee received it all. If there is no evidence upon this point, all the trustees who join in signing the receipt will be held responsible *in solido*, on the ground that the acknowledgment in the receipt is *prima facie* evidence of the facts stated. At common law the receipt was *conclusive*, and estopped the trustee from denying that he received any of the money; but equity rejects the estoppel, and will determine according to the fact. But if a trustee, signing a receipt, receives any part of the money, and it does not appear how much, he will be answerable for the whole.[6]

4. *Compromises.*]—If the trustee has compromised a claim, without leave of court had on notice to the *cestui que trust*,[7] the burden is on him of showing that by the situation existing at the time he made the compromise, it was properly judged advantageous for the estate.[8] If he shows this he is not made liable by the result proving disadvantageous.[9] If he obtained leave under a statute authorizing the court to grant it, and not requiring notice, or under the general power of a court of equity to direct a trustee, on notice to the *cestui que trust*,[10] the order of the court protects him[11] irrespective of the result, and throws upon a *cestui*

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[1] Brent v. Maryland, 18 Wall. 430, and cases cited.
[2] Jessop v. Miller, 2 Abb. Ct. App. Dec. 449.
[3] Commissioners of Johnson County v. Thayer, 94 U. S. (4 Otto), 631, 644.
[4] 6 Abb. N. Y. Dig. 25, 35.
[5] Monell v. Monell, 5 Johns. Ch. 283.
[6] 2 Perry on Trusts, 501, § 416.
[7] Sollee v. Croft, 7 Rich. Eq. 34, 43, 45; Anon v. Gelpcke, 5 Hun, 245.
[8] "The Chancellor is the only safe and secure counsellor to trustees." NASH, J., Freeman v. Cook, 6 Ired. Eq. N. C. 373, 378.
[9] Murray v. Blatchford, 1 Wend. 583, 616; Bacot v. Hayward, 5 Rich. (S. C.) 441.
[10] If the court has equity powers only by express statute, the rule is the same. Treadwell v. Cordis, 5 Gray, 341.
[11] Alike on the compromise of a legal (Talbot v. Earl of Radnor, 3 Myine & K. 252; Wheeler v. Perry, 18 N. H. 307) as of an equitable claim. Jones v. Stockett, 2 Bland Ch. (Md.) 409, 425.

que trust who assails the compromise, the burden of proving fraud or bad faith.

5. *Justification of dealings with the estate.*]—If a trustee purchases of the *cestui que trust*, or accepts a benefit from him, the burden is on the trustee to vindicate the transaction from any shadow of suspicion, and to show that it was perfectly fair and reasonable in every respect.[1] If he alleges the consent of the *cestui que trust*, the presumption is against the fairness of the transaction, and the burden is on him to show it affirmatively, and to establish all the conditions necessary to its validity.[2] If the trustee deals with the trust fund for his own benefit, the *cestui que trust*, on calling him to account, need not show that there was any inequality or disadvantage in the transaction.[3] He is absolutely entitled to have it set aside, unless, being *sui juris*, he has ratified the act or waived the objection.[4] Silent acquiescence, without facts constituting an estoppel, does not affect the right of action,[5] unless unreasonably prolonged.[6]

6. *Admissions and declarations of the cestui que trust.*]—To let in the admissions and declarations of the *cestui que trust* against the trustee, being the party on the record, it must clearly appear that the action is brought for the benefit of the declarant or those claiming under him.[7] The admissions of one of several *cestuis que trustent* in a formal trust are not generally competent for the purpose of defeating the title of their trustee, especially in an express trust of real property.[8] But where the *cestuis que trustent* are really principals, their admissions are competent, and their relation may involve an agency, in which case the admissions of one will be competent against the other.

7. *Admissions and declarations of the trustee.*]—In the case of a formal express trust the admissions and declarations of a sole trustee, if made while he was trustee,[9] and relating to matters within the scope of his duty and authority, are competent evidence against him or his *cestui que trust*,[10] when adduced in favor of third persons. If his trust partook of the nature of an agency, his admissions and declarations within the scope of the agency are competent. In any case, his admissions and declarations

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[1] 2 Perry on Trusts, 516, § 428. Held otherwise where the trustee acts in the hostile attitude of an urgent creditor. 11 Moak's Eng. 112, note.

[2] Cumberland Coal Co. v. Sherman, 30 Barb. 553, 572.

[3] Jewett v. Miller, 10 N. Y. 402.

[4] Boerum v. Schenck, 41 Id. 182.

[5] 14 Moak's Eng. 85, note. *Contra*, 15 Id. 19.

[6] Twin-lick Oil Co. v. Marbury, 91 U. S. (1 Otto), 587.

[7] May v. Taylor, 7 Jur. 512, s. c. 6 Mann. & G. 261; 6 Scott N. R. 974.

[8] Pope v. Devereaux, 5 Gray (Mass.) 409, 413.

[9] Beatty v. Davis, 9 Gill (Md.) 211.

[10] Maxwell v. Harrison, 8 Geo. 61, 67; Helm v. Steele, 3 Humph. (Tenn.) 472. *Contra*, Graham v. Lockhart, 8 Ala. N. S. 9; 2 Perry on Trusts, 522, § 433; Thomas v. Bowman, 30 Ill. 84, 29 id. 426. Compare Thompson v. Drake, 32 Ala. 99.

made at whatever time, if relevant to the issue, are competent evidence against himself personally. If there are several co-trustees, the admissions of one are competent against himself, but not against his co-trustee,[1] nor, alone, against their *cestui que trust*.[2]

8. *Judgments.*]—A judgment or verdict against one individually does not estop him as trustee.[3] But an adjudication against him as trustee estops him in respect to his private right as a *cestui que trust* held at the time of the former action, or acquired from persons then holding it.[4] An adjudication against him in the capacity of trustee does not estop him from bringing, as trustee for a different purpose, or in a different right, another action against the same defendant, and hence it does not estop the defendant in favor of the trustee.[5]

9. *Presumption of conveyance by trustee.*]—A presumption of fact that a conveyance has been made by a trustee to those entitled to a conveyance, in conformity to the trust, arises after a considerable lapse of time.[6] So where the object of a trust has entirely failed, a reconveyance from the grantee to the grantor, or if there were several, to that one who had the exclusive beneficial right, will be presumed, both in equity and at law.[7] Three things must concur to warrant this presumption: 1. A duty on the part of the trustee to convey; 2. A reason for the presumption, not necessarily sufficient to induce conviction of a conveyance in fact, but a reason of justice; 3. The object must be the support of a just title. The case must be such that equity would decree a conveyance.[8] But a conveyance which would be a breach of their trust cannot be presumed,[9] even after great lapse of time.

10. *Constructive and resulting trusts.*]—Parol evidence is competent for the purpose of charging a grantee as trustee *ex maleficio*, or as a constructive trustee, where the application of the statute requiring written evidence would operate as a fraud.[10] Evidence of a parol agreement is competent to show that defendant made advances and took title to plaintiff's property for his benefit as to any surplus. A stranger is not to be made a con-

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[1] Davies v. Ridge, 3 Esp. 101.
[2] Walker v. Dunspaugh, 20 N. Y. 170.
[3] Rathbone v. Hooney, 58 N. Y. 463.
[4] Corcoran v. Chesapeake, &c. Canal Co. 94 U. S. (4 Otto), 741, 745.
[5] Leggott v. Great Northern Railway Co. 1 Q. B. Div. 599, s. c. 17 Moak's Eng. 238.
[6] See Jackson v. Moore, 13 Johns. 513; Jackson v. Cole, 4 Cow. 587.
[7] Lade v. Holford, Bull. N. P. 110; England v. Slade, 4 T. R. 682.
[8] French v. Edwards, 21 Wall. 150.
[9] Brewster v. Striker, 2 N. Y. 19, affi'g 1 E. D. Smith, 321, 7 N. Y. Leg. Obs. 140.
[10] This is the better opinion amid much conflict in the authorities. Dodge v. Wellman, 1 Abb. Ct. App. Dec. 512; Ryan v. Dox, 34 N. Y. 307, rev'g 25 Barb. 440; Carr v. Carr, 52 N. Y. 251; Sandford v. Norris, 4 Abb. Ct. App. Dec. 144.

structive trustee merely because he acts as agent of the trustee. It should be shown that he received and became chargeable with some part of the trust property, or knowingly assisted in a fraudulent transaction on the part of the trustee.[1]

A resulting trust, even in real property, in the cases in which the statute allows such trusts,[2] may be proved by parol evidence[3] to explain a conveyance from a third person. But if a written agreement between the parties appears, manifesting an intent to make an absolute conveyance, parol evidence is not competent between them to prove that a trust was intended, unless fraud or mistake is shown;[4] but it is competent for the purpose of proving that the conveyance was a mere security.[5] To establish a resulting trust by plaintiff's payment of the consideration for a title taken by defendant, it must appear that the consideration, or a definite fractional part, was paid at or before the time of the conveyance. Parol proof of intent to pay is not enough, nor is proof of subsequent payment, unless in pursuance of an agreement made at or before the time of conveyance.[6]

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[1] Barnes v. Addy, L. R. 9 Ch. App. 244, s. c. 8 Moak's Eng. 848.
[2] 6 Abb. N. Y. Dig. 10, 11.
[3] Swinburne v. Swinburne, 28 N. Y. 568. The statute of frauds does not apply. 6 Abb. N. Y. Dig. 8.
[4] St. John v. Benedict, 6 Johns. Ch. 111; Sturtevant v. Sturtevant, 20 N. Y. 39.
[5] Even though there was no personal debt. Horn v. Keteltas, 46 N. Y. 605.
[6] 6 Abb. N. Y. Dig. 8, 9.

PART II.

EVIDENCE AFFECTING PARTICULAR CAUSES OF ACTION.

CHAPTER XII.

ACTIONS FOR MONEY LENT

1. Grounds of action.
2. Delivery of money not enough.
3. Direct testimony to loan.
4. Delivery to third person.
5. To which of several was credit given.
6. Request.
7. Authority of agent.
8. Parties to joint adventure.
9. Joint debtors.
10. Written evidence.
11. Due bill.
12. Defendant's check in favor of plaintiff.
13. Defendant's check drawn on plaintiff.
14. Defendant's receipt.
15. Plaintiff's check.
16. Plaintiff's account books.
17. Character in which the parties dealt.
18. Connected and collateral agreements.
19. Mortgage.
20. Medium of repayment.
21. *Defenses*—Disproof of loan.
22. — Illegality.

1. *Grounds of action.*]—Under modern practice, to sustain an action for money lent, an actual loan should be proved; that is, it must appear that money or its representative[1] passed between the parties, or was advanced by plaintiff to a third person on the request of defendant, and on his express or implied promise to repay it.[2]

2. *Delivery of money not enough.*]—Proof of the delivery by plaintiff of money or checks to the defendant is not enough without something to characterize the act as a loan.[3] Delivery of money is presumed, in the absence of other evidence, to be in

[1] Compare Glyn v. Hertel, 8 Taunt. 208; Howard v. Danbury, 2 C. B. 803; Litchfield v. Irwin, 51 N. Y. 51.

[2] At common law a count for money lent was often sustained by proof of a note in the hands of an indorsee, or by other evidence not showing a loan between the parties. Under the Code the question is, does the pleading correctly state the essential legal elements in the transaction; and if there be a variance, has defendant been misled to his prejudice. See Briggs v. Vanderbilt, 19 Barb. 222; and paragraph 10 (below).

[3] Welch v. Seaborn, 1 Stark. 474.

payment of an obligation.[1] But very slight evidence indicating that defendant received it as a borrower is enough to go to the jury and sustain a finding that the transaction was a loan.[2]

3. *Direct testimony to loan.*]—A witness may testify directly to the fact that he lent, or made a loan,[3] subject of course to cross examination as to the details; but the facts being brought out, the opinion of the witness is not competent for the purpose of proving that it was a loan. He cannot testify that he "considered it" such.[4]

4. *Delivery to third person.*]—It is not necessary to show that the money was paid into defendant's hand.[5] Proof that it was disbursed as he directed will suffice. Thus evidence that he, being indebted, requested plaintiff to pay the creditor, and promised if he would do so to repay him, is appropriate,[6] although it would equally well sustain an action for money paid to defendant's use. So money paid in pursuance of defendant's request to pay it to a third person, or his request to advance such sums to his wife as she might call for, is recoverable as a loan to defendant, if the credit was given to him.[7] But proof of a loan made to the third person exclusively, though at the request of the defendant, is not enough to sustain an averment of a loan to defendant.[8]

5. *To which of several was credit given.*—When there is uncertainty on the evidence as to whether the loan proved was made to one or other of several persons, that is to say, whether credit was given to one or another, a witness who was present and an actor in the transaction may be asked on whose credit[9]

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[1] Fleming's Exr. v. McLain, 13 Penn. St. 177, and cases cited; Fish v. Davis, 62 Barb. 122; Bogert v. Morse, 1 N. Y. 377; Sayles v. Olmstead, 66 Barb. 590. As to the evidence of distinction between a loan or advancement, see p. 151 of this vol.

[2] Thus the testimony of a witness that defendant several times "got money and checks" of plaintiff's decedent, is not enough to sustain a verdict that they were got by way of loan. Fleming's Exr. v. McLain (above). Nor is the admission of defendant that "he had had money" of the plaintiff. Bogert v. Morse (above). But where, after defendant had made such admission to the witness, the witness said plaintiff "told me to speak to you about it," and defendant turned away without replying, this was held sufficient evidence that it was a loan to sustain the verdict. Id. So where plaintiff and defendant were at the races, and defendant having lost a bet, plaintiff handed him money in reply to his request for money, a verdict finding a loan was sustained. Lawton v. Sweeney, 8 Jur. 964. As to evidence of the *res gestæ* for this purpose, see paragraph 15.

[3] Cole v. Varner, 31 Ala. 244.

[4] Saltmarsh v. Bower, 34 Ala. 613, 620.

[5] Wade v. Wilson, 1 East, 195.

[6] Hamilton v. Starkweather, 28 Conn. 138.

[7] Stevenson v. Hardy, 3 Wils. 388, s. c. 2 W. Blackst. 872, modifying in effect Marriott v. Lister, 2 Wils. 141.

[8] Butcher v. Andrews, 1 Salk. 23.

[9] Bank v. Kennedy, 17 Wall. 19. But the authorities are not uniform. See Chapter on MONEY PAID.

it was made; or, in other words, what was the purpose and intent of the payment; subject, of course, to cross-examination as to the elements involved in his answer.[1] So the lender may, in connection with the facts, testify to his intent to give credit to defendant.[2] But in either case the witness's opinion, as distinguished from a statement of the fact, is not competent.[3] The entry made by him in his check book, at the time of drawing his check for the money to be lent, may be proved by him as part of the *res gestæ*.[4] After his death the entry is admissible without his testimony.[5]

6. *Request.*]—The request relied on to characterize the transaction as a loan, must be proved to have come from the defendant, or his authorized agent. Proof of the actual application of the fund to his use, without anything tending to show recognition or ratification on his part, is not enough.[6] The one making the payment may testify that it was made in consequence of the request.[7] Evidence of the request may be corroborated by evidence of defendant's contemporaneous declarations of intent to make the request.[8]

7. *Authority of agent.*]—Where the request was made by an alleged agent, the authority of the agent cannot be proved by his declarations made to the plaintiff on obtaining the loan.[9] Nor where a loan is obtained by a husband upon promissory notes made by his wife can his authority to pledge her separate estate for their payment be proved by his declarations.[10]

Testimony, in general language, that the one who borrowed was agent of the defendant and acted as such, is not enough to prove his authority to bind his principal by borrowing.[11] Even proof of special authority to buy goods, is not sufficient evidence

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[1] To make an exception to such a question available the grounds should be stated —as that the witness is not shown to have the means of knowledge; and that the question is framed so as to call for a mental conclusion instead of a fact. 57 N. Y. 651. See also Chapter XIV, paragraph 19.

[2] Danforth v. Carter, 4 Iowa, 230; and see Chap. XIII, paragraph 19.

[3] Id.

[4] Stark v. Corey, 45 Ill. 431. Compare Peck v. Von Keller, 76 N. Y. 604.

[5] N. Y. Dyeing, &c. Establ. v. Berdell, 68 N. Y. 613.

[6] Kelley v. Lindsey, 7 Gray (Mass.) 287; Henry v. Wilkes, 30 N. Y. 562. Compare Perkins v. Dunlap, 5 Greenl. 268, which is sustainable as an action for money paid to defendant's use rather than for money lent. So if a lender agrees to take and does take the express written promise of A., the fact that the money was applied to the joint use of A. & B. will not establish their joint liability for a loan. Underhill v. Crawford, 29 Barb. 664.

[7] See Sweet v. Tuttle, 14 N. Y. 465. But the authorities are not uniform. See Chapter on MONEY PAID.

[8] Clark v. McGraw, 14 Mich. 139, 149.

[9] Starin v. Town of Genoa 23 N. Y. 489; s. p. Deck v. Johnson, 4 Abb. Ct. App. Dec. 315. For rules applicable to master's borrowing for ship in foreign port, see The Grapeshot, 9 Wall. 138, and cas. cit.; The Emily Souder, 17 Id. 666.

[10] Deck v. Johnson, 1 Abb. Ct. App. Dec. 497; Second Nat. Bank v. Miller, 2 N. Y. S. Ct. (T. & C.) 104.

[11] Perkins v. Stebbins, 29 Barb. 523; and see Kent v. Tyson, 20 N. H. 121.

of authority to borrow the money with which to buy.[1] But if the money has been actually mingled with defendant's funds, or applied to his use, very slight evidence of recognition and adoption on his part will suffice.[2] Evidence that the money actually and beneficially went into defendant's possession, and was retained after demand, dispenses with necessity of other evidence of special authority in the agent.[3] If the agent had authority to borrow, the misapplication of the money by him is not relevant,[4] unless plaintiff was connected with it. Where the question is whether the agent's authority extended to borrowing, defendant may be held liable by evidence that he had held out the agent as authorized by previously ratifying repeated transactions of the same sort.[5]

8. *Parties to joint adventure.*]—In respect to the power of one to borrow for all, there is a distinction between a firm (where the power depends on familiar principles of the law of partnership) and a combination of persons having merely a joint ownership of property, or even an interest in a joint adventure or enterprise. Proof of joint ownership of property does not alone suffice to establish authority in one of the owners to borrow money on the credit of the others, even for the benefit of the property.[6] Nor does proof that several were engaged together in a joint adventure, as distinguished from a partnership, suffice.[7] In such cases there must be express authority, or circumstances from which authority may be inferred, or ratification.[8]

9. *Joint debtors.*]—The request of one of several joint debtors who are apparently all principals, although it may suffice to sustain an action for money paid,[9] will not suffice to sustain an action for money lent; for one of several joint debtors, who is a

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[1] Bank of Indiana v. Bugbee, 1 Abb. Ct. App. Dec. 86; Martin v. Peters, 4 Robt. 434.

[2] See Gill v. Gillingham, 1 F. & F. 284; Hearne v. Keene, 5 Bosw. 579. Especially now that parties can testify. 1 Daly, 327. Approval of an advance to pay duties for an agent does not imply authority in the agent to borrow. Tucker v. Woolsey, 6 Lans. 482.

[3] Merchants' Bank v. State Bank, 10 Wall. 644; Gold Mining Co. v. National Bank, 96 U. S. (6 Otto), 640, 644.

[4] City Bank of New Haven v. Perkins, 4 Bosw. 420.

[5] Kelley v. Lindsey, 7 Gray (Mass.) 287; Bank of Auburn v. Putnam, 1 Abb. Ct. App. Dec. 80; Hammond v. Varian, 54 N. Y. 398. Where such transactions came to the knowledge of the lender before the loan, and he acted on the faith of them, the defendant is liable also on the ground of estoppel. The cases where it has not appeared that the lender had any knowledge of such transactions, are not in harmony. It depends somewhat on the nature of the agency, and sometimes, in part, on the usages of business. See, for instance, 8 N. Y. 167, 41 Me. 382, 56 N. Y. 583, rev'g 1 N. Y. S. Ct. (T. & C.) 247. As to whether, where a son borrows in his father's name, and there is no direct proof of agency, the fact of the father having paid other debts contracted by his son is admissible for the purpose of charging him,—compare 56 N. Y. 336, rev'g 7 Lans. 381; and 54 N. Y. 398.

[6] See Mumford v. Brown, 6 Cow. 475.

[7] Moss v. Jerome, 10 Bosw. 220; Alger v. Raymond, 7 Id. 426.

[8] See Chapter VII.

[9] Elmendorf v. Tappen, 5 Johns. 176.

principal as between himself and the others, has no implied authority to borrow money for all jointly to pay the debt.[1]

10. *Written evidence.*]—The law recognizes the general usage of men, in lending money, to take written evidence of it;[2] and this is one reason why proof of the mere delivery of money without writing is presumed to be payment of an obligation, not a loan. Under modern procedure, the question whether the action should be for money lent or on the written contract, is not vital; and if the defendant is not surprised, the court should disregard a variance.[3] If plaintiff took an express written agreement, and it is void for reasons not inherent in the loan itself, or if it has been rescinded, he may sue for money lent, ignoring the express agreement.[4] But if the plaintiff relies on a written promise to repay, he cannot resort to parol evidence to enable himself to recover otherwise than according to its tenor; nor against other parties than those bound by the writing;[5] except that if the agreement is non-negotiable and not under seal, he may give parol evidence to charge the undisclosed principal of the signer,[6] or to show himself the real party in interest though not named in the paper. If the agreement is to pay according to the terms of another writing referred to without reciting its terms, the other writing must be produced or accounted for,[7] but its execution need not be proved.[8] A written agreement, if any, is the best evidence, and should be produced or accounted for. Where, however, the writing was not made as embodying the contract or promise, but was merely a signature or entry for an incidental purpose,[9] it is not

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[1] Ib.; Rolfe v. Lamb, 16 Vt. 514.

[2] Veiths v. Hagge, 8 Iowa, 187. But the peculiar habit of the lender is not primarily competent without something to show that the other party dealt with knowledge of it. Sugart v. Mays, 54 Geo. 554. Where, however, plaintiff testified that he lent the money sued for on a credit of 6 months, without taking a note,—*Held*, that, as unfavorable inference might be drawn against this statement, from the length of time, it was competent to allow him to testify that he had frequently before made such loans to other persons. Stolp v. B'air, 68 Ill. 541.

[3] Wright v. Hooker, 10 N. Y. 58; and see 54 N. Y. 686, aff'g 4 Daly, 92; 3 N. Y. S. Ct. (T. & C.) 443. But a promissory note is not evidence of money lent, except as between the original parties to it. Rockfeller v. Robinson, 17 Wend. 206, limiting 4 Id. 411. Nor as against one signing expressly as surety. Balcom v. Woodruff, 7 Barb. 13.

[4] Thus, on a loan which was in itself valid, the lender may recover, although he took a security which the borrowers were forbidden by law to issue. Curtis v. Leavitt, 15 N. Y. 9, 95, 96, 246, 296; Vanatta v. State Bank, 9 Ohio St. 27. So where the security given has been surrendered by mistake. Baxter v. Paine, 16 Gray (Mass.) 273. Void securities are admissible in evidence for the purpose of proving that they are worthless. Enthoven v Hoyle, 16 Jur. 272.

[5] See note 6 (below). But a deposit with bankers, for which the depositor took the banker's certificate payable on presentation and indorsement, is recoverable as a loan, and without indorsement before suit; but it should be in possession ready for surrender. Umbarger v. Plume, 26 Barb. 461.

[6] Briggs v. Partridge, 64 N. Y. 362; 7 M. & G. 590. As to negotiable paper, compare 1 Wall. 234.

[7] Alabama, &c. R. R. Co. v. Nabors, 37 Ala. 489.

[8] Smith v. N. Y Central R. R. Co. 4 Abb. Ct. App. Dec 262.

[9] As where the clerk procured the borrower to write his name in the cash book, so as to know the correct spelling. Keene v. Meade, 3 Pet. 1, 7.

the primary evidence, but the transaction may be proved by parol.

11, *Due bill.*]—An "I. O. U." and a due bill (*e. g.*, Due A. B. $80 on demand) are competent as evidence of a loan;[1] but they are, if unexplained, quite as appropriate in support of an allegation of an account stated.[2] Evidence identifying the plaintiff with "U." or "the bearer," is not necessary in the first instance.[3] It is for defendant to show that the paper was given to some one else.[4]

12. *Defendant's check in favor of plaintiff.*]—A check drawn by defendant on his banker, in favor of plaintiff, and produced by plaintiff, is not by itself evidence of a loan by plaintiff, but rather of a payment to him;[5] but with evidence, for instance, that it was drawn on a bank where defendant had no funds, and was not intended to be presented, but given as a memorandum, it will support the action.[6] Unless some circumstances are shown to excuse the omission,[7] there must be evidence of demand and notice;[8] but delay therein is not material, unless the drawee has failed or the drawer otherwise sustained injury by the delay.[9]

13. *Defendant's checks on plaintiff.*]—Checks drawn by the defendant upon the plaintiffs, his bankers, and paid by them, are not alone evidence of money lent by them.[10] There must be proof of such a state of the accounts as to show that the checks represent money lent.[11]

14. *Defendant's receipt.*]—Upon the same principle defendant's simple receipt for money, without indicating it as a loan, is competent, but by itself wholly insufficient to support the action.[12]

15. *Plaintiff's check.*]—Where a check drawn by plaintiff in favor of defendant is relied on as evidence of the payment, the

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[1] Hinsdale v. Eells, 3 Conn. 377; Hay v. Hide, 1 D. Chip. (Vt.) 214; s. p. 12 Ad. & E. 641. So is a memorandum check. Turnbull v. Osborne, 12 Abb. Pr. N. S. 200. Otherwise of a mere conditional promise to pay a sum of money, without importing any consideration. Morgan v. Jones, 1 C. & J. 162.

[2] See Fessenmayer v. Adcock, 16 M. & W. 449; 1 Esp. Cas. 426; and see L. R. 1 C. P. 297; L. J. 10 Q. B. 43.

[3] Fessenmayer v. Adcock (above).

[4] Curtis v. Rickards, 1 M. & G. 46.

[5] Pearce v. Davis, 1 Moody & Rob. 365.

[6] Cushing v. Gore, 15 Mass. 69; Currier v. Davis, 111 Id. 480; and see Carter v. Hope, 10 Barb. 180.

[7] As that the drawer had no funds there. Reddington v. Gilman, 1 Bosw. 235.

[8] Pearce v. Davis, 1 Moody & Rob. 365.

[9] Murray v. Judah, 6 Cow. 484.

[10] White v. Ambler, 8 N. Y. 170, s. p. Reddington v. Gilman, 1 Bosw. 235.

[11] The bank books are not competent for the purpose. White v. Ambler (above). And the testimony of a clerk, speaking in general terms and from recollection, without the production of the books, that at the time they were drawn the defendant's account was greatly overdrawn, is not enough. Fletcher v. Manning, 12 Mees. & W. 571. See p. 52 of this vol.

[12] McFailand v. Strip, 17 Ark. 41; and see 3 J. J. Marsh. 37.

check being produced from plaintiff's custody, though with marks of cancellation by the bank, is not alone evidence that the money was received by the defendant, unless it was payable to his order, and indorsed by him. If it be payable to bearer, it is necessary to give some evidence tending to show that defendant received the money.[1] If the books of the bank or a pass-book are relied on, they should be proved by their production (or by the production of a copy of the entries, where that is allowed by law[2]), and by producing the clerk who made the entries,[3] or accounting for his absence, and proving his handwriting. Proof that the money was actually paid to the defendant on plaintiff's check will not, however, alone support the action; for, like a receipt, it is only evidence of the payment of money which presumptively is in satisfaction of a debt, and not a loan.[4]

16. *Plaintiff's account books.*]—The plaintiff's accounts are not in general admissible as independent evidence that money was paid,[5] much less that a payment was a loan. Where plaintiff himself testifies to the loan, his own entry of the fact of payment, made contemporaneously with the fact, and as part of the *res gestæ*, is admissible upon that ground.[6] Where the plaintiff or other person making the entry is not examined as a witness, the entries in plaintiff's books are not in general competent evidence of the payment.[7] In some States, however, the parties'

[1] Patton v. Ash, 7 Serg. & R. 125; Fleming's Ex'r v. McLain, 13 Pa. St. 177. See also Beasley v. Crossley, 3 Bing. 430. The entry in the check book that it was drawn to defendant, is not alone enough. Freeman v. Kelly, Hoffm. 90, and see 3 Pick. 96.

[2] As in case of a foreign corporation, see p. 52 of this vol. n. 10. Compare Merrill v. Ithaca R. R. Co. 16 Wend. 586.

[3] Patton v. Ash (above). See 7 Gray, 191, and Chap. on PAYMENT.

[4] Cary v. Gerrish, 4 Esp. Cas. 9; Aubert v. Walsh, 4 Taunt. 293; Fleming's Ex'r v. McLain (above). Proof of a check drawn by plaintiffs, and payable to and indorsed by defendant, and paid and produced by plaintiffs, who are bankers, together with an envelope indorsed by defendant with a memorandum describing the note, and enumerating securities, is sufficient evidence to go to the jury to establish a loan. Union Trust Co. v. Whiton, 9 Hun, 657.

There is some conflict in the cases as to whether the rule of *res gestæ* will not justify the admission of declarations of the plaintiff, made at the time of delivering the money or drawing the check, as evidence that he intended a loan and not a payment, although made in the absence of the defendant. In some cases such declarations have been excluded, on the ground that, defendant being absent, they did not bind him. But the better view is that such declarations are competent for the purpose of characterizing the act on the part of the plaintiff, it being understood that proof that he intended a loan is not sufficient to support the action without additional evidence proper to bind the defendant. Huntziger v. Jones, 60 Penn. St. 170.

The effect of such declarations, like the effect of the act itself, may depend upon evidence yet to be given. This principle is fully sustained in Beaver v. Taylor (1 Wall. 637), where plaintiff was allowed to give in evidence the letters of his correspondent who made payments on his behalf, and the entries which plaintiff thereupon made in his own books, not as matters binding the defendant, but as part of the *res gestæ* necessary to the complete proof of the act of the plaintiff in making the payment.

[5] Unless the defendant is shown to have had access, and assented. Himes v. Barnitz, 8 Watts (Penn.) 89, 47.

[6] The law making parties competent does not exclude their books.

[7] Low v. Payne, 4 N. Y. 247; Veiths v. Hagge, 8 Iowa, 184; Maine v. Harper, 4 Allen (Mass.) 115.

own books are admissible for small sums, with certain suppletory proof.[1] The reason why the parties' own books are not admitted to prove loans is, that they are not the usual method of preserving evidence of loans, and an exception, therefore, to the rule excluding them has recently been recognized in the case of the books of bankers and others, where there is evidence that the payment of money constituted, at the time the charges were made, the ordinary business of the party, and that the charges in question were made in the ordinary course of that business.[2]

17. *Character in which the parties dealt.*]—Where the action is by a person suing in his individual right, and the proof is of a debt due him in his representative capacity or conversely, the plaintiff cannot recover without an amendment in this respect, unless the case is such that a payment to the plaintiff will protect the defendant irrespective of the variance.[3]

18. *Connected and collateral agreements.*]—Where the loan was made upon a promise to repay or to give security for repayment, which is void by the statute of frauds,[4] as well as where a stipulation for a term of credit was obtained by fraud of the borrower,[5] or upon a condition which remains unperformed (as distinguished from an alternative contract),[6] or upon a special agreement for security which has been wholly rescinded by the parties,[7] the loan may be recovered without regard to the special agreement, and plaintiff may prove the fraud, etc., though not alleged, as part of the *res gestæ*.[8] If the lender received a collateral security, this fact does not suspend his remedy;[9] and, he need not prove an offer to return it before suit; it is enough that he holds it ready to be surrendered;[10] but, if it be negotiable paper, and indorsers or other parties contingently liable have been discharged, it must appear that they were not discharged by neglect,

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[1] See the chapter on SALES OF GOODS, &c.

[2] Cummings v. Hill's Adm'r, 35 Iowa, 253. But in the courts where such evidence is received, it should appear that, from the nature of the transactions or course of dealing, or other circumstances, that the case falls within the general principle which justifies the admission of the party's own books in other cases, namely, that better evidence is not obtainable. Young v. Jones, 8 Iowa, 219.

[3] Thus, defendant cannot defeat a recovery by showing that the funds were held by the lender in a trust capacity, and that he had no power to loan them, unless defendant shows also that by reason of a successor in the trust having already been appointed, or otherwise, a payment to the plaintiff will not protect the defendant. See also chapters on EXECUTORS AND ADMINISTRATORS, OFFICERS, RECEIVERS, AND TRUSTEES.

[4] Swift v. Swift, 46 Cal. 266; Binion v. Browning, 26 Mo. 270.

[5] Nelson v. Hyde, 66 Barb. 59.

[6] Bristow v. Needham, 9 Mees. & W. 729.

[7] James v. Cotton. 7 Bing. 266.

[8] Nelson v. Hyde (above). Compare Peck v. Root. 5 Hun, 547; French v. White, 5 Duer, 254.

[9] Brengle v. Bushey, 40 Md. 141, s. c. 17 Am. R. 586; Lewis v. U. S. 92 U. S. (2 Otto), 623, and cases cited.

[10] Scott v. Parker, 1 Q. B, 809; Lawton v. Newland, 2 Stark. 73.

or at least that defendant has lost nothing by such neglect.[1] If the lender has entered into an agreement for satisfaction or payment which has failed by default of the borrower to fulfill it, or was vitiated by fraud on his part, the lender may recover in disregard of such agreements.[2]

19. *Mortgage.*]—Where a mortgage of real or personal property is taken to secure payment, if a written acknowledgment of a debt on the part of the defendant is embodied in it or taken with it, the lender may recover thereon without first enforcing the mortgage.[3] But where the only writing expresses that the mortgage was for the purpose of securing a sum specified, not indicated to be a debt, the mortgagor is presumptively not personally liable.[4]

20. *Medium of repayment.*]—Where there is an express promise to repay in a particular currency—*e. g.*, to pay so many "dollars"—parol evidence is not admissible to prove that any other than lawful money of the country was intended, unless the contract is shown to have been made in a country where another currency or currency using that designation for coin of a different value, was authorized. In such case parol evidence is admissible to explain what was intended,[5] and to prove the equivalent value.[6]

21. *Defenses; Disproving loan.*]—If the making of any loan whatever by plaintiff is denied,[7] evidence of his poverty at the time is competent as tending to disprove it.[8] But upon the question

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[1] Marston v. Boynton, 6 Metc. (Mass.) 127.

[2] Westcott v. Keeler, 4 Bosw. 564; Arnold v. Crane, 8 Johns. 79.

[3] Elder v. Rouse, 15 Wend. 218.

[4] Culver v. Sisson, 3 N. Y. 264; Weed v. Covill, 14 Barb. 242; and see 1 Duer, 390. To the contrary, Coor v. Grace, 10 Smedes & M. (Miss.) 434; and see 4 Q. B. 182. And in such case it has been held that parol evidence that the transaction was a loan is inadmissable. Waite v. Dimick, 10 Allen, 364. See 1 N. Y. R. S. 738, § 139.

[5] Thorington v. Smith, CHASE, Ch. J., 8 Wall. 1.

[6] As to what kind of evidence of intention would suffice, see Confederate Note Case, 19 Wall. 548, 559. Proof of promise to pay in Indian currency, no variance, under declaration alleging promise to pay in lawful money of Great Britain. Harrington v. MacMorris, 5 Taunt. 228. See, as to valuation, Story Confl. of L. § 310; Rice v. Ontario Steamboat Co. 56 Barb. 384; Gunther v. Colin, 3 Daly, 125; Colton v. Dunham, 2 Paige, 267; Stranaghan v. Youman, 65 Barb. 392; R. S. of U. S. §§ 3564, 3565; Schmidt v. Herfurth, 5 Robt. 124.

[7] As to distinction between loan and gift, see Hick v. Keats, 4 B. & C. 71; Hill v. Wilson, L. R. 8 Ch. 888, and p. 151–155 of this vol.

[8] Dowling v. Dowling, 10 Ir. C. L. 236; Darling v. Westmoreland, 52 N. H. 401, s. c. 13 Am. R. 55, and cases cited. Whether the alleged borrower may support his denial by proof that he had no need to borrow is disputed; but where he has been allowed to do so, the other party may rebut it. Thus where defendant testified he had no need to borrow, he had received money from A., proof that, on the contrary, after the alleged loan he remitted money to A. is competent. Stolp v. Blair, 68 Ill. 541. On the question whether the money used to pay off an incumbrance on defendant's property was lent to him or to the person who assumed to act as his agent in receiving and applying it, defendant may prove that, as between them the debt was the debt of such agent. Henry v. Wilkes, 31 N. Y. 562.

whether the loan was made to the defendant or another person, evidence of the insolvency or poverty of the defendant is not competent for the purpose of showing that the credit was probably not given to him,[1] unless it appears that something passed between the parties on the subject of pecuniary responsibility.[2] Where, however, such evidence has been admitted as a circumstance tending to show that he borrowed it, is competent for him to show in rebuttal that he borrowed for his wants from another person.[3] Evidence of the defendant's declarations at about the time of the transaction, as to his pecuniary affairs, are not admissable;[4] nor is the fact that he made no entry in his books.[5]

22. *Illegality.*]—To defeat the action on the ground that the loan was made in execution or in furtherance of an illegal purpose, it is not enough to show that the lender knew of an illegal purpose of the borrower in respect to the application of the money when borrowed, unless the lender shared the intent.[6] For the purpose of establishing such intent, parol evidence is competent in contradiction or variance of a writing.[7]

The borrower's abandonment of the purpose, without any change or act on the part of the lender, does not render the illegal loan valid so that the lender can recover.[8] Where the loan was made by transferring a thing in action, founded on a consideration illegal or contrary to public policy as between the original parties, or a fund which was the proceeds of an illegal transaction in which the borrower and the lender were previously engaged, the plaintiff may nevertheless recover, if the loan was a new transaction the assent to which did not involve assent to the previous illegal contract.[9]

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[1] See chapter on Money Paid. To make an exception on this point available it should be specific. 61 N. Y. 630.

[2] Second Nat'l Bank v. Miller, 2 N. Y. S. Ct. (T. & C.) 107; and see 63 N. Y. 639; Green v. Disbrow, 56 N. Y. 336, rev'g 7 Lans. 381.

[3] Burlew v. Hubbell, 1 Supm. Ct. (T. & C.) 235.

[4] Douglass v. Mitchell, 35 Penn. St. 440, 415.

[5] Id.

[6] Bond v. Perkins, 4 Heisk. (Tenn.) 364; and see Gregory v. Wilson, 36 N. J. 315, s. c. 13 Am. R. 448; Earl v. Clute, 2 Abb. Ct. App. Dec. 1.

[7] 1 Greenl. Ev. 330, note.

[8] Kingsbury v. Fleming, 66 N. C. 524.

[9] Wintermute v. Stinson, 16 Minn. 468; Hamilton v. Canfield, 2 Hall, 526; Planters' Bank v. Union Bank, 16 Wall. 483; and see Brooks v. Martin, 2 Wall. 81.

CHAPTER XIII.

MONEY PAID TO DEFENDANT'S USE.

1. Grounds of action.
2. Previous request or previous promise to reimburse.
3. Parol evidence to vary a writing.
4. Subsequent promise to reimburse.
5. Agent's action against principal.
6. Obligation to pay what defendant ought rather to have paid.
7. Surety's action against principal or co-surety.
8. Implied promise to indemnify.
9. Action between parties to negotiable paper.
10. Proof of payment.
11. — by oral evidence.
12. — by producing defendant's order in favor of third person.
13. — by plaintiff's checks or accounts.
14. — by the payee's receipt, or surrender of evidence of debt.
15. Judgment against plaintiff in action of which defendant had notice.
16. Medium of payment.
17. Amount.
18. Source of the fund paid.
19. Object and application of the payment.
20. Demand and notice.
21. *Defences.*

1. *Grounds of action.*[1]]—Plaintiff must show his payment[2] of money or its representative, to the use of defendant; and an express or implied assent on the part of defendant to the making of the payment;[3] which is usually proved by either (1) a previous request, or (2) a subsequent promise to reimburse, or (3) legal compulsion on plaintiff to pay what defendant ought to have paid, or (4) other circumstances showing that he did not officiously volunteer, but was justified in making the payment without express assent; and then the law is said to imply a request or promise.[4]

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[1] The action was often resorted to at common law, as a substitute for a bill in equity, and was encouraged wherever equity would compel defendant to repay to plaintiff money the latter had been compelled to pay for his benefit. Chan. Walworth, Wright v. Butler, 6 Wend. 290.

[2] Under a complaint for money paid, evidence to charge defendant as indorser or guarantor cannot be received. Cottrell v. Conklin, 4 Duer, 45.

[3] Thus, if an officer holding process against a defendant, voluntarily pays it himself, he cannot recover the amount from defendant (Jones v. Wilson, 8 Johns. 434; Beach v. Vandenburgh, 10 Id. 361); but, if he pays it at the request of the defendant, he may recover it. Leonard v. Ware, 4 N. J. L. (1 South.) 150; Moseley v. Boush, 4 Rand. (Va.) 392.

[4] For instance, a party met to dine at a tavern, and after dinner all but one left without paying, whereupon he paid for all, and he was allowed to recover. 8 East, 614. So where a wife dies in the absence of her husband, one who humanely pays the necessary funeral expenses may recover them of the husband. Bradshaw v. Beard, 12 C. B. N. S. 344, and cases cited. See, also, Exall v. Partridge and England v. Marsden, paragraph 6, note 1. The rule forbidding recovery by an officious volunteer has lost much of its intended efficacy to prevent one man from constituting another his debtor without the latter's consent, since, in most cases of pre-existing liability, one may now take an assignment and sue as assignee. In that case the action will not be for *money paid*, but on the original demand. The rule still applies (1) where the demand was not assigned but satisfied, (2) where it was not assignable in its nature, (3) where it was contracted or created only by plaintiff's act. Where

If the facts which thus raise an implied request or promise are alleged, an allegation of the request or promise is not necessary.[1]

2. *Previous Request, or previous Promise to Reimburse.*]—It is not necessary to prove that the request or promise was formally expressed; it may be inferred from circumstances,[2] and the relation of the parties (principal and agent, for instance)[3] often supplies the place of a specific request.

If the request or promise was made by a third person, there must be something to show that he was authorized to bind the defendant.[4] Where several persons are associated for a common purpose, but not being partners, a request made by one to advance money for the benefit of all is enough, if there be circumstances from which his agency for the others may be inferred.[5]

Where a previous request is proved, it is not necessary to prove that the payment was beneficial to the defendant; he is equally liable whether it discharged a debt of his or constituted a loan or gift to a third person.[6] The evidence must bring the payment within the scope of the request.[7]

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the demand was assignable, and the evidences of it were delivered up to plaintiff, an assignment may be presumed, in furtherance of justice, if there was any privity between plaintiff and defendant. See p. 2 of this vol.; and, for instances, Duffy v. Duncan, 32 Barb. 587; Mills v. Watson, 1 Sweeny, 374.

[1] Farron v. Sherwood, 19 N. Y. 227; Cobb v. Charter, 32 Conn. 358; Pomeroy on Rem. § 517, &c., and cases cited.

[2] Thus, where the plaintiff accompanied the defendant when the latter was making a purchase, and said in his presence, to the shopkeeper, "if he does not pay for it I will," and defendant was silent, it was held that, although the promise was void for not being in writing, yet plaintiff having paid, as in honor bound, on defendant's default, his payment might be deemed made at defendant's request. Alexander v. Vane, 1 M. & W. 511.

[3] Paragraph 5.

[4] Burdick v. Glass Co. 11 Vt. 19; McElroy v. Melear, 7 Coldw. (T.) 140; Martin v. Peters, 4 Robt. 434. See last chapter.

[5] Whether the mere relation of joint contractors in an enterprise is enough to make the request of one support an action for money paid for all is not agreed. Tradesman's Bank v. Astor, 11 Wend. 87; Porter v. McClure, 15 Id. 191; Chrisman v. Long, 1 Ind. 212; and see Bassford v. Brown, 22 Me. 9; Moss v. Jerome, 10 Bosw. 220. The true principle seems to be that among persons who have consented to share a common responsibility, there is *prima facie* authority in each from each other to discharge the common burden. Add. on Contr. Bk. 2, ch. 8, § 2. The distinction is between authority to incur liability—which is not presumed—and authority to discharge any liability duly assumed. See pp. 188 and 189 of this vol. and notes. Thus, where several persons *jointly* employ attorney or counsel (Edger v. Knapp, 6 Scott N. R. 713), or agree on an arbitrator without fixing the liability for expenses, and one pays the expenses in order to take up the award, he may recover one half. Marsack v. Webber, 6 Hurls. & N. 1.

[6] Brittain v. Lloyd, 14 M. & W. 762; Emery v. Hobson, 62 Me. 578, s. c. 16 Am. R. 513. But if the payment was solely for the benefit of the plaintiff himself, as where A. promised B. to share the costs of a suit on behalf of B. if B. would bring it, and it did not appear that A. could have had any interest in the result,—*Held*, that B. could not recover on the promise without proof that his bringing the suit was induced by the promise. Knox v. Martin, 8 N. H. 154.

[7] Thus to charge defendant on a promise to pay what may be needed for the support of a minor, beyond his wages, there must be proof that he needed the money paid. Merritt v. Seaman, 6 N. Y. 168.

3. *Parol evidence to vary a writing.*]—If the plaintiff proves a written contract with defendant, which expressly or in effect required plaintiff to bear the expense in question, plaintiff cannot prove a parol agreement made at the same time, that the defendant would pay it;[1] but he may prove such an agreement made prior to the written obligation, unless it be such as was merged in the latter.[2] So he may prove a parol request or promise not contradicting or varying the legal effect of the instrument, though it formed the consideration,[3] or a usage which adds another term to the agreement.[4] In other words, the entire agreement may be proved, notwithstanding a part of it was reduced to writing.[5] So he may prove a parol request or promise made as a condition of delivering the instrument.[6] Where an express promise is proved, the fact that, at the time of making it, the parties agreed to reduce it to writing, but never did so, does not defeat the action.[7]

4. *Subsequent Promise to reimburse.*]—Where the plaintiff's payment was wholly voluntary or officious, he may recover on proof of a promise[8] to reimburse, founded on sufficient consideration. There is sufficient consideration within this rule, if the precedent payment was beneficial to defendant,[9] or if it discharged a legal obligation against him, or if it discharged what the law recognizes as a moral obligation.[10] It is not essential to

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[1] Thus where builders, in order to complete work they had contracted in writing to do, paid a license fee, held that they could not give parol evidence of a contemporaneous promise of the employer to pay it. They must perform their written contract. If they were not bound to make the payment, they would be justified in ceasing work because of his neglect to pay it. Thorp v. Ross, 4 Abb. Ct. App. Dec. 416, WOODRUFF, J.

[2] Thus one of several jointly bound, or one of several co-sureties, suing another for indemnity, may prove a parol agreement made at or prior to their written obligation, that defendant would indemnify him. Barry v. Ransom, 12 N. Y. 462; Robison v. Lyle, 10 Barb. 512.

[3] See Unger v. Jacobs, 7 Hun, 220, and cases cited.

[4] See, for this principle, Broom's Phil. of the Law, 83, &c., and cases cited; Seago v. Deane, 4 Bing. 459.

[5] See Hope v. Balen, 58 N. Y. 380, aff'g 35 Super. Ct. (J. & S.) 458. Compare Johnson v. Oppenheim, 55 N. Y. 280, aff'g 35 Super. Ct. (J. & S.) 440; Brewers' Fire Ins. Co. v. Burger, 10 Hun, 58, and cases cited.

[6] See Remington v. Palmer, 62 N. Y. 31, rev'g 1 Hun, 619, s. c. 4 Supm. Ct. (T. & C.) 696.

[7] Stover v. Flack, 30 N. Y. 64.

[8] An express promise, made not to the plaintiff, but to another person who was privy to the transaction, is enough. Hassinger v. Solms, 5 S. & R. 4. But a mere admission to a stranger is not.

[9] Thus if one by mistake pays his neighbor's tax, this is a good consideration for a promise by the latter to repay. Nixon v. Jenkins, 1 Hilt. 318; but plaintiff must prove a legal tax. Weinberger v. Fauerbach, 14 Abb. Pr. N. S. 91. The defendant's promise to repay one who volunteered to pay an execution may be implied from the defendant's insisting on the payment as satisfaction, and having the execution quashed in consequence. Roundtree v. Holloway, 13 Ala. N. S. 357.

[10] As to what constitutes a moral obligation, see Goulding v. Davidson, 26 N. Y. 604, rev'g 28 Barb. 438, and cases cited; Freeman v. Robinson, 9 Vroom, 383, s. c. 20 Am. R. 399. If the original consideration was beneficial, and plaintiff was le-

show an express promise, except where the only consideration was a moral obligation; but the promise may be inferred by the jury from an account rendered to which no objection was made.[1] A promise made by one of several former partners after dissolution is not enough as against the others.[2] In the case of joint debtors not partners, a promise by one is not enough as against the others to revive a legal obligation once barred.[3]

5. *Agent's action against principal.*]—A request or agency is not presumed from the mere fact that plaintiff paid defendant's debt;[4] and agency being shown,[5] the agent must show payments pursuant to his instructions or within his authority. In an action for money paid he cannot recover for property bought by himself as his own, and afterward transferred to account of his principal.[6] On the question whether the act of the agent was done

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gally liable to pay, defendant's subsequent promise to repay will sustain an action, although it was made after he had once been wholly exonerated. Hassinger v. Solms, 5 S. & R. 4.

[1] See Quincey v. White, 63 N. Y. 370, and cases cited; Coe v. Hutton, 1 Serg. & R. 398; McLellan v. Longfellow, 34 Me. 552.

[2] Baker v. Stackpoole, 9 Cow. 420; Van Keuren v. Parmelee, 2 N. Y. 523; McElroy v. Melear, 7 Coldw. (T.) 140. But see for authorities *contra*, p. 219 of this vol.

[3] Lewis v. Woodworth, 2 N. Y. 512. Whether it is enough in any other case, see p. 189 of this vol.

[4] Stephens v. Broadnax, 5 Ala. N. S. 258.

[5] As to how far circumstantial evidence of agency is competent,—see Richards v. Millard, 56 N. Y. 574, rev'g 1 Supm Ct. (T. & C.) 247. The agency, though it be in the purchase of land, may be proved by parol. Baker v. Wainwright, 36 Md. 336. Compare Levy v. Brush, 45 N. Y. 589, rev'g 8 Abb. Pr. N. S. 418. The fact that plaintiff acted as ship's husband is sufficient *prima facie* evidence of his appointment; and if an owner relies on his refusal to be answerable for expenses incurred, he must show that his notice was given before the work was commenced. Chappell v. Bray, 6 H. & N. 145.

[6] Field v. Syms, 2 Robt. 35, s. p. Beck v. Ferrara, 19 Mo. 30. Not even on proof of a usage of his trade to do so, not shown to be known to defendant. Day v. Holmes, 103 Mass. 306.

According to Hoy v. Reade, 1 Sweeny, 626, an agent employed to purchase goods, and suing to recover his advances and charges, makes a *prima facie* case by proof of a purchase pursuant to principal's direction, the amount expended therefor, and the disbursements, charges and commissions, and that the same were necessary and usual; and if, before action brought by the agent, he has wrongfully converted the goods purchased, such conversion does not defeat the action, unless the principal, if he still remain the owner of the property, counter-claims the value. According to the opinion of MILLER, J., in Rosenstock v. Tormey, 32 Md. 169, s. c. 3 Am. R. 125, in a stockbroker's action to recover deficiency on resale by him, on his principal's default, of stock bought on his order, plaintiff must prove actual purchase and notice to defendant thereof given at a time when he or his agents had the stock or the proper *indicia* of title actually in hand and ready to be delivered; and that, upon such notice and request for payment of price and commissions, the defendant did not pay for the stock, and that, after reasonable time and giving notice of intent to resell, the stock was actually sold, either at public auction or at a sale publicly and fairly made at the stock exchange or board where such stocks were usually sold, at its fair market price on the day of sale. It is not necessary to prove a tender, nor to prove a resale at a *public* stock board [citing 25 Md. 242]; but while evidence of the usage of dealers in stocks is admissible, (if the broker was not limited to a specified authority,) to show the manner in which the order may be performed, it is not admissible to set up against one not shown to be cognizant of the usage, a usage

in good faith in pursuance of his supposed duty, the information and advice upon which he acted is competent as part of the *res gestæ*.[1] For the purpose of showing the manner of executing the defendant's order, the plaintiff's instructions to those by whom he carried it out, his letters to a sub agent &c., are competent in his own favor as part of the *res gestæ*.[2] If it is shown that he acted in good faith, supposing that he was acting under the instructions and for the interest of his principal, the latter, if he received the benefit of the transaction, must show that, when he was informed of the act, he gave notice of his repudiation of it within a reasonable time.[3] What is a reasonable time is a question for the court, if the facts are undisputed; but if the evidence is conflicting, it is a mixed question of law and fact, and the court should instruct the jury upon the several hypotheses insisted on by the parties.[4] Costs and expenses for which the agent has been held liable to third persons, when acting in good faith and without fault, on behalf of his principal, he may pay and recover from the latter without proof of a special request or authority to pay them.[5] The fact of advances having been shown, an account rendered by plaintiff to the defendant stating their amount, and not objected to by the defendant, is *prima facie* evidence of the amount,[6] and throws on defendant the burden of proving that the advances were less or the fund on hand greater.[7]

6. *Obligation to pay what defendant ought rather to have paid.*]—Neither a previous request to pay, nor a subsequent promise to reimburse, need be proved, where plaintiff shows

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which the law deems unreasonable; *e. g.*, a fictitious purchase or sale. Id. The plaintiff need not show affirmatively that those from whom he purchased were actually in possession of the stock at the time of the purchase, in order to prevent the stockjobbing act from rendering the contract void. Genin v. Isaacson, 6 N. Y. Leg. Obs. 213.

[1] See Law v. Cross, 1 Black, 533, 539.

[2] Rosenstock v. Tormey, 32 Md. 169, s. c. 3 Am. R. 131. But his sub-agent's letters to him are not competent primary evidence of the making the purchase. Id. Compare, however, Beaver v. Taylor, 1 Wall. 637; and see 3 Wall. 149; Kahl v. Jansen, 4 Taunt. 565: Fairlie v. Hastings, 10 Ves. 128; Betham v. Benson, 1 Gow. 45; Langhorn v. Allnutt, 4 Taunt. 511.

[3] Law v. Cross, 1 Black, 533; Hoyt v. Thompson, 19 N. Y. 218.

[4] Wiggins v. Burkham, 10 Wall. 129.

[5] Stocking v. Sage, 1 Day, 522, SWIFT, Ch. J.; Powell v. Trustees of Newburgh, 19 Johns. 284, SPENCER, Ch. J.; and see Douglas v. Moody, 9 Mass. 548. If the liability arose by reason of the agent's mistake of law and consequent error in duty in a matter which the employer properly trusted to him, he cannot recover. Capp v. Topham, 6 East, 392. Otherwise if it was imposed by law on him, and it was by his delay that the principal became directly liable. Hales v. Freeman, 4 Moore, 21; Rate v. Payne, 13 Ad. & E. N. S. (Q. B.) 900.

[6] Mertens v. Nottebohms, 4 Gratt. (Va.) 163, 168, 173. So an account of sales made, and rendered to one of the parties to a joint adventure, by the consignee and common agent of both parties to sell, is admissible in the action of the former against the other party, for money paid, to prove the loss. Peltier v. Sewall, 12 Wend. 386.

[7] Ledoux v. Porche, 12 Rob. 543.

that, either by compulsion of law, or to relieve himself from liability, or to protect himself from damage, he has been obliged to pay what defendant himself ought to have paid.[1] The most common instances of this kind are where a surety or one entitled to indemnity[2] pays the obligation of the defendant and sues for reimbursement, or where one of several joint obligors, having paid the whole debt, sues his co-obligors for contribution. In this class of cases, the fact that plaintiff was legally required to pay defendant's debt, stands in the place of request or promise. But it is not enough to prove that plaintiff paid under the mistaken supposition that he was legally liable.[3]

7. *Surety's action against principal or co-surety.*]—If the instrument in which several persons are bound to another describes some of them as sureties for others, or if the signatures of some state that they are sureties for others, this is *prima facie* evidence, as between the obligors, of their relation.[4] If the signature of one does not indicate for which of several signing absolutely he is a surety, it may be presumed, in the absence of other evidence, either in the tenor of the instrument or in the extrinsic circumstances, that he was surety for all previously signing.[5] But between the parties who are either principals or sureties, the question of suretyship in a written instrument is open to parol proof.[6] Such evidence does not vary the instrument, but is collateral to it, simply showing the relation of the parties.[7] Hence,

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[1] Bailey v. Bussing, 28 Conn. 455. The leading case on the general principle is Exall v. Partridge, 8 T. R. 314. There plaintiff, at defendant's request, left his coach in defendant's possession, and while there it was lawfully distrained by defendant's landlord for non-payment of rent, and plaintiff paid the rent to secure his carriage, and recovered it of defendant. But in England v. Marsden, L. R. 1 C. P. 529, the owner of furniture, for his own advantage in letting it, left it on the defendant's premises, and it was distrained in the same manner. *Held*, that his payment of the rent was not compulsory within the rule. So, where a part owner of lands is obliged to pay the tax on the whole, to protect his share, he may recover from the other owners their just proportion, without showing any assent on their part. Graham v. Dunnigan, 2 Bosw. 516; but if the tax collector pays a man's tax, he cannot recover it without some evidence of the assent of the latter. Overseers of Wallkill v. Overseers of Mamakating, 14 Johns. 87.

[2] If there is a written obligation to indemnify, the action will usually be upon that, and not an action merely for money paid to defendant's use.

[3] Bancroft v. Abbott, 3 Allen (Mass.) 524; Whiting v. Aldrich, 117 Mass. 582. But one who, under the mistaken supposition that he is a trustee, pays money for the estate, may be entitled to reimbursement. Morrison v. Bowman, 29 Cal. 337. And one who by mistake or ignorantly pays defendant's debt, may recover it, if defendant had notice and suffered it to be done. Ely v. Norton, 2 Abb. Ct. App. Dec. 19.

[4] Harris v. Warner, 13 Wend. 400.

[5] See Sisson v. Barrett, 6 Barb. 199, 2 N. Y. 406.

[6] Sisson v. Barrett, 6 Barb. 200, 2 N. Y. 406.

[7] Blake v. Cole, 22 Pick. 97; Barry v. Ramson, 12 N. Y. 462; Apgar v. Hiler, 4 Zabr. 812; Hubbard v. Gurney, 64 N. Y. 457, and see 11 Moak's Eng. R. 41, n.; Monson v. Blakely, 40 Conn. 552, s. c. 16 Am. R. 94. The reason of the rule forbidding parol evidence to vary a writing,—viz.: that the parties may be presumed to have embodied all the terms of their contract in the writing,—cannot justly apply

parol evidence is competent to show that one who signed without qualification was in fact surety, and for whom;[1] and that one who signed with qualification was in fact a principal;[2] and that one who signed as surety generally was a co-surety with one who signed without qualification,[3] or that he signed under promise of indemnity.[4] Such evidence is admissible alike in support of an action by one claiming to be surety, for reimbursement; or by one claiming to be co-surety, for contribution; and in defense of one sued as principal, for contribution, and claiming to be surety; or sued as co-surety, and claiming to be indemnified.[5] The promise to indemnify may be proved by parol, for it is not a promise to answer for the debt, &c., of a third person, within the meaning of statute of frauds.[6] For this purpose evidence of declarations made either at the time of negotiating the loan, or at the time of signing the obligation are equally competent as part of the *res gestæ*.[7] It is not enough for a surety to show that he became surety voluntarily without the request or assent of the alleged principal.[8] Evidence of defendant's admission that plaintiff was his surety is competent; but to charge several defendants (not partners), such admission or declaration of one made in the absence of the others is not competent against the others, unless there is something to show that the declarant had authority to speak for them.[9]

When the relation of suretyship or of co-suretyship is shown, the law implies the promise to reimburse[10] or to contribute.[11] A co-surety may recover full indemnity, but not without proof of

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to the arrangements between several parties upon one side as to how they will bear the resulting liability, as among themselves, unless the contract manifest an intention to define their relations toward each other.

[1] Robison v. Lyle, 10 Barb. 512, HARRIS, J.; Mohawk & Hudson R. R. Co. Co. v. Costigan, 2 Sandf. Ch. 306.

[2] Robson v. Lyle (above); see also Sisson v. Barrett, 6 Barb. 199.

[3] Sisson v. Barrett (above).

[4] Barry v. Ransom, 12 N. Y. 462.

[5] Same cases.

[6] Barry v. Ransom, 12 N. Y. 462; Horn v. Bray, 51 Ind. 555, s. c. 19 Am. R. 742, and cases cited. *Contra*, Bissig v. Britton, 59 Mo. 204, s. c. 21 Am. R. 379. So, an agreement between two separate indorsers that if one will pay in goods the other will reimburse him, may be proved by parol. Sanders v. Gillespie, 59 N. Y. 250; affi'g 64 Barb. 628.

[7] Robison v. Lyle, 10 Barb. 512, HARRIS, J., 1851; s. p. 12 N. Y. 462, DENIO, J.

[8] Gager v. Babcock, 48 N. Y. 154; McPherson v. Meek, 30 Mo. 345; Carter v. Black, 4 Dev. & B. L. 425. But tacit assent is enough. Alexander v. Vane, 1 M. & W. 511. The requirement of the law that a creditor should give security for the support of a debtor imprisoned on his execution, if the debtor make oath of his own inability, has been held sufficient to enable a creditor, paying pursuant to security so given, to recover of the debtor. Plummer v. Sherman, 29 Me. 555.

[9] Warner v. Price, 3 Wend. 397, and see p. 188 of this vol.

[10] Holmes v. Weed, 19 Barb. 128; Vartie v. Underwood, 18 Id. 561. If there are several principals, the liability of either to the surety is not qualified by evidence that, as between the principals, the one was not liable for the whole debt. Westcott v. King, 14 Barb. 32.

[11] Norton v. Coons, 3 Den. 130, and cases cited.

an agreement,[1] or a request and benefit raising an equity which, under the circumstances, is equivalent.[2] Mere evidence that plaintiff became co-surety at defendant's request is not enough.[3]

It is enough for the surety to prove that his payment was under a fixed legal liability; he need not prove legal compulsion to pay, as by suit brought;[4] nor need he show, to charge a co-surety for contribution, that the principal is unable to pay.[5] The implied promise may be rebutted by circumstances.[6] The mere fact that the defendant became surety at the request of plaintiff is not, however, sufficient to rebut the presumption of a promise to contribute;[7] nor is the fact that he did not sign till a long time after the other parties were bound;[8] but evidence that that the plaintiff, upon requesting the defendant to join, expressly promised to indemnify him,[9] or that he should be put to no loss,[10] or evidence that plaintiff received a personal benefit from the execution of the obligation, as where the money raised went into his hands,[11] is sufficient to exonerate the defendant from liability to contribute.

8. *Implied promise to indemnify.*]—If plaintiff incurred the liability by innocently complying with the request or direction of the defendant, (whether he was the agent[12] of defendant, or not[13]), in an act which would have been lawful if plaintiff had the right or authority which he claimed or assumed, the law implies a promise on defendant's part to indemnify plaintiff. No such promise is implied when plaintiff knew the act was illegal.[14] Where the wrong done consisted in negligence merely, plaintiff, who has been obliged to pay, may recover, on proof that, as between him and defendant, the latter was the one actually negligent, and the former only constructively liable therefor.[15] In either class of cases, the judgment against plaintiff and defendant, holding them jointly liable to the third person, and which

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[1] McKee v. Campbell, 27 Mich. 497.

[2] See Daniel v. Ballard, 2 Dana (Ky.) 296.

[3] McKee v. Campbell (above). *Contra*, see Byers v. McClanahan, 6 Gill. & T. 499.

[4] Mauri v. Heffernan, 13 Johns. 58; compare Stone v. Hooker, 9 Cow. 154.

[5] Goodall v. Wentworth, 20 Me. 322. *Contra*, Atkinson v. Stewart, 2 B. Monr. 348.

[6] Bagott v. Mullen, 32 Ind. 332, s. c. 2 Am. R. 351.

[7] Id. (disapproving Chit. on Cont. 669, and see note 10, on p. 255, of this vol.

[8] In this case, eight months. McNeil v. Sandford, 3 B. Monr. (Ky.) 11.

[9] Thomas v. Cook, 8 B. & C. 728; Cutter v. Emery, 37 N. H. 567. See Garner v. Hudgins, 46 Mo. 399, s. c. 2 Am. R. 520.

[10] Apgar v. Hiler, 4 Zabr. 812.

[11] Daniel v. Ballard, 2 Dana (Ky.) 296, s. p. 21 Pick. 196, 32 Ind. 332, s. c. 2 Am. R. 355.

[12] Howe v. Buffalo, &c. R. R. Co. 37 N. Y. 297, affi'g 38 Barb. 124.

[13] Dugdale v. Lovering, L. R. 10 C. P. 196, s. c. 12 Moak's Eng. R. 316.

[14] Peck v. Ellis, 2 Johns. Ch. 131; Miller v. Fenton, 11 Paige, 18.

[15] Gray v. Boston Gas-Light Co. 114 Mass. 149, s. c. 19 Am. R. 324.

judgment plaintiff has paid, may be explained by parol evidence to show the relation of the parties to the tort.[1] If the verdict or judgment which plaintiff has paid was in an action against both, or against one and defended at his request by the other, or defended by plaintiff, after notice and request to defendant to assume its defense, it is evidence against defendant of the amount of damages.[2]

9. *Action between parties to negotiable paper.*]—An action on the bill or note is founded directly on the instrument, and a release or other discharge, though given before maturity, may bar the action.[3] But an action for money paid on it, is on a cause of action which did not arise until the payment, and which consists in the right of one paying money for the benefit of another, pursuant to his request or direction, to have it refunded;[4] and although the negotiable paper, pursuant to the terms of which the payment was made, may be part of the necessary evidence,[5] the contract sued on does not inhere in the paper, but exists outside of it; and variance in the description of the paper is but of trifling importance.[6] Presumptively the right to claim re-imbursement arises in the inverse order in which the names of the parties appear on the paper.[7] The promise to re-imburse may be proved by parol, though contradictory to the apparent relation arising from the paper; as where an accommodation maker sues the payee,[8] or an accommodation acceptor sues the drawer.[9] So a parol agreement made between indorsers at the time of indorsing, that they will share any liability thereon, may be proved, to support an action by one against the other for contribution. Proof that an acceptance was made without funds rebuts this presumption arising from the order of names on the paper, and raises the presumption of such a promise by the drawer to re-imburse. This latter presumption again is rebutted by evidence that the acceptance was by express agreement for accommodation

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[1] Bailey v. Bussing, 28 Conn. 455; Armstrong County v. Clarion County, 66 Penn. St. 218, s. c. 5 Am. R. 368.

[2] See Inhabitants of Westfield v. Mayo, 122 Mass. 100, s. c. 23 Am. R. 292; Grand Trunk Rw. Co. v. Latham, 63 Me. 177.

[3] Cuyler v. Cuyler, 2 Johns. 186.

[4] Wright v. Garlinghouse, 26 N. Y. 539.

[5] Id.

[6] Cameron v. Warbritton, 9 Ind. 351.

[7] Watson v. Shuttleworth, 53 Barb. 357; Sweet v. McAllister, 4 Allen, 353.

[8] Seymour v. Minturn, 17 Johns. 175.

[9] Wright v. Garlinghouse (above); Ross v. Espy, 66 Penn. St. 481, s. c. 5 Am. R. 394; Phillips v. Preston, 5 How. U. S. 278. But such a parol agreement between maker and indorser is not competent for the purpose of showing that the indorser is not entitled to recover against the maker, if the indorser was under no legal obligation for the consideration, and refused to contract except in that form. Crater v. Binninger, 45 N. Y. 545, affi'g 54 Barb. 155. To charge one who signed as surety for the drawer, there must be some evidence that he was a party to the request to accept for accommodation. Wright v. Garlinghouse, 26 N. Y. 539, rev'g 27 Barb. 474.

of the payees, or other parties who were to be looked to for payment. It is only in the absence of an express agreement that the law implies a promise on the part of the drawer.[1] In the action for money paid, evidence of demand and notice of non-payment is necessary to charge the defendant if it would have been necessary in an action against him by the same plaintiff directly upon the bill or note itself;[2] otherwise not. But a judgment recovered by a former holder against the defendant is competent evidence from which to infer that he had notice.[3]

10. *Proof of Payment*]—To sustain this action (as distinguished from an action on a contract to indemnify from liability, &c.), actual payment must be shown.[4] Proof of the mere incurring of liability is not sufficient,[5] even as to incidental items,[6] nor is it made sufficient by the fact that the creditor accepted the plaintiff's obligation in discharge of the defendant's liability,[7] unless the new obligation was negotiable paper.[8]

11. — *by oral evidence.*]—A witness of the fact of payment may testify to it, and, if an actor in the transaction, to the purpose and object of it, under the same restrictions as in the case of a loan.[9] But he must speak from his knowledge of the transaction, not from that subsequently derived from receipts or other memoranda.[10] But memoranda of payment, made by the witness at or presently after the time, may be used by him in testifying, and thereupon put in evidence.[11] If it be proved that a receipt was given, it need not (unless the receipt of a public officer) be produced or accounted for in order to let in oral evidence of the fact of payment,[12] unless its terms become material. Evidence of the oral admissions or declarations of the payee is not competent against the defendant,[13] unless there is something to connect the

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[1] Thurman v. Van Brunt, 19 Barb. 410, HARRIS, J.

[2] Wilbur v. Selden, 6 Cow. 162.

[3] Hamilton v. Veach, 19 Iowa, 419. Even though plaintiff was not a party to the action in which the judgment was had. Keeler v. Bartine, 12 Wend. 110. Compare Beck v. Hunter, 3 La. Ann. 641.

[4] But under an agreement to pay personal expenses on a journey, such expenses as he avoided by means of facilities personal to himself, may be proved. Moore v. Remington, 34 Barb. 427.

[5] Ainslie v. Wilson, 7 Cow. 662.

[6] Whiting v. Aldrich, 117 Mass. 582.

[7] The giving of a bond, though accepted in satisfaction, is not enough (Maxwell v. Jameson, 2 B. & Ald. 51, and cases cited; Cumming v. Hackley, 8 Johns. 202; Ainslie v. Wilson, 7 Cow. 662); nor is a bond and warrant of attorney (Taylor v. Higgins, 3 East, 169); nor indorsing a bill given to make a compromise and release defendant's property (Douglas v. Moody, 9 Mass. 543); nor even the fact that plaintiff has been charged in execution (Powell v. Smith, 8 Johns. 249).

[8] See p. 263 (below).

[9] Pages 240, 241 of this vol.

[10] Keith v. Mafit, 38 Ill. 303; and see Scarborough v. Reynolds, 12 Ala. 252, 263.

[11] See p. 261 (below).

[12] Berry v. Berry, 17 N. J. L. 440; Jackson v. Stackhouse, 1 Cow. 122.

[13] See Gandolfo v. Appleton, 40 N. Y. 533.

defendant with him, or with the declaration offered, or unless the declaration was part of the *res gestæ* of an act properly in evidence.[1]

12. — *by producing defendant's order in favor of third person.*]—The production from plaintiff's possession of an order or draft for the money, shown to have been executed by defendant,[2] and payable to a third person specified therein,[3] and which is shown, or may be presumed to have been previously in the possession of the payee (and this is presumed in the case of a draft or order in the common form, but not in the case of a letter or note addressed to the plaintiff), is *prima facie* evidence of payment according to its tenor by the plaintiff,[4] although it be not indorsed nor accompanied by a receipt.[5] The presumption may, however, be rebutted by evidence of facts tending to explain the possession as acquired without payment,—as, for instance, proof of a usage to leave drafts with the payee, for acceptance, in which case the question whether the plaintiff's possession is evidence of payment is one for the jury.[6] The order is not, however, evidence of payment of plaintiff's money to defendant's use, but is presumptively evidence of payment from funds of defendant inferred to be in plaintiff's hands. There must be some evidence to rebut this presumption.[7]

13. — *by plaintiff's check or accounts.*]—The same rules apply in proving payment by check, as in an action for money lent.[8] Evidence of defendant's admission, even by silence, when he was told by plaintiff that he had sent a check, is competent to go to the jury, although the payment be one not presumably within the personal knowledge of defendant, especially after great lapse of time.[9]

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[1] See p. 245, note 4.

[2] Lane v. Farmer, 13 Ark. (Eng.) 63.

[3] Zeigler v. Gray, 12 Serg. & R. 42. Compare Close v. Fields, 9 Tex. 442, 13 Id. 623, 2 Id. 232; where the same rule was applied to a draft with the payee's name in blank.

[4] Blount v. Starkey, 1 Tayl. N. C. 110, s. c. 2 Hayw. 75; Succession of Penny, 14 La. An. 194, 2 Greenl. Ev. 475, § 519.

[5] Zeigler v. Gray (above). If a receipt be indorsed, its execution should be proved, but if the omission to prove it is not objected to, the effect of the possession of the order as evidence of payment is not impaired. Weidner v. Schweigert, 9 Serg. & R. 385.

[6] Close v. Fields (above).

[7] Alvord v. Baker, 9 Wend. 323. Where it is the usual course of business for a factor to accept bills drawn by his principal and return them to him, to be used for raising money as he pleases, the factor's possession of such bills bearing the blank indorsement of the principal, is sufficient *prima facie* evidence of ownership to enable the factor to recover from the principal the money paid thereon at maturity, in the absence of proof of an unlawful diversion. Rice v. Isham, 4 Abb. Ct. App. Dec. 37.

[8] Pages 244–246 of this vol. Proof of a check drawn by plaintiff in favor of A., and paid to A., is evidence of payment, without proof that plaintiff delivered the check to A. Mountford v. Harper, 16 M. & W. 825.

[9] Price v. Burva, 6 Weekly R. 40.

14. — *by the payee's receipt or surrender of evidence of debt.*] —Where there is no evidence connecting the plaintiff's request or obligation with the particular person to whom the payment was made,—as, for instance, in the case of an agent's purchases in the market, or payments for necessaries,—the receipt or other admission of the payee is not alone competent evidence of the payment, as against defendant;[1] for the payee or other witness should be produced;[2] but it is admissible in connection with other competent evidence of the fact of payment,—such as evidence that plaintiff's check was sent to, and received by, the payee,—and that the receipt was given in consequence,[3] and as part of the transaction.[4] If the payee is not living, however, his receipt is competent, as a declaration against interest.[5] On the other hand, when the person to whom the payment is made is designated by the contract of the defendant,—as in case of an order in favor of such person,[6]—or is pointed out by law,—as in case of a payment of taxes[7] or for public lands,[8]—then the receipt of such person, its execution being duly proved, is competent evidence of the fact of payment. Hence, where the payment was in discharge of a pre-existing liability of defendant (such liability or his admission of it being of course otherwise proven), the appropriate evidence of that discharge, as between him and the payee, is competent evidence against him and in favor of the plaintiff.[9] If the debt paid subsisted in a written instrument, shown to have been in possession of the payee thereof,[10] the plaintiff's production of the instrument, with the written receipt, if any, (its execution by the payee being duly proved if required,) is competent evidence

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[1] Cutbush v. Gilbert, 4 Serg. & R. 555; Roll v. Maxwell, 5 N. J. L. (2 South.) 493. Compare Steph. Dig. Ev. 37.

[2] Printup v. Mitchell, 17 Geo. 558; Davidson v. Berthoud, 1 A. K. Marsh. (Ky.) 353.

[3] Carmarthen, &c. Rw. Co. v. Manchester, &c. Rw. Co. L. R. 8 C. P. 685; Leatherbury v. Bennett, 4 Harr. & M. 392.

[4] Davis v. Shreve, 3 Litt. (Ky.) 260; Keykendall v. Groer, 3 Coldw. (Tenn.) 463; Dunn v. Slee, Holt N. P. C. 399; Harrison v. Harrison, 9 Ala. 78.

[5] Davies v. Humphreys (6 Mees. & W. 153, s. c. 4 Jur. 250), even if plaintiff might but does not testify (Middleton v. Melton, 10 B. & C. 317, 325); and has even been held evidence of all material facts stated in it,—*e. g.*, that the debt was originally incurred for the benefit of one of the joint debtors. Davies v. Humphreys (above).

[6] Paragraph 12 (above).

[7] Hall v. Hall, 1 Mass. 101. One who sues for re-imbursement for paying by mistake an *assessment* on his neighbor's land, must give some evidence of a legal assessment (Weinberger v. Fauerbach, 14 Abb. Pr. N. S. 91); otherwise as to regular annual taxes (Bowman v. Downer, 28 Vt. 532; and see Hall v. Hall, 1 Mass. 101, where the judges were equally divided on the point).

[8] Cluggage v. Swan, 4 Binn. (Penn.) 150; and see Russell v. Whiteside, 5 Ill. (4 Scam.) 7.

[9] See Sluby v. Champlin, 4 Johns. 461. Satisfaction of a decree may be proved without producing a copy of the decree itself. Davidson v. Peck, 4 Mo. 438.

[10] Mygatt v. Pruden, 29 Geo. 43.

of payment.[1] And, in any case, the receipt given by the payee is competent evidence of the fact of payment whenever there is other evidence connecting defendant with the payee and the debt paid,—as, for instance, where defendant requested plaintiff to settle for him with a specified creditor,[2] or where the payment was of a joint obligation of both parties,[3] or a debt for which plaintiff was bound as surety.[4]

When the receipt of the payee is thus competent, it is *prima facie* sufficient evidence of payment, without producing or accounting for the the absence of the payee.

If the one who gave the receipt is produced, he may use it to refresh his memory, or to testify from, and the receipt then becomes admissible, independently of any other ground of competency, if it was made by the witness at or presently after the time of payment.[5]

15. *Judgment against plaintiff in action of which defendant had notice.*]—When the money sued for was paid, pursuant to a judgment recovered by the third person against plaintiff, the judgment is competent evidence against the defendant to prove the fact of the judgment and the sum paid. If the action was

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[1] See Jessup v. Gray, 7 Blatchf. 332; Bayne v. Stone, 4 Esp. 18; Bracken v. Miller, 4 Watts & S. 102, 112; Chandler v. Davis, 47 N. H. 462; even without plaintiff's testimony. Mills v. Watson, 1 Sweeny, 374. *Contra*, Mills v. Hyde, 19 Vt. 59. And is the best evidence, and should be produced or accounted for unless defendant has admitted the payment and expressly or tacitly promised to re-imburse it, in which case the burden may be thrown on him to prove the instrument. Chappell v. Bray, 6 H. & N. 145.

[2] Sherman v. Crosby, 11 Johns. 148; approved in 3 Wall. 148. The person to whom performance of an act is agreed to be made, is competent to acknowledge such performance. Fenner v. Lewis, 10 Johns. 38. Whether the principle stated in the text applies to receipts of firm creditors in favor of one who assumed to pay the firm debts generally, is not well settled. Newell v. Roberts, 13 Conn. 63; Scott v. Russell, 36 Geo. 484.

[3] Ballance v. Frisbie, 3 Ill. (2 Scam.) 63. *Contra*, Thomas v. Thomas, 2 J. J. Marsh. 60, 64; Ford v. Smith, 5 Cal. 314.

[4] Prather v. Johnson, 3 Harr. & J. 487; approved in 3 Wall. 149; Sluby v. Champlin and Mills v. Watson, cited above. Receipts by the holder of a note, entered on an execution issued at his suit against plaintiff as indorser, are competent to prove payment as against the maker. Garnsey v. Allen, 27 Me. 366. But a mere receipt of the sheriff is not evidence that plaintiff's payment discharged the execution against the defendant. Stone v. Porter, 4 Dana (Ky.) 207. In the case of money charged in the accounts of one acting in a trust capacity, the receipts of the payees are sufficient, especially if the payees are dead or beyond jurisdiction. Shearman v. Atkins, 4 Pick. 283; approved in 3 Wall. 148, as authority for treating them as primary evidence. The tax collector's receipts are higher evidence of the administrator's payment of taxes on the estate, than the testimony of a witness to the fact of payment. The witness's testimony is not competent if the receipts can be produced. Hall v. Hall, 1 Mass. 101. The production of the bond to the collector, on which plaintiff was surety, with the collector's receipts, are competent, and *prima facie* sufficient. Sluby v. Champlin, 4 Johns. 461.

[5] See McCormick v. Pennsylvania Central R. R. Co. 49 N. Y. 303, rev'g 3 Alb. L. J. 129; Lathrop v. Bramhall, 64 N. Y. 365; Halsey v. Sinsebugh, 15 Id. 485, 489. As to case of contemporaneous memorandum by another witness, or contemporaneous declaration of witness to supply what he has since forgotten, see Shear v. Van Dyke, 10 Hun, 528.

defended by the plaintiff,[1] the judgment is evidence of the facts on which it was founded, in the following cases, viz., if defendant was joined with plaintiff as a co-party in the action;[2] or had agreed to abide the result, or covenanted against the consequences of such an action;[3] or was primarily liable as the one for whose debt or actual default the action was brought,[4] and had notice from defendant of its pendency, and reasonable opportunity to assume the defence if he desired.[5] In these cases the judgment recovered is conclusive evidence against the present defendant, both as to the damages and costs.[6] In other cases of actions against plaintiff alone, the judgment paid, with proof of the relation of suretyship or indemnity, is competent *prima facie* evidence of the amount due from defendant,[7] although there be no provision to that effect in defendant's contract.

Since the principal is not presumptively bound by the judgment, as he was not a party to the action, the surety, to make it evidence against him, is bound to show *aliunde* that it was rendered against him upon a transaction against which the principal was bound to indemnify him.[8]

The same rules apply whether the judgment was foreign or domestic.[9]

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[1] Otherwise, of a judgment confessed, note 3 (below).

[2] Davidson v. Peck, 4 Mo. 438; Hare v. Grant, 5 Reporter, 183. Whether conclusive, see Dent v. King, 1 Geo. 200.

[3] Rapelye v. Prince, 4 Hill, 119; Bridgeport Ins. Co. v. Wilson, 34 N. Y. 275, rev'g 7 Bosw. 427; Thomas v. Hubbell, 15 N. Y. 405. Unless collusion or neglect is shown. Chapin v. Thompson, 4 Hun, 779. A variance as to the manner in which the suit was brought is immaterial. Allaire v. Ouland, 2 Johns. Cas. 52. But on a mere general promise to indemnify, without referring to suits, a judgment against the plaintiff does not alone prove defendant's liability, unless he had notice and opportunity to defend. Douglass v. Howland, 24 Wend. 35.

Where plaintiff relies merely on a contract of indemnity, and proves that he confessed judgment, the burden of proof is upon him, in his action against his indemnitor, to show that the creditor was entitled to as much as the amount confessed. And this is so, although the indemnitee has previously given notice of suit brought to his indemnitor, and the latter has neglected to defend it. Stone v. Hooker, 9 Cow. 154.

[4] Mayor, &c., of v. Troy, &c. R. R. Co. 49 N. Y. 657, affi'g 3 Lans. 270.

[5] Smith v. Compton, 3 B. & Ad. 408, approved in 34 N. Y. 275.

[6] Beers v. Pinney, 12 Wend. 309, and cases cited; Fake v. Smith, 2 Abb. Ct. App. Dec. 76; Green v. Goings, 7 Barb. 652. This rule has recently been held not to apply, where the claim for indemnity is not on contract, but on a breach of trust. Parker v. Lewis, L. R. 8 Ch. 1056, s. c. 7 Moak's Eng. 529. What is sufficient notice is not well settled. All authorities agree that reasonable notice under the circumstances is sufficient. Compare Robbins v. Chicago City, 2 Black, 418; 4 Wall. 657; Barmon v. Lithauer, 1 Abb. Ct. App. Dec. 99; Allaire v. Ouland, 2 Johns. Cas. 52. The rule is different in an action for a breach of warranty. Somers v. Schmidt, 24 Wisc. 417, s. c. 1 Am. R. 191. Whether costs of the former suit can be recovered, unless the present plaintiff proves he gave notice to the present defendant, is unsettled. De Colyar on Guar. 316; Pierce v. Williams, L. J. 23 Exch. 322; see the N. Y. Stat. of 1858, c. 314, § 3. Where one defends an action for debt, by showing voluntary payment of the amount to a sheriff holding an execution against his creditor, he must produce not only the execution and the sheriff's receipt, but also the record of the judgment. Handly v. Greene, 15 Barb. 601.

[7] Dubois v. Hermance, 56 N. Y. 673, affi'g 1 Supm. Ct. (T. & C.) 293.

[8] Konitsky v. Meyer, 49 N. Y. 571. As to successive actions, see 6 Wend. 288.

[9] Id.

Parol evidence is competent to explain the relation of the parties to the cause of action in the judgment (in a judgment either upon contract [1] or for tort [2]), for the purpose of showing that as between them defendant was primarily liable. If plaintiff paid as the surety, &c., of the defendant, in consequence of a suit against himself, but does not prove that he gave defendant notice of the suit, defendant may show that plaintiff has no claim to be re-imbursed; or not to the amount alleged; or that he made an improvident compromise and that defendant, had he received notice, might have done better.[3]

16. *Medium of payment.*]—Under the common law procedure, proof of the transfer of property, whether land, chattels, or things in action, accepted by the defendant's creditor, in payment, as money, is admissible under an allegation of money paid to defendant's use,[4] but the mere giving of one's own non-negotiable obligation to the creditor is not,[5] nor is the giving of one's own negotiable obligation, unless expressly accepted in payment,[6] or unless wrongfully obtained and actually negotiated, or wrongfully negotiated in fraud of plaintiff's rights.[7] Under the new procedure, the payment will usually be alleged as made; or if, on the trial, there be a variance in the proof, it will be a question for the court or referee, whether to disregard or amend it, or not. If the payment was of a precedent debt, and was made with negotiable paper, plaintiff may recover on showing, either[8] that the creditor expressly accepted the paper in payment,[9] or that the paper has been paid. If he proves that even his own negotiable bill or note was expressly accepted in payment of defendant's debt, he may recover against defendant without proving that such paper has been paid.[10] If the payment was by giving any other obligation binding himself to pay, he must prove payment on such obligation,[11] unless there was an express

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[1] Davidson v. Peck, 4 Mo. 438, paragraph 8 (above).

[2] Paragraph 8 (above).

[3] Smith v. Compton, 3 B. & Ad. 408. Compare 34 N. Y. 275.

[4] Randall v. Rich, 11 Mass. 494; Ainslie v. Wilson, 7 Cow. 662; Garnsey v. Allen, 27 Me. 366; Jones v. Cooke, 3 Dev. N. C. Law, 112; Ralston v. Wood, 15 Ill. 159, 171; Hulett v. Soullard, 26 Vt. 295, 298. *Contra*, Stroud v. Pierce, 6 Allen (Mass.) 413. As to value of foreign money, see p. 247. Where plaintiffs, who were agents to purchase for defendants, proved delivery of their own merchandise to defendants, instead of payment of purchase price, *held* a total failure of proof. Field v. Syms, 2 Robt. 35.

[5] Cases in note 7, paragraph 10 (above); unless perhaps, if payable to a stranger. Parker v. Osgood, 4 Gray, (Mass.) 456.

[6] Van Ostrand v. Reed, 1 Wend. 424.

[7] Bleadon v. Charles, 7 Bing. 246.

[8] See Dunnigan v. Crummey, 44 Barb. 528, and cases cited.

[9] Howe v. N. Y. & Erie R. R. Co. 37 N. Y. 297; Bennett v. Cook, 45 Id. 268; Witherby v. Mann, 11 Johns 518.

[10] Cummings v. Hackley, 8 Johns. 202. As to the presumption whether paper was accepted in payment, see 13 N. Y. 167, 46 Id. 637.

[11] And it seems that payment pursuant to such obligation, though even after suit brought would sustain the action. 9 Mass. 548, 23 Pa. St. 464.

promise of defendant, to pay him if he would incur the expense.[1]

17. *Amount.*]—It has been held that where plaintiff is compelled to pay defendant's debt, and does so by transferring property at a valuation, or any sufficient consideration other than money, which is received by the creditor as of equivalent value, defendant cannot reduce the recovery by offering evidence that the property was of less value; for it is enough for him that he was discharged by what his creditor accepted as worth the full amount of the debt.[2] But if the transaction was a compromise on payment of a less sum than was due,—especially if plaintiff stood in a relation of trust and confidence, as where he acted as defendant's agent in settling a debt, at less than its full value, or in a depreciated currency,—he can only recover the sum he actually paid; and the same rule applies to a surety.[3]

18. *Source of the fund paid.*]—A money payment shown to have been made by plaintiff will ordinarily be presumed to have heen made from his own funds; but when there is anything in the relation of the parties or the character in which plaintiff sues, to allow of doubt, he should be prepared with evidence on the point.[4] Thus, where a partner is compelled to pay a firm debt, the presumption is that he pays with firm money.[5] So, advances made by one of a committee holding funds, are not presumed to be of his own money.[6] If co-plaintiffs allege a joint payment they must show payment out of joint funds, by proof of partnership or otherwise.[7] The declaration of the person who paid the money, made at the time of paying it, as to whose fund it was, is competent in his favor, as part of the *res gestæ*.[8]

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[1] Bullock v. Lloyd, 2 Carr. & P. 119; Smith v. Pond, 11 Gray (Mass.) 254; but in this case the action was on a promise of indemnity, not for money paid.

[2] Garnsey v. Allen, 27 Me. 366. NELSON, J., was of the same opinion in Bonney v. Seeley, 2 Wend. 482; and this is clearly the sound rule, although in that case the Supreme Court held that evidence of the actual value was admissible in reduction, but in that case there does not seem to have been any other evidence of a valuation than that implied in the consideration mentioned in the deed. a. p. Ralston v. Wood, 15 Ill. 159, 171; Hulett v. Soulard, 26 Vt. 295, 298.

[3] Reed v. Morris, 2 Mylne & C. 361.

[4] In an action by plaintiff in his private capacity, he may be asked whether the loan sued for was made as his private transaction, or was his act as a receiver. Davis v. Peck, 54 Barb. 425.

[5] Hill v. Packard, 5 Wend. 375.

[6] Bassford v. Brown, 22 Me. 9.

[7] Doremus v. Selden, 19 Johns. 213; see also Coffee v. Tevis, 17 Cal. 239.

[8] Carter v. Beals, 44 N. H. 408; Bank of Woodstock v. Clark, 25 Vt. 308. In Beasley v. Watson (41 Ala. 234), a guardian's declaration that the payment was his ward's money was admitted; and see 36 Ala. 670, 10 M. & W. 572. But where plaintiff was guardian of property of infants, and administrator of their father's estate, and made advances to the widow while she was supporting the wards.—*held* that evidence that he had no funds as guardian during the period was too remote, and not competent to show that the advances were his own money. Elliott v. Gibbons, 31 N. Y. 67. Compare further p. 240 of this vol., and next chapter.

19. *Object and application of the payment.*]—Where a payment has been proved to have been made through an agent by correspondence, the letters of the agent enclosing the receipts, and the entries thereupon made by the plaintiffs in their accounts, are admissible in connection, as part of the *res gestæ*, to establish necessary dates, &c.[1] The conversation accompanying an act of payment, and characterizing it, is admissible as part of the *res gestæ*, to show the application made of it.[2] And a witness who was a party to the transaction, and was present and cognizant of the circumstances, may be asked on whose behalf the payment was made, and whether it was made in consequence of the request, and what was its purpose and intent,[3] subject, of course, to cross-examination.[4] But on the question as to whether the payment was made on the credit of defendant or another person, evidence of their relative wealth or poverty is incompetent,[5]

20. *Demand and notice.*]—Where plaintiff sues for contribution on having paid a joint debt, he need not prove that a demand was made on him before payment;[6] and where he has been sued, he need not generally prove notice of the suit to defendant, except for the purpose of making the judgment recovered against him *prima facie* or conclusive evidence of the amount of defendant's obligation, &c., and of recovering all his costs.[7]

Demand on defendant, (which should be proved where he is not in default without it,) if made solely by letter, should be

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[1] See Beaver v. Taylor, 1 Wall. 637. This case and those referred to on p. 253, must be deemed to overrule, to this extent, Jordan v. Wilkins, 3 Wash. 110.

[2] Bank v. Kennedy, 17 Wall. 19; Bank of Woodstock v. Clark, 25 Vt. 308; Allen v. Duncan, 11 Pick. 308; but not subsequent declarations as narratives of past events, made by one still living, unless they are the admission of him against whom they are adduced. Dunn v. Slee, Holt, N. P. 399. Evidence admitted thus as part of the *res gestæ* does not have the effect, if the defendant was absent, to bind him as a representation by him, unless there is other evidence of the authority of the declarant to represent him. Second Nat'l Bank v. Miller, 2 Supm. Ct. (T. & C.) 107. But it is nevertheless admissible, for the purpose simply of characterizing the act of the party present. See p. 245, note 4. When made by an alleged agent of the absent party, its effect to bind him as a declaration must depend on evidence of authority.

[3] Sweet v. Tuttle, 14 N. Y. 465; Richmondville Seminary v. McDonald, 34 Id. 379; Bank v. Kennedy (above). To the contrary see 56 N. Y. 618; 57 Id. 651.

[4] See p. 241 of this vol.

[5] Wheeler v. Packer, 4 Conn. 102; s. p. 56 N. Y. 334; rev'g 7 Lans. 381, on this point. Second National Bank v. Miller, 2 N. Y. Supm. Ct. (T. & C.) 107; s. p. Trowbridge v. Wheeler, 1 Allen (Mass.) 162. In Wheeler v. Packer, (4 Conn. 102), HOSMER, Ch. J., excludes the evidence, saying aptly "If poverty will authorize inferences concerning a person's agreement, so will wealth and avarice, and generosity and benevolence." Pollock v. Brennan, (39 Super. Ct. [J. & S.] 477,) on the question of a sale is not necessarily to the contrary, for there the question was whether a business properly belonged to the husband or wife, and the very question seems to have been, to whom did the capital belong?

[6] Pitt v. Purssford, 5 Jur. 611.

[7] See p. 262, (above). This being a collateral notice, it seems that the written notice need not be produced or accounted for, unless some question arises on its terms. See McFadden v. Kingsbury, 11 Wend. 667.

proved by notice to produce the letter, and if defendant does not comply, by giving secondary evidence of its contents.[1] A letter-press copy can only be used as secondary evidence,[2] but a duplicate original, written and signed at the same time with the one sent, is primary evidence, admissible without giving notice to produce the counterpart.[3] An independent oral demand, though made at the same time with delivery of a written one, is competent;[4] but the conversation had with the mere bearer of a written demand is not competent without producing or accounting for the writing.[5] An account in plaintiff's handwriting, produced from defendant's possession,[6] or otherwise shown to have been presented to him, is competent to go to the jury; and, with the omission to make any objection, is *prima facie* evidence of the correctness of the items as to amount, &c.[7] If defendant's oral admissions are adduced in evidence, he is entitled to have the whole statement taken together, to the extent of all that was said by the same person in the same conversation that would in any way qualify or explain the part adduced against him, or tend to destroy or modify the use which the adversary might otherwise make of it, but no further.[8] But the jury may discredit the connected denial, while giving credit to the admission.[9] The fact that he questioned part of the items only, strengthens the presumption that others are correct.[10] His objecting to the whole account on other grounds, explains the omission of any objection to the correctness of items, sufficiently to deprive it of the effect of an admission.[11]

21. *Defenses.*]—If plaintiff proves a request to pay a particular demand, is no defence that the demand was not legally due, as for instance where it was a void assessment. or even a contract usurious on its face;[12] but illegality, such that the act of paying was illegal, must be shown.[13] Although the claim paid was not merely void but illegal, and plaintiff knew it, yet if the money was advanced on a new contract it is recoverable;[14] though it would be otherwise if plaintiff was *particeps criminis* in the original transaction.[15]

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[1] Weeks v. Lyon, 18 Barb. 530.
[2] Foot v. Bentley, 44 N. Y. 166.
[3] Hubbard v. Russell, 24 Barb. 404.
[4] Smith v. Young, 1 Campb. 439.
[5] Glenn v. Rogers, 3 Md. 312.
[6] Nichols v. Alsop, 10 Conn. 263.
[7] See chapter on ACCOUNTS STATED.
[8] Rouse v. Whited, 25 N. Y. 170, rev'g 25 Barb. 279.
[9] Craighead v. The State Bank, 1 Meigs, 199. (But not arbitrarily. 1 Abb. Ct. App. Dec. 111.)
[10] Id.
[11] Quincy v. White, 63 N. Y. 370.
[12] As to the form and effect of denials, see Simmons v. Sisson, 26 N. Y. 264.
[13] Mosely v. Boush, 4 Rand. (Va.) 302; McElroy v. Melear, 7 Coldw. (T.) 140.
[14] Armstrong v. Toler, 11 Wheat. 258.
[15] Brown v. Tarkington, 3 Wall. 381; Pitcher v. Bailey, 8 East, 171. Compare

Defendant may prove in his exoneration that the payment was from a fund plaintiff held for his indemnity;[1] and evidence that plaintiff received such a fund,[2] or was party to a proceeding in which he was entitled to it, throws on plaintiff the burden of accounting for its disposition.[3] The statute of limitations is available as to any payment, though only a part payment, not made within the six years.[4]

Knowlton v. Congress Spring Co. 5 Reporter, 166, and contrary decision in 57 N. Y. 518.

[1] Gorrpel v. Swinden, 1 D. & L. 888.

[2] Fielding v. Waterhouse, 40 Super. Ct. (J. & S.) 427, and cases cited. Ramsey v. Lewis, 30 Barb. 403.

[3] Cockayne v. Sumner, 22 Pick. 117.

[4] Davis v. Humphreys, 6 M. & W. 153; De Colyar on G. 318.

CHAPTER XIV.

ACTIONS TO RECOVER BACK MONEY PAID BY PLAINTIFF TO DEFENDANT UNDER MISTAKE, DURESS, EXACTION OR FRAUD, OR THE CONSIDERATION FOR WHICH HAS FAILED.

1. The payment.
2. Mistake.
3. Subsequent promise to repay.
4. Forged or counterfeit paper.
5. Duress or exaction.
6. Fraud.
7. Failure of consideration.

1. *The payment.*]—In all these classes of cases the payment to be proved is usually not a payment to a third person by plaintiff, as in actions for Money Paid to Defendant's Use, nor a payment to defendant by a third person, as in actions for Money Received to Plaintiff's Use, but a payment directly from plaintiff to defendant, which plaintiff seeks to recall on the ground that he was under no legal obligation to pay, and that defendant has no title to the money. The payment should be shown to have been in money, or that which defendant received as money, or equitably ought to account for as such.[1] An allegation of money paid by plaintiffs to defendant is not sustained by proof that they gave him their negotiable promise to pay, unless it was expressly accepted as cash in absolute payment,[2] or unless it has been negotiated by defendant in fraud of plaintiffs' right.[3] The principles governing the mode of proving the payment, and the effect of a variance, are sufficiently stated in the last two chapters and the next one.

2. *Mistake.*]—The burden of proof is on the plaintiff to show the mistake[4] on which he relies.[5] Evidence of a mistake at the time of making the contract pursuant to which the payment was made, does not raise a presumption that the plaintiff continued under the mistake at the subsequent time of payment, but the evidence must connect the mistake with the time of payment

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[1] Moyer v. Shoemaker, 5 Barb. 319.
[2] Van Ostrand v. Reed, 1 Wend. 424.
[3] Bleadon v. Charles, 7 Bing. 246.
[4] For recent cases on the distinction between mistakes of law and of fact, see 15 Am. R. 171, n.; Earl of Beauchamp, L. R. 6 Eng. & J. App. 223, s. c. 6 Monk's Eng. 37; Carpentier v. Minturn, 6 Lans. 56; 65 Barb. 293; Holdredge v. Webb, 64 Barb. 9.
[5] Kirkpatrick v. Bank, 2 Hill S C. 577; Urquhart v. Grove, 2 Rob. (La.) 207. In case of a person *non sui juris*, surprise and a mistake of law may be enough. Pitcher v. Turin Plankroad Co. 10 Barb. 436.

also,[1] unless there is evidence of exaction and protest.[2] Clear proof of mistake is requisite.[3] Mistake of fact is shown within the rule, by proof either that some fact which really existed was unknown, or that some fact was supposed to exist which did not.[4] The material facts intended by the rule are those which show that the demand asserted did not exist, not such as show a mere set-off.[5] The rule applies, notwithstanding the parties made a jump settlement or an adjustment "hit or miss," if it be shown that such agreement was made under mistake.[6] Where the case is free from fraud and from negligence prejudicing defendant, it is not necessary for plaintiff to negative the means of knowledge as well as actual knowledge of the true state of facts.[7] Under the general rule that in the interpretation of a writing the court may receive all the light that surrounding circumstances can throw upon its language[8] evidence of the parties' knowledge[9] or ignorance,[10] is competent; and may be shown by the testimony of the party himself.[11] If a reformation of a written contract is necessary, the omission to demand that relief in the complaint may be cured by amendment, or disregarded.[12] Conversations at the time of payment, and forming part of the *res gestæ*, are competent even to contradict statements contained in writings of defendant's agents put in evidence by plaintiff to show defendant's receipt of the money.[13] Negligence in making the mistaken payment is not relevant, unless the situation of other parties has been changed in consequence of the payment;[14] and if this be so, the burden of proving the fact rests upon the defendant.[15]

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[1] Wyman v. Farnsworth, 3 Barb. 369.

[2] Meyer v. Clark, 45 N. Y. 284, rev'g 2 Daly, 497.

[3] Elting v. Scott, 2 Johns. 157; Taylor v. Beavers, 4 E. D. Smith, 215; and see Mutual Life Ins. Co. v. Wager, 27 Barb. 354; Cullreath v. Cullreath, 7 Geo. 64; Kent v. Manchester, 29 Barb. 595, and cases cited. For the contrary notion, that in all civil issues preponderance of probability is enough, see Kane v. Hibernia Ins. Co. 10 Vroom, 697, s. c. 23 Am. R. 239.

[4] Rheel v. Hicks, 25 N. Y. 291.

[5] Franklin Bank v. Raymond, 3 Wend. 72.

[6] Wheadon v. Olds, 20 Wend. 174.

[7] Kelly v. Solari, 9 Mees & W. 54, s. c. 6 Jur. 107; and see Martin v. McCormick, 8 N. Y. 331.

[8] See pp. 129–131 of this vol. for the fuller discussion of this principle.

[9] Lake v. Artisans' Bank, 3 Abb. Ct. App. Dec. 10.

[10] Reynolds v. Commerce Fire Ins. Co. 47 N. Y. 597. But ignorance is not always equivalent to mistake. National Life Ins. Co. v. Minch, 53 N. Y. 144, rev'g 6 Lans. 100.

[11] But his undisclosed intent is not usually competent. Dillon v. Anderson, 43 N. Y. 231; unless motive is material. See Lewis v. Rogers, 34 Super. Ct. (J. & S.) 64. Nor is the intent of the draftsman competent. Nevins v. Dunlap, 33 N. Y. 676.

[12] Rosboro v. Peck, 48 Barb. 96.

[13] Hall v. Holden, 116 Mass. 172.

[14] Duncan v. Berlin, 11 Abb. Pr. N. S. 116, rev'g 5 Robt. 547, s. c. 4 Abb. Pr. N. S. 34; Lawrence v. Am. Nat. Bank, 54 N. Y. 432.

[15] Mayer v. Mayor, &c. 63 N. Y. 455.

3. *Subsequent promise to repay.*]—It is not necessary to allege the promise to repay, which the law implies from defendant's receiving plaintiff's money by mistake;[1] but if sufficient evidence of a legal obligation, or what the law regards as a moral obligation,[2] has been given, evidence of a subsequent promise by the plaintiff to refund is competent.[3]

4. *Forged or counterfeit paper.*]—There is a presumption that the drawees know the signature of the drawer,[4] and of the payee[5] and indorser,[6] on whose supposed signatures they pay, which is conclusive in favor of the drawer against their allegation of mistake; but there is no such presumption as to the genuineness of the writing in the body of the paper.[7] In an action to recover the value of bad money received by plaintiff from defendant in payment of a debt, or for other consideration, the burden is on the plaintiff to prove the money bad.[8] In an action on a receipt for bills, to be accounted for if good, parol evidence is competent to show that defendant promised to take the money and try it, and return it if condemned; and this, with evidence of sufficient lapse of time,[9] throws on defendant the burden of accounting.[10]

5. *Duress.*[11]]—To recover back money paid under duress, it is not essential to allege and prove a contract.[12] The mere fear of legal process,[13] or threats of prosecution without threats of imprisonment or arrest, are not sufficient.[14] As against a party to legal process, who by fraudulent or improper use of it, knowing that he has no just claim, compelled plaintiff to pay a demand, neither evidence of protest,[15] nor of the final termination of the process,[16] is necessary. Evidence that a judgment has been re-

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[1] See Farron v. Sherwood, 17 N. Y. 227; Byxbie v. Wood, 24 Id. 607; Steamship Co. v. Jolliffe, 2 Wall. 457.

[2] See p. 251 of this vol. n. 10.

[3] Bentley v. Morse, 14 Johns. 468; Rosboro v. Peck, 48 Barb. 92; Ege v. Koontz, 3 Penn. St. 109.

[4] National Park Bank v. Ninth Nat. Bank, 46 N. Y. 77.

[5] Graves v. Am. Exchange Bank, 17 N. Y. 205.

[6] Morgan v. Bank of State of N. Y. 11 N. Y. 404. But as to indorsers other than the payee, see Holt v. Ross, 54 N. Y. 472, affi'g 59 Barb. 554.

[7] Bank of Commerce v. Union Bank, 3 N. Y. 230.

[8] Atwood v. Cornwall, 25 Mich. 142. Compare Burrill v. Watertown, &c. Co. 51 Barb. 105.

[9] Marcum v. Beirne, 6 J. J. Marsh. (Ky.) 604.

[10] As to appropriate evidence on question of genuineness, see chapter on BILLS, NOTES AND CHECKS.

[11] For conflicting definitions of duress, coercion, and exaction,—see 7 Wall. 214; 10 Id. 414; 14 Id. 332; Peyser v. Mayor, &c. of N. Y. 70 N. Y. 497; Meyer v. Clark, 45 N. Y. 284, rev'g 2 Daly, 497; Am. Exch. Fire Ins. Co. v. Britton, 8 Bosw. 148.

[12] Carew v. Rutherford, 106 Mass. 1, s. c. 8 Am. R. 287, and cases cited.

[13] Quincy v. White, 63 N. Y. 370, rev'g 5 Daly, 327.

[14] Harmon v. Harmon, 61 Me. 227, s. c. 14 Am. R. 556.

[15] Meek v. McClure, 49 Cal. 624; s. p. McKee v. Campbell, 27 Mich. 497.

[16] Chandler v. Sanger, 114 Mass. 364, s. c. 19 Am. R. 367. Compare Moulton v. Beecher, 1 Abb. N. C. 193.

versed after the money has been collected under it, and that the action was subsequently finally dismissed, makes a *prima facie* case in favor of the defendant in the judgment[1] to recover back the money; and the burden of proving an equitable right to retain it is cast on the adverse party.[2] One who sues to recover back what he paid to get possession of his goods withheld on an unjust claim of lien thereon,[3] has the burden of showing that the claim of lien was unfounded.[4] So in an action against the collector, for duties alleged to have been illegally exacted, the burden of proof is on plaintiff to show not merely exaction, but that it was excessive and illegal; unless it be shown that he had no authority in the premises, and could hold the goods for no amount whatever. On an issue as to the amount of duty, the burden of proof of illegal amount rests on plaintiff.[5] If an officer had no notice of the facts which rendered his demand illegal, proof of protest at the time of payment is necessary;[6] otherwise not,[7] unless required by statute.[8] In cases of personal duress, when the state of mind of the person at the time is relevant, to show weakness (in connection with which defendant's pressure, though perhaps not technically amounting to duress, is fraudulent, and therefore equivalent in effect), the plaintiff's own acts and declarations, as well as those constituting the alleged duress, are competent, within the limits already stated in regard to proof of mental weakness and undue influence.[9] But the opinion of a witness, as to whether language used was calculated to induce one to act through fear, is not competent; the language itself must be given.[10]

6. *Fraud.*]—The fact that the complaint states fraudulent representations of the defendant, by which the plaintiff was induced to pay him the money which he seeks to recover back, does not necessarily stamp the action as in tort. It is no objection to a recovery in such a case that fraud is not proved,[11] if sufficient facts appear to warrant a recovery as for money had and received; especially when the words in the complaint charging fraud may be regarded as matter of inducement. Having money that rightfully belongs to another, creates a debt; where-

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[1] But not in favor of his surety who was not a party Garr v. Martin, 20 N. Y. 306, rev'g 1 Hilt. 358.

[2] Crocker v. Clement, 23 Ala. 296, 307.

[3] Harmony v. Bingham, 12 N. Y. 99, affi'g 1 Duer, 209; and see Great Western Ry. Co. v. Sutton, L. R. 4 H. of L. Cas. 226, 249.

[4] Briggs v. Boyd, 56 N. Y. 289, affi'g 65 Barb. 197.

[5] Arthur v. Unkart, 96 U. S. (6 Otto), 118, 122.

[6] Meek v. McClure, 49 Cal. 624.

[7] Id.; Atwell v. Zeluff, 26 Mich. 118. Except for purpose of recovering interest. Id.

[8] As to the requisite distinctness of protest, compare Curtis' Administratrix v. Fiedler, 2 Black, 461; Davies v. Arthur, 96 U. S. (6 Otto), 148.

[9] See chapter on WILLS. Blair v. Coffman, 2 Overt. (Tenn.) 176.

[10] Johnson v. Ballew, 2 Port. (Ala.) 29.

[11] The New York Code Civ. Pro. § 529, now requires proof of fraud if alleged.

ever a debt exists without an express promise to pay, the law implies a promise, and the action sounds in contract, although, under the Code, this implied promise need not be alleged.[1] But if fraud is alleged as the cause of action, so that defendant would be liable to arrest on a judgment against him, plaintiff cannot recover on establishing a contract, express or implied, without proving the fraud.[2] Proof of a mistake is not enough to sustain an allegation of a cause of action thus founded on fraud.[3] The burden of proof is of course on the plaintiff to prove the fraud by which the payment was induced.[4] The principles regulating the mode of proof of fraud are the same as those elsewhere stated of actions for deceit.

7. *Failure of consideration.*[5]—Where plaintiff sues to recover back money paid by him to defendant under a contract the consideration of which has failed, the principles applicable to actions on such contracts apply as to the mode of proof, except that the burden is on the plaintiff to prove non-performance by defendant, or other failure of consideration.[6] If the contract was in writing, it should be produced or accounted for.[7] If it contains a covenant to repay and is under seal, the action should be upon the covenant;[8] though under the new procedure, if the complaint shows a good cause of action for money paid, the allegation of the contract may be regarded as matter of inducement, and is properly pleaded for that purpose.[9] Evidence that plaintiff delivered his money to defendant upon conditions stated by him at the time, and that defendant received it in silence, is *prima facie* evidence of assent to the conditions.[10] An order drawn by defendant in favor of plaintiff, and delivered to him, and proved to have been subsequently countermanded by defendant, is competent without evidence of presentment to the drawee; and if expressed to be for value received, is *prima facie* evidence of the receipt by defendant of its amount from plaintiff.[11]

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[1] Byxbie v. Wood, 24 N. Y. 607, aff'g Sheldon v. Wood, 2 Bosw. 267; compare Knapp v. Meigs, 11 Abb. Pr. N. S. 405, and p. 273 of this vol.

[2] The release of a precedent debt is not enough under an allegation of money payment induced by fraud. De Grau v. Elmore, 50 N. Y. 1.

[3] Dudley v. Scranton, 57 N. Y. 424, and cases cited.

[4] Mutual Life Ins. Co. v. Wager, 27 Barb. 354.

[5] As to the test of the right to recover back money paid under an illegal contract, —see Knowlton v. Congress Spring Co. 57 N. Y. 518; opposed in a further decision in 5 Reporter, 166, s. c. 16 Alb. L. J. 10.

[6] Wheeler v. Board, 12 Johns. 363.

[7] Allen v. Potter, 2 McCord, 323.

[8] Miller v. Watson, 5 Cow. 195.

[9] Eno v. Woodworth, 4 N. Y. (4 Comst.) 249.

[10] Hale v. Holden, 116 Mass. 172.

[11] Child v. Moore, 6 N. H. 33.

CHAPTER XV.

ACTIONS FOR MONEY RECEIVED BY DEFENDANT TO PLAINTIFF'S USE.

1. Grounds of action.
2. The pleadings.
3. Plaintiff's title to the fund.
4. Receipt of the money by defendant.
5. — by an agent of defendant.
6. The medium and amount of payment.
7. Action by depositor against bank.
8. Bank's action for overdraft.
9. Action by principal against his agent.
10. Demand and notice.
11. *Defendant's evidence.*

1. *Grounds of action.*]—The ground of the action is that defendant, or his agent, has received money, or property which plaintiff is entitled to charge him with as money, which belongs of right to plaintiff, and which defendant ought to pay over to him.[1]

2. *The pleadings.*]—The complaint, unless on an account,[2] must usually be special, setting forth the relation of the parties, and the contract or wrong by means of which the money was received. If the facts alleged constitute a tort, such as a conversion, or deceit in obtaining credit, or a breach of trust, it does not necessarily make the action one of tort. If a wrong is alleged merely as matter of inducement,[3] or if it be, although in form stated as the gist of the action, a mere legal conclusion, and unsupported by the facts alleged,[4] evidence of the facts alleged establishing liability on contract, express or implied, will sustain the action,

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[1] The principles on which this action is sustained are liberal, applying to almost every case where a person has received money which in equity and good conscience he ought to refund; and, upon the same principles, the defendant may avail himself of any considerations, equitable as well as legal, which show that the plaintiff, in fairness and justice, is not entitled to the whole of his demand, or any part of it. BLACKSTONE, J., MANSFIELD, J., NELSON, J., Eddy v. Smith, 13 Wend. 490, and cases cited. a. p. Cope v. Wheeler, 41 N. Y. 303, affi'g 53 Barb. 350, s. c. 37 How. Pr. 181. Strictly speaking, evidence that plaintiff paid money to a third person for defendant's use (Claycomb v. McCoy, 48 Ill. 110); or in consequence of his fraud (Butler v. Livermore, 52 Barb. 570); or to defendant under a contract which has failed (Briggs v. Vanderbilt, 19 Barb. 222); is not appropriate under a mere allegation of money had and received by defendant to plaintiff's use. See p. 268 of this vol. But under the new procedure, the question is usually one of variance, not of entire failure of proof. But see N. Y. Indemnity Co. v. Gleason, 7 Abb. New Cas.

[2] Allen v. Patterson, 7 N. Y. 476.

[3] Graves v. Harte, 59 N. Y. 162; Byxbie v. Wood, 24 Id. 607, affi'g 2 Bosw. 267.

[4] As where, after alleging a delivery of money to a banker or agent, which necessarily constitutes a mere debt, not a bailment, the pleader alleges that defendant wrongfully converted the sum to his own use. Greentree v. Rosenstock, 61 N. Y. 583, affi'g 34 Super. Ct. (J. & S.) 505; Sheahan v. Shanahan, 5 Hun, 461, s. p. Vilmar v. Schall, 61 N. Y. 564, affi'g 35 Super. Ct. (J. & S.) 67. But see note 11 on p. 271.

although the suggestion of fraud be unproved. If, on the other hand, fraud is alleged in such way that, on a judgment against defendant, he would be liable to arrest, the plaintiff cannot recover without proof of this allegation.[1] Plaintiff will not be deemed to waive a tort alleged in a manner appropriate to a cause of action, and to rest on an implied promise, unless such intent appears by the complaint.[2] Where the tort is not alleged, plaintiff may still prove it, as part of the transaction by which defendant actually received money which he ought to refund to plaintiff —as, for instance, that defendant wrongfully took plaintiff's goods, sold them, and received the price.[3] But to entitle plaintiff to recover, on waiver of tort and as for money received, facts constituting a cause of action on contract, express or implied, must be alleged;[4] and it must appear that defendant received money or pecuniary benefit equivalent thereto.[5]

3. *Plaintiff's title to the fund.*]—Plaintiff may recover on proof of a contract made with himself, in his own name, although he acted as agent of the true owner of the fund; for the contract makes him the trustee of an express trust.[6] So, under an unsealed contract, he may recover on parol proof that he was the real principal, and that the contract was made by his consent,[7] or with his agent, though without his consent.[8] Parol evidence is competent to show that, in an unsealed[9] contract[10] made by another in his own name,[11] the plaintiff was the real principal,

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[1] Ross v. Mather, 51 N. Y. 108; De Grau v. Elmore, 50 Id. 1. Compare Coit v. Stewart, 12 Abb. Pr. N. S. 216; Barker v. Clark, Id. 106.

[2] Chambers v. Lewis, 11 Abb. Pr. 210, aff'g 10 Id. 206, s. c. 2 Hilt. 591.

[3] Harpending v. Shoemaker, 37 Barb. 270, 291, s. p. Boston, &c. R. R. Co. v. Dana, 1 Gray (Mass.) 83, 100; Pierce v. Wood, 3 Fost. (N. H.) 519, 531. Where the evidence was that defendant received proceeds of *negotiable paper* wrongfully obtained from plaintiff, held that the action should have been for equitable relief. Wilson v. Scott, 3 Lans. 308. So it has recently been held that this action by a municipality is not sustained by evidence that defendant wrongfully borrowed of a public officer money held by him as such. The action should be case or a bill in equity. Perley v. County of Muskegon, 32 Mich. 132, s. c. 20 Am. R. 637.

[4] Walter v. Bennett, 16 N. Y. 250.

[5] Under an express contract of a bailee to account for proceeds, recovery for mere application of the property to defendant's own use, without receipt of proceeds, is not allowed. Moffat v. Wood, Seld. Notes, No. 5, 14. Compare Roth v. Palmer, 27 Barb. 652. Whether evidence of appropriation by a wrong-doer is sufficient, without evidence of sale and receipt of proceeds, is not agreed. Compare Moses v. Arnold, 43 Iowa, 187, s. c. 22 Am. R. 239; Norden v. Jones, 33 Wisc. 600, s. c. 14 Am. R. 782; 2 Greenl. Ev. 88, § 108, n. 5, and cases cited; Henry v. Marvin, 3 E. D. Smith, 71.

[6] P. 234 of this vol. n. 8.

[7] Fischesser v. Heard, 42 Geo. 531.

[8] Calland v. Lloyd, 6 Mees & W. 26.

[9] As to sealed contracts, see Briggs v. Partridge, 64 N. Y. 357, aff'g 39 Super. Ct. (J. & S.) 339.

[10] Even though such as the statute of frauds requires to be in writing. Ford v. Williams, 21 How. U. S. 287, s. p. Dykers v. Townsend, 24 N. Y. 57.

[11] It is not material that the contract does not indicate that the apparent party was an agent. Ford v. Williams (above).

whether disclosed[1] to defendant or not.[2] The declarations of the depositor or payer of money, made as part of the *res gestæ* of payment, are competent to show the source of the fund for the purpose of proving in whom was the title.[3] And the letters in which plaintiff received the fund are competent as bearing on the question, though not necessarily as proof of the facts stated therein.[4] If declarations as to the source or title of the fund are shown to have been made in presence of the defendant, they are competent, in connection with evidence of his tacit admission or other conduct under them.[5] Defendant's declaration to plaintiff that he holds the fund subject to his order is sufficient *prima facie* evidence of plaintiff's title.[6] But privity of contract is not essential.[7]

4. *The receipt of the money by defendant.*]—The action is not sustained unless there has been an actual receipt of money by the defendant, or something equivalent to it,[8] or unless the defendant is estopped by representations made to the plaintiff from denying the receipt.[9] But it is enough that, on all the facts, it may fairly be presumed that defendant has received plaintiff's money. Positive evidence is not required.[10] For this purpose evidence of its payment over the counter of the defendant's office, to a person acting as clerk and apparently in authority, is competent to go to the jury.[11] Where there are several defendants, partnership,[12] or a joint reception, or a joint interest, or a joint contract,[13] should be shown. An acknowledgment of having received the money, made by defendant in any form, is competent evidence against him.[14] Thus the consideration named in the agent's conveyance to a third person is competent against the agent;[15] but it does not conclude plaintiff as to the amount.[16] If a receipt was given by defendant to the plaintiff, or to the third person from whom the

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[1] See Ford v. Williams, 21 How. U. S. 287; Hubbert v. Borden, 6 Whart. (Penn.) 79, 91.

[2] See N. J. Steam Nav. Co. v. Merchants' Bank, 6 How. U. S. 344, 381.

[3] Stair v. York Nat'l Bank, 55 Penn. St. 364, s. p. Bank v. Kennedy, 17 Wall. 19.

[4] Darling v. Miller, 54 Barb. 149; see p. 170 of this vol. n. 9, and p. 245, n. 4.

[5] Hayslep v. Gywmer, 1 Ad. & E. 162.

[6] Stacy v. Graham, 3 Duer, 444.

[7] Cousidiere v. Beers, 1 Abb. Ct. App. Dec. 333; Ela v. Am. Merchants' Union Express Co. 29 Wisc. 611, s. c. 9 Am. R. 619; Cutler v. Demmon, 111 Mass. 474; Ross v. Curtis, 30 Barb. 238.

[8] Price v. Oriental Bank, 38 Law. J. N. S. 41, s. c. 26 Weekly R. 543.

[9] As, for instance, where plaintiff has acted on the representation by settling with third persons, or as in the case of a sheriff's return. See also Bullard v. Hascall, 25 Mich. 132.

[10] Tuttle v. Mayo, 7 Johns. 132.

[11] Newman v. North Am. Steamship Co. 113 Mass. 362.

[12] Gilchrist v. Cunningham, 8 Wend. 641.

[13] Manahan v. Gibbons, 19 Johns. 427.

[14] As to qualified oral admissions, see p. 266 of this vol.

[15] Thalheimer v. Brinckerhoff, 6 Cow. 90.

[16] Mains v. Haight, 14 Barb. 76.

money was received, it is not necessary to produce or account for it, unless some question arises on its terms. Its terms are not conclusive against either party, but explainable by parol,[1] unless grounds for an estoppel appear.

Where defendant's duty was to sell and collect, evidence of a sale alone is not alone enough[2] without other evidence raising a presumption of collection. But if defendant is a wrong-doer, or neglect to collect were a breach of duty, his admission that he had sold the goods is enough to go to the jury from which they may infer receipt of proceeds.[3]

If the money was received by collecting a written security or evidence of debt from a third person,[4] the instrument need not be produced or accounted for in order to let in parol proof of the collection of the sum due on it;[5] but the instrument is competent in favor of plaintiff if he chooses to put it in evidence,[6] and being only collaterally in question, subscribing witnesses need not be produced unless it is under seal.[7]

5. — *by an agent of defendant.*]—If payment to a third person is relied on, there must be some evidence that he was defendant's agent.[8] Evidence of the declarations of the alleged agent are not competent for the purpose of proving the agency, unless there is something to connect the defendant with the declarations.[9] Evidence that the defendant was informed by the alleged agent of his receipt of the fund, and thereupon gave him directions as to its disposal, is competent evidence that defendant received the money.[10] Where the authority shown was not a general agency, but a special authority,—particularly if conferred by a principal acting in *autre droit*, as, for instance, an executor authorizing an attorney to take out ancillary administration in another State and sell assets there,—the person dealing with the agent must look to his authority, and cannot recover of the principal on proof of money received by the agent only.[11] A sufficient agency having been proved, a receipt given, or admission of pay-

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[1] White v. Parker, 8 Barb. 48, 69; Phelps v. Bostwick, 22 Barb. 314; Union Bank v. Solles, 2 Strobh. 390.

[2] Haskins v. Dunham, Anth. N. P. 111.

[3] Hathaway v. Burr, 21 Me. 567.

[4] As, for instance, where one who collected a running account (Planters' Bank v. Farmers' Bank, 3 Gill. & J. [Md.] 449, 469); or a warrant of attorney to confess judgment (Bayne v. Stone, 4 Esp. 13); or a judgment (Martin v. Williams, 1 Dev. L. N. C. 386), or an award (Brinckerhoff v. Wemple, 1 Wend. 470), or a negotiable note or draft (Bullard v. Hascall, 25 Mich. 132; Sally v. Capps, 1 Ala. 121), is sued for the proceeds, plaintiff need not produce nor account for the instrument.

[5] S. P. Steele v. Lord, 70 N. Y. 283.

[6] See, for instance, French v. Shreeve, 18 N. J. L. (3 Harr.) 147; Geisse v. Dobson, 3 Whart. (Penn.) 34.

[7] Rundle v. Allison, 34 N. Y. 180, 184.

[8] Farias v. De Lizardi, 4 Rob. 407; and see p. 241 of this vol.

[9] Snook v. Lord, 56 N. Y. 605.

[10] Coates v. Bainbridge, 5 Bing. 58.

[11] Owings v. Hull, 9 Pet. 607.

ment made, by the agent, at the time of the transaction, is admissible against the principal.[1]

6. *The medium and amount of payment.*]—The evidence must show payment of money, or that which the parties treated as money, or which the defendant ought to account for as such. Evidence of the receipt of foreign money is competent;[2] so, of course, of bank notes;[3] but defendant may show the depreciated character of the medium of payment, except where it was a breach of his duty to plaintiff to accept such currency.[4] The delivery of non-negotiable things in action, or other property, is not appropriate under an allegation of money received,[5] unless connected with evidence that defendant expressly accepted the property as a payment of money, or that he has actually turned it into money or its equivalent, or that it was intended between him and the plaintiff to be sold, and sufficient time has elapsed to do so, and that he is in default for not accounting. A credit in account with a third person may be proved under an allegation of money received, if accepted by defendant as a set off equivalent to money,[6] or if allowed in violation of his duty and to the prejudice of plaintiff. Under the new procedure, however, if defendant is shown to have received money value, a variance in the medium is not an entire failure of proof, but material if defendant is prejudiced. The evidence must tend to show a definite sum,[7] or certain *data* from which, by an arithmetical calculation, the jury may ascertain the sum,[8] and it is no objection that the fund was received mixed with other moneys, if a several right of action is shown to exist in plaintiff for his share.[9] Variance in the amount may be disregarded,[10] within the limits of recovery fixed by the demand for judgment. If the receipt of coins or bank notes is proved without proof of their denomination, the smallest denomination in circulation is to be presumed,[11] in the absence of fraud or fraudulent concealment.

7. *Action by depositor against bank.*]—A certificate of deposit,[12] as well as evidence of an ordinary deposit in account, is competent in an action for money received. An ordinary certificate of deposit is not a contract, within the rule excluding parol

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[1] Thallhimer v. Brinckerhoff, 6 Cow. 90; s. p. Anderson v. Broad, 2 E. D. Smith, 530, s. c. 12 N. Y. Leg. Obs. 187.
[2] Ehrensperger v. Anderson, 3 Exch. 149, 156.
[3] Pickard v. Bankes, 13 East, 20
[4] See Cockrill v. Kirkpatrick, 9 Mo. 688.
[5] Nightingale v. Devisme, 5 Burr. 2589.
[6] Noy v. Reynolds, 1 Ad. & E. 159.
[7] Harvey v. Archbold, 3 B. & C. 626.
[8] Taukersley v. Childers, 23 Ala. 781.
[9] See Green v. Givan, 33 N. Y. 843.
[10] Lass v. Wetmore, 2 Sweeny, 209.
[11] 2 Greenl. Ev. 109, § 129*a*.
[12] Talladega Ins. Co. v. Landers, 43 Ala. 115, 134.

evidence,[1] and if it be, parol evidence is competent to explain abbreviations, etc., in it,[2] and to charge the bank by showing that the depositor justly supposed he was dealing with them although the certificate was signed by an officer individually.[3]

Evidence of usage is not admissible to show that deposits made during depreciation of currency, and marked in the pass-book respectively, "coin" or "currency," were always to be repaid in kind, for without special agreement, a bank deposit creates a debt, and whatever is legal tender will discharge it. Usage cannot alter the law.[4] The fact that plaintiff's book has been balanced, does not dispense with the necessity of proving demand before suit.[5] The balancing and return of the pass-book has the effect of an account stated, but a depositor is not concluded if he objects within a reasonable time;[6] still the burden is upon him to show the error.[7] Drawing for the precise balance is evidence of acquiescence.[8] But payments by the bank on checks in which the depositor's signature was forged,[9] are made in their own wrong, and plaintiff's delay to discover the forgery does not avail defendants,[10] unless defendants show negligence to their prejudice.[11] The books of the bank are evidence against it,[12] but not in its favor.[13] The declarations of plaintiff, made at the time of the deposit, as part of the *res gestæ*, are competent in his favor,—for instance, to prove the capacity in which he claimed to hold the

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[1] Hotchkiss v. Mosher, 48 N, Y. 478.

[2] Hulbert v. Carver, 37 Barb. 62, and cases cited.

[3] Coleman v. First Nat'l Bk. of Elmira, 53 N. Y. 388, 394; and although, as between the officer and the bank, it was the officer's private transaction. Caldwell v. Nat'l Mohawk Valley Bk. 64 Barb. 333. Whether deposit was made with teller, as such, or personally, a question of fact for the jury. Id.; Pattison v. Syracuse National Bank, 4 Supm. Ct. (T. & C.) 96.

[4] Thompson v. Riggs, 5 Wall. 663, 680. *Contra*, Chesapeake Bk. v. Swain, 29 Md. 483. As to when the credit given for a deposit is conclusive, see Manhattan Co. v. Lydig, 4 Johns. 377; Mechanics' & Farmers' Bk. v. Smith, 15 Id. 115; Oddie v. Nat'l City Bk. 45 N. Y. 735; Hepburn v. Citizen's Bk. 2 La Ann. 1007.

[5] Downes v. Phoenix Bank, 6 Hill, 297; and see Payne v. Gardiner, 29 N. Y. 146.

[6] Schneider v. Irving Bank, 1 Daly, 500, a. c. 30 How. Pr. 190; Hutchinson v. Market Bank, 48 Barb. 302.

[7] Shepard v. Bank of State of Missouri, 15 Mo. 143.

[8] Lockwood v. Thorne; 11 N. Y. 170, rev'g 12 Barb. 487.

[9] Weisser v. Denison, 10 N. Y. 68. Otherwise of raised checks, p. 270 of this vol.

[10] Welsh v. German American Bank, 42 Super. Ct. (J. & S.) 462.

[11] Page 269 of this vol. In an action against a savings bank for a mispayment, where the bank relies on its rule that it will only be responsible for ordinary care and diligence, if the two signatures were so dissimilar that when compared the discrepancy would be easily and readily discovered by a person competent for the position, then the failure to discover it would be evidence of negligence which should go to the jury. Otherwise, if the difference was not marked and apparent, or if it would require a critical examination to detect it, and especially if the discrepancy was one as to which competent persons might honestly differ in opinion. Appleby v. Erie Co. Savings Bank, 62 N. Y. 12.

[12] See p. 52 of this vol.

[13] White v. Ambler, 8 N. Y. 170. Unless it be a foreign corporation. Page 52 of this vol.

fund,—and the declarations of an officer or clerk of the bank, made in reference to the accounts, while acting in the course of his duty as such, are also competent against the bank.[1]

8. *Bank's action for over-draft.*]—In the action of the bank against a depositor for an over-draft, the presumption is that the depositor had funds there to meet any check drawn by him which they are shown to have paid,[2] and the books of the bank are not of themselves evidence in their favor, of the state of his account.[3]

9. *Action by principal against his agent.*]—The agency of defendant may be proved by direct testimony to the fact,[4] or by the acts and conduct of the parties, and evidence of what passed between them in reference to the transactions in question.[5] The fact that defendant received or charged commissions is cogent evidence of agency.[6] On the question of agency in a particular transaction, when the testimony is in conflict, the fact that defendant had acted as such agent in previous transactions for plaintiff is admissible to explain the language and writings of the parties in the transaction in question. But the evidence of such fact (if not sufficient to prove a general agency) is not competent for the purpose of proving an agency in the particular transaction, or even in determining the credibility of the conflicting testimony. The principle upon which evidence of similar transactions to the one in issue is admitted, is to explain intent, not to prove the act or its probability.[7] Under an allegation of agency, evidence of a joint adventure is not a failure of proof, but raises a question of variance.[8]

A general receipt may be explained by parol, even though it contain a general promise to account.[9] But when the receipt embodies a contract,—as, for instance, where it prescribes the manner in which the money is to be appropriated,—it is not

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[1] Price v. Marsh, 1 Car & P. 60; p. 44 of this vol. note 2.

[2] White v. Ambler, 8 N. Y. 170.

[3] Id.; State Bank v. Clark, 1 Hawks, 36; p. 244 of this vol. Unless it be a foreign corporation (p. 52), or it be shown that the bank furnished transcripts to its depositors, so that its officers can be deemed to have been the agents of both parties for the purpose of keeping the account (Union Bank v. Knapp, 3 Pick. 96), or some other special ground is shown. See p. 53 of this vol. As to negligence in permitting plaintiff's clerk or officer to make over-drafts, see Manufacturers' Nat. Bk. v. Barnes, 65 Ill. 69, s. c. 16 Am. R. 576; Tradesman's Bank v. Astor, 11 Wend. 87.

[4] See pp. 241, 250 of this vol.

[5] A circular, stencil plate, and form of invoice delivered to plaintiff by defendant, while soliciting consignments, of goods for sale,—*Held* competent as evidence bearing upon the consignments and the terms on which they were made, and the character in which defendant proposed to plaintiff to act in receiving. Whittaker v. Chapman, 3 Lans. 155.

[6] Armstrong v. Stokes, L. R. 7 Q. B. 598, s. c. 3 Moak's Eng. 217.

[7] Richards v. Millard, 56 N. Y. 574, rev'g 1 Supm. Ct. (T. & C.) 247.

[8] Power v. Fisher, 8 Bosw 258. Otherwise of an allegation of loan; for there is agency in a partnership or joint adventure, but none in a loan.

[9] Eaton v. Alger, 2 Abb. Ct. App. Dec. 5.

liable to be varied by parol evidence;[1] though a subsequent parol agreement, superceding that shown by the receipt, may be proved.[2] When an attorney gives a general receipt for the evidence of a debt then due, it is presumed that he received it as attorney, for collection; and the burden is on him to show that he received it specially and for some other purposes.[3] Notwithstanding writings between the parties in which the transaction appears as an assignment from plaintiff to defendant, or a conveyance showing a sale from defendant to plaintiff, parol evidence is competent to show that their relation was that of principal and agent, and, therefore, that the defendant is accountable for the property or transaction. The legal effect of the instrument as between the parties thereto is not varied by this proof, but only the accountability of defendant.[4] And where plaintiff relies on defendant's conveyance or bill of sale to prove a sale by him, the consideration named, though *prima facie* evidence in plaintiff's favor, is not conclusive, but parol evidence is competent to vary it.[5] Partners may be held on their agreement to account and pay over, although one had withdrawn before the sales, and the moneys were received by the other only.[6] On an allegation that money was received by his agent, plaintiff may recover on proof that he received property of substantial pecuniary value,[7] or notes which were good and collectable,[8] and by his transactions he released the debtor and deprived his principal of all remedy except against himself.[9] Profits made by an agent in his employment belong absolutely to his principal, and he may recover them as money received.[10] Refusal of an agent, after reasonable time, to account for goods delivered to him for sale raises the presumption that he has sold them and has the proceeds;[11] and the invoice which was delivered to him, and is unexplained by him, is evidence that all the articles named in it came to his possession, and raises a presumption against him that he sold them at least for as much as the invoice prices.[12] The source of the money received, and circumstances of its receipt, not being within plaintiff's knowledge, he is not held to strictness of allegation and proof in that respect.[13] In cases of long continued fraudulent embezzlement or misappropriation by one who was exclusively

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[1] Wood v. Whiting, 21 Barb. 190, 197.
[2] Egleston v. Knickerbocker, 6 Barb. 458.
[3] Smedes v. Elmendorf, 3 Johns. 185.
[4] Richards v. Millard, 56 N. Y. 574, s. c. below, 1 Supm. Ct. (T. & C.) 247.
[5] Mains v. Haight, 14 Barb. 76.
[6] Briggs v. Briggs, 15 N. Y. 471. Compare Ayrault v. Chamberlin, 26 Barb. 83; and see chapter on PARTNERS; and see Andrews v. Jones, 10 Ala. 460.
[7] Beardsley v. Root, 11 Johns. 464.
[8] Allen v. Brown, 44 N. Y. 228, affi'g 51 Barb. 86, and cases cited.
[9] Same cases.
[10] Morison v. Thompson, L. R. 9 Q. B. 480.
[11] Hunter v. Welch, 1 Stark. 224.
[12] Field v. Moulton, 2 Wash. C. C. 155.
[13] See Hall v. Morrison, 3 Bosw. (N. Y.) 520, 527.

plaintiff's agent, if there is sufficient evidence of the main fact to go to the jury, evidence of his previous insolvency, and contemporaneous unexplained acquisition of large property, is relevant; and his declarations concerning his property and business transactions, made to third persons, in the absence of the plaintiff or his agents, are inadmissible to rebut such evidence.[1] To show the intentional character of false entries and the like, evidence of other such acts by him (within reasonable limits of time), the errors all being in his own favor, is competent to explain motive and intent.[2]

10. *Demand and notice.*]—Demand may be inferred by the jury from notice of the mistake or other ground of the demand, and an informal request to rectify it.[4] Demand or instructions to remit will not be presumed against even a foreign factor, merely from lapse of time.[5] Where plaintiff proves a demand and refusal, defendant has a right to prove the reasons which were given by him at the time.[6]

11. *Defendant's evidence.*]—Under a general denial of the contract alleged, defendant may prove that the contract contained material provisions under which the money was received, other than those alleged,[7] or that there was a departure from the contract by plaintiff's request, and the money was paid accordingly.[8] Plaintiff's parol evidence to show a rescission by subsequent consent may be met by parol evidence that, by a still later consent, the contract (although under seal) was reinstated.[9]

An agent, sued by his principal, may testify to his own opinion as to the necessity of the exercise of a discretion which was vested in him for the purpose of the transactions on which he is called to account,[10] and to his good faith in its excercise.[11] The *res gestæ* are competent for the same purpose.[12] He may testify generally that

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[1] Boston & W. R. R. Co. v. Dana, 1 Gray, 83, 101, 103.

[2] Regina v. Richardson, 2 F. & F. 343.

[3] Whether demand is necessary in case of mistake, &c., is not agreed. The better opinion is that where defendant is not a wrong-doer, or violating his agreement (14 N. Y. 492), in retaining the money, demand, or at least notice of mistake, given before suit, must be proved. Moak's Van Santv. Pl. 379; Mayor, &c. of N. Y. v. Erben, 3 Abb. Ct. App. Dec. 255, affi'g 10 Bosw. 189. *Contra*, Calais v. Whidden, 64 Me. 249; Utica Bank v. Van Gieson, 18 Johns. 485. Unless defendant has put it out of his own power to comply. The reasonableness of the rule is seen in the fact that, while the cause of action is in the nature of an equitable one, the form of the action is legal, and costs are not in the discretion of the court.

[4] Muir v. Rand, 2 Ind. 291. Compare Walsh v. Ostrander, 22 Wend. 178, and 2 Abb. N. Y. Dig. 2d ed. 642-644.

[5] Halden v. Crafts, 4 E. D. Smith, 490, s. c. as Walden v. Crafts, 2 Abb. Pr. 301.

[6] Bennett v. Burch, 1 Den. 141.

[7] Marsh v. Dodge, 66 N. Y. 533, rev'g 4 Hun, 278, s. c. 6 Supm. Ct. (T. & C.) 568.

[8] Gwynn v. Globe Locom. Works, 5 Allen, 317.

[9] Flynn v. McKeon, 6 Duer, 203.

[10] France v. McElhone, 1 Lans. 7.

[11] See 38 N. Y. 281, and cases cited.

[12] See p. 245, n. 4, and p. 170, n. 9, and Hudson v. Crow, 26 Ala. 515, 522.

he paid over all he had received, and may testify to what allowances were made on settlements which are in evidence, although there were written receipts.[1] Evidence that the usual course of dealing was to make daily returns and payments, without passing any vouchers, raises a presumption of law that defendant had fully accounted, and throws on plaintiff the burden of proving the contrary.[2] If defendant relies on plaintiff's consent that he retain to his own use moneys received, the evidence of such consent should be clear and satisfactory.[3]

Defendant cannot exonerate himself by proving that he received the money merely as agent for another,[4] unless the agency was disclosed;[5] nor even then if he was a wrong-doer in receiving,[6] or paid over in fraud of plaintiff's right. Defendant's agency for a third person being shown, it will not be presumed that the money had been paid over to the principal, unless from the nature of the business, or the usual course of transacting it, it would be expected that payment would be made to the principal and not to the agent.[7] To show good faith in paying over, the *res gestæ* of the payment are competent,[8] as well as the testimony of the defendant.[9]

In respect to illegal consideration, the law recognizes a distinction between enforcing an illegal contract and asserting title to money which has arisen from it.[10] One who received money in trust to pay it to plaintiff in discharge of an alleged indebtedness of the payer, cannot resist the action on the ground that the contract between plaintiff and the payer, out of which the alleged indebtedness arose, was illegal. The debtor waiving the objection, the depositary cannot avail himself of it.[11] The fact that the defendant himself was the agent by whom the illegal agreement was made, does not alter the case. It is not ignorance on his part of such illegality, but the absence of any legal connection between the new promise of defendant to deliver such money as directed and the original contract, which precludes him from

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[1] France v. McElhone, 1 Lans. 7. See, however, chapters on ACCOUNTS STATED and PAYMENT.

[2] Evans v. Birch, 3 Campb. 10.

[3] Howe v. Savory, 49 Barb. 403, 51 N. Y. 631.

[4] And a custom of banks to collect money as agents, without disclosing their agency, is insufficient to show that a bank, in collecting, acted as agent. Canal Bank v. Bank of Albany, 1 Hill, 287.

[5] See Barbour v. Litchfield, 4 Abb. Ct. App. Dec. 655, and cases cited; and chapter on GOODS SOLD.

[6] Tugman v. Hopkins, 4 M. & G. 389, 401.

[7] Hathaway v. Burr, 21 Me. 567, 572. In an action against an agent for money alleged to be due to plaintiff,—*Held*, that defendant might give in evidence a verbal order of his principal not to pay the money. Thorne v. Peck, 13 Johns. 315.

[8] See, for instance, Knowlton v. Clark, 25 Ind. 395.

[9] See p. 281, n. 11.

[10] Brooks v. Martin, 2 Wall. 81.

[11] Merritt v. Millard, 3 Abb. Ct. App. Dec. 291, s. c. 4 Keyes, 208, and cases cited, affi'g 10 Bosw. 309.

setting up such a defense.[1] But money received by defendant under an illegal contract to which plaintiff was a party, cannot be recovered if the action requires the enforcement by the court of any unexecuted provision of the contract.[2]

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[1] Id.; and see Wilkinson v. Tousley, 16 Minn. 299, s. c. 10 Am. R. 139. Character is not in issue on the question whether a debt was for money lost at play. Thompson v. Brown, 4 Wall. 471.

[2] Woodworth v. Bennett, 43 N. Y. 273, and cases cited, rev'g 53 Barb. 361. Compare Knowlton v. Congress Spring Co. 57 N. Y. 518. Again, *contra*, 5 Reporter, 166.

CHAPTER XVI.

ACTIONS ARISING ON SALES OF PERSONAL PROPERTY.

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I.—Actions for the price of goods, &c.

1. *Grounds of action.*]—The characteristic facts constituting the cause of action, are that plaintiff, at the defendant's request, sold and delivered to him personal property for which he owes the price or value.[1] These facts are implied in and admissible under a general allegation that "defendant is indebted to plaintiffs in the sum of, &c., for goods sold and delivered to defendant by plaintiffs at a time and place named, on defendant's request."[2]

The agreement of sale is of the gist of the action.[3] Evidence of an agreement which is to be regarded as one for the manufacture of goods for defendant rather than for a sale to him, is not an entire failure of proof; and the variance may be disregarded,[4] unless defendant is surprised to his prejudice.[5] On the other hand, if the facts on which the law raises an implied promise to pay are directly stated, an allegation of such promise is not necessary.[6] Under the new procedure,[7] as well as at common law,[8] where plaintiff may waive his right of action for damages for the tortious conversion of personal property, and recover in assumpsit, he may prove the facts under a complaint for goods sold and delivered.[9] If the evidence supports allegations in the complaint of a cause of action on contract, the failure to prove superfluous allegations of fraud, will not prevent a recovery;[10] but if the fraud is alleged as the gist of the action, so that on judgment against defendant, execution would go against his person, a failure to prove the fraud is fatal,[11] unless an amendment is allowed, or a waiver of the tort put on record.

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[1] Allen v. Patterson, 7 N. Y. (3 Seld.) 476.

[2] Id. As to the sellers election of remedies, see Dustan v. McAndrew, 44 N. Y. 72, affi'g 10 Bosw. 130.

[3] On a voluntary delivery to defendant, in payment of his demand against a stranger to the transaction, the deliverer cannot receive the value from the deliveree, on the ground that the delivery was made pursuant to a parol promise void under the statute of frauds. Fowler v. Moller, 10 Bosw. 374.

[4] Union Rubber Co. v. Tomlinson, 1 E. D. Smith, 364. Compare Prince v. Down, 2 Id. 525.

[5] The chief importance of the distinction is in the fact that on a contract for manufacture, &c., compliance with the statute of frauds need not be shown.

[6] Farron v. Sherwood, 17 N. Y. 227.

[7] Weigand v. Sichel, 4 Abb. Ct. App. Dec. 595; Abbott v. Blossom, 66 Barb. 353; Harpending v. Shoemaker, 37 Id. 270; see also Pomeroy on Rem, § 567, &c.; Link v. Vaughn, 17 Mo. 585; Robinson v. Rice, 20 Id. 229.

[8] See Osborn v. Bell, 5 Den. 370; Hinds v. Tweddle, 7 How. Pr. 278, and cases cited.

[9] To the contrary where there was an express contract to account. Moffat v. Wood, Seld. Notes, No. 5, 14; but see Roth v. Palmer, 27 Barb. 652.

[10] Graves v. Waite, 59 N. Y. 156; Ledwich v. McKim, 53 Id. 307.

[11] See Ross v. Mather, 51 N. Y. 108; De Graw v. Elmore, 50 Id. 1. The reason of the rule is, that on the one hand, if plaintiff alleges and proves facts raising an implied promise or an express contract, the tortious conduct of defendant ought not to exonerate him. On the other hand, if the complaint states a tort as the cause of action, defendant may be precluded from pleading counterclaims, and will be liable to imprisonment; hence, a failure to prove the tort is not a mere variance. If the

The *delivery*, under an agreement alleged as a sale and delivery, or its equivalent so far as plaintiff's duty is concerned, is essential to the theory of the action.[1] But if, where proof of delivery fails, the facts in evidence would sustain an action for damages for defendant's refusal to complete his bargain, the case is one of variance merely, not of entire failure of proof, and the court or referee may allow an amendment.[2] So, under an allegation that the sale and delivery was to defendant, evidence of a sale to defendant on his credit, and of delivery to a third person at his request, is not an entire failure of proof, but only a question of variance, even though the sale was for the benefit of such third person.[3] Failure to prove a superfluous allegation of promise to indemnify, &c., may be disregarded.[4]

For the greater convenience of the reader we will consider first, the rules applicable in the more common action for price, although they are to some extent applicable also in actions for refusal to deliver, &c., and, then, those peculiar to special and executory contracts, and to warranties.

2. *Plaintiff's title to the goods, &c.*]—The usual allegation that plaintiffs sold and delivered goods, &c., sufficiently imports that the goods belonged to them.[5] Evidence of title is not usually required,[6] and when required, unless title is specially put in issue, very slight evidence is enough, and if plaintiff proves sale and delivery,[7] he is not bound to give further evidence of his title than the fact that he had actual possession and control.[8] If one purchases a doubtful right, he concedes the right, and cannot afterward dispute it in an action for the price.[9] On the question of title, evidence of the plaintiff's declarations of ownership, made while in possession and before sale, and explanatory of the existing possession, is competent in his own favor, and if clear, they are *prima facie* evidence of his title.[10] The admissions and declarations of one under whom plaintiff claims, and who is de-

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frame of the complaint is such as to present contract as the cause of action, unproved allegations of tort are mere variance, to be disregarded, unless defendant has been surprised and prejudiced. *Contra*, now by N. Y. Code Civ. Pro. § 529.

[1] Evans v. Harris, 19 Barb. 416; Catlin v. Tobias, 26 N. Y. 217.

[2] Dunnigan v. Crummey, 44 Barb. 528, and cases cited.

[3] Rogers v. Verona, 1 Bosw. 417. Compare Cowdin v. Gottgetren, 55 N. Y. 650. At common law not even a variance. Porter v. Mc Cluer, 15 Wend. 189, and cases cited (Bronson, J.); and see Monroe v. Hoff, 5 Den. 360.

[4] Hay v. Hall, 28 Barb. 378.

[5] Phillips v. Bartlett, 9 Bosw. 678. And if they were partners, an allegation of partnership is not necessary. Id. Under an allegation that property belonged to plaintiff, proof that it was consigned to him as factor, he being chargeable with its value, whether sold, lost, or destroyed,—held not a material variance. Gorum v. Carey, 1 Abb. Pr. 285.

[6] Compare Gilmore v. Wilbur, 18 Pick. 517.

[7] Compare Cobb v. Williams, 7 Johns. 24.

[8] Fitzpatrick v. Caplin, 4 E. D. Smith, 365; Reilly v. Cook, 13 Abb. Pr. 255, s. c. 22 How. Pr. 93.

[9] Compare Costar v. Brush, 25 Wend. 628.

[10] Roebke v. Andrews, 26 Wis. 311. Compare Tilson v. Terwilliger, 56 N. Y. 273.

ceased, if against his interest when made, are competent in support of plaintiff's title.[1]

3. *License to sell.*]—Plaintiff will be presumed to have a license, if one be necessary to render the sale lawful.[2] But if the lack of one is shown, there is no presumption that one would have been taken out in time.[3]

4. *Ordinary sale by delivery.*]—The agreement, price and delivery may all be proved by uncontradicted evidence showing an account rendered by plaintiff to defendant on the face of which he is charged as the buyer, and that he unqualifiedly admitted the justice of the demand.[4] Where the admission is susceptible of being understood as referring only to the correctness of items in description or price, other evidence of delivery of the goods must be adduced. Admissions as proof of either separate fact will be further considered below. Under an allegation of sale and delivery to or by a party, evidence of the act on the part of his agent is admissible.[5]

5. *Evidence of express agreement.*]—A witness testifying to a sale, can state it in general terms, subject of course to cross-examination; but cannot state his opinion or understanding, as distinguished from his recollection or impression of the acts and conversation of the parties.[6] If it appear by the testimony that there was a written contract, it must be produced, or its absence accounted for, to open the way for parol evidence of its contents;[7] and plaintiff must prove performance of its conditions. A mere receipt for price, though specifying the goods,[8] or for the goods, though specifying the price, is not the primary evidence

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[1] Thus in a broker's action, the declarations of the owner of the goods that he had sold them, and received the price from the broker as guarantor, are, after the death of the declarant, competent against the buyer, to show that the right of action was transferred from the declarant to the broker. White v. Chouteau, 10 Barb. 202, s. p. in a further decision, 1 E. D. Smith, 493.

[2] Smith v. Joyce, 12 Barb. 21; and see McPherson v. Cheadell, 24 Wend. 15; Thompson v. Sayre, 1 Den. 175.

[3] See Kane v. Johnston, 9 Bosw. 154.

[4] See Power v. Root, 3 E. D. Smith, 70; Jaques v. Elmore, 7 Hun, 675; N. Y. Ice Co. v. Parker, 21 How. Pr. 302; Griffin v. Keith, 1 Hilt. 58; Webb v. Chambers, 3 Ired. (No. Car.) 374. This is the better opinion (see Pow. Ev. 226), although other proof of delivery has been sometimes required at circuit.

[5] Sherman v. N. Y. Central R. R. Co. 22 Barb. 239.

[6] Murray v. Bethune, 1 Wend. 191; and see on this distinction, 3 Abb. N. C. 229.

[7] Unless defendant's admission of its contents is received as primary evidence. Slatterie v. Pooley, 6 Mees. & W. 664. Compare Northrup v. Jackson, 13 Wend. 85. As to destruction of the instrument, see Tayloe v. Riggs, 1 Pet. 591; Steele v. Lord, 70 N. Y. 280, and cases cited. Items charged in an account as goods delivered on defendant's orders will not be presumed to have been delivered on written orders. Smith v. Joyce, 12 Barb. 21.

[8] See Terry v. Wheeler, 25 N. Y. 520; but compare Bonesteel v. Flack, 41 Barb. 435, s. c. 27 How. Pr. 310.

of the contract, such as to render oral testimony secondary;[1] nor is a memorandum of the terms of sale, made by one party,[2] or by a witness,[3] and not communicated to, or not assented to by the other—as for instance where it was made by the broker of both merely for the purpose of preserving a charge of his commissions.[4] Evidence that the buyer, after receiving a written statement of terms, took possession of the property without dissent, shows an acceptance of, and acquiescence in the terms.[5] Where the contract refers to a written instrument not as embodying the contract, but for ascertaining some of the terms of the contract, it is not necessary to prove the execution of the latter in order to admit it in evidence in establishing the contract sued on; but identifying it is enough.[6]

A contract for a sale on fixed terms as to price or otherwise, is admissible under a general allegation of sale and delivery, &c., if all the conditions of the contract are fulfilled, and nothing remains but payment of the price.[7]

A written contract is admissible under an allegation of the contract, not stating that it was in writing;[8] and an allegation that there was a writing is not needed, even when the writing is necessary by reason of the statute of frauds.[9]

If the contract was in duplicate, the production of either one will be enough, if signed by the defendant,[10] without producing or accounting for the other.[11] If it consists of two or more parts, one containing the consideration for the other, both must be produced or accounted for, unless the one is complete in itself.[12]

An invoice is, alone, no evidence of a sale,[13] but may be made

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[1] Southwich v. Hayden, 7 Cow. 334. If the sale was of a note or other written evidence of debt, the rule does not require the production of the note, &c. Lamb v. Moberly, 3 Monr. (Ky.) 179.

[2] Meacham v. Pell, 51 Barb. 65. It is competent if it was communicated. Lathrop v. Bramhall, 64 N. Y. 365.

[3] Parsons v. Disbrow, 1 E. D. Smith, 547.

[4] Gallaher v. Waring, 9 Wend 28.

[5] Dent v. N. A. Steamship Co. 49 N. Y. 390. Compare 1 Wall. 359.

[6] Smith v. N. Y. Central R. R. Co. 4 Abb. Ct. App. Dec. 262.

[7] Moffett v. Sackett, 18 N. Y. 522; Porter v. Talcott, 1 Cow. 359, and cases cited. And at common law this rule was applied where conditions not performed had been forfeited by the defendant. Corlies v. Gardner, 2 Hall, 345; Clark v. Fairchild, 22 Wend. 583. Otherwise now: see Oakley v. Morton, 11 N. Y. 25. Compare Holmes v. Holmes, 9 N. Y. 525, affi'g 12 Barb. 137.

[8] See page 293 of this vol.; and Tuttle v. Hannegan, 54 N. Y. 686, affi'g 4 Daly, 92.

[9] 1 Greenl. Ev. 86.

[10] Stephen Dig. Ev. art. 64.

[11] See Cleveland, &c. R. R. Co. v. Perkins, 17 Mich. 296.

[12] Dobbin v. Watkins, Col. & C. Cas. 39, s. c. 3 Johns. Cas. 2 ed. 415. But see paragraph 44, and page 523 of this vol.

[13] It does not of itself necessarily indicate to whom the things are sent, or even that they have been sent at all. Hence, standing alone, it is never regarded as evidence of title. Dows v. National Exchange Bank of Milwaukee, 91 U. S. (1 Otto), 618, 630. As between the consignor and consignee, the bill of lading cannot be regarded as a contract in writing, but merely as an admission or declaration on the

relevant by connected writings[1] or parol evidence of intention. A bill of parcels or particulars, expressing that defendant bought the goods of plaintiff, if shown to have accompanied the goods to defendant's possession,[2] is *prima facie*, but not conclusive evidence that the transaction was a sale.[3]

Oral evidence is competent, to show that a mere receipt for merchandise[4] or for the money as an advance on merchandise to be delivered,[5] or a mere unilateral promise in writing by the buyer, to pay a certain sum, not stating any terms of sale,[6] was given on a sale, and to prove the terms of the sale; for such a receipt or promise is not a written contract within the rule excluding parol evidence to explain or vary it. Otherwise of an instrument that expressly imports a bailment or storage,[7] unless shown to have been delivered subsequently to a completed sale.[8]

6. *—made by letter or telegram.*]—To prove a contract made by a proposal and assent through correspondence (as distinguished from the filling of an order received by mail), it is not enough to prove that the proposal was assented to by a mental act, nor by conduct unknown and not communicated to the proposer.[9] But it is not necessary to prove that the assent actually came to the knowledge of the proposer, nor does evidence that it did not come to his knowledge avail.[10] It is enough to prove that the assenting party duly mailed or delivered to the telegraph company[11] (whichever was the adopted course of correspondence),[12] an unqualified[13] assent; and from the moment the communication

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part of the consignor as to his purpose, at the time, in making the shipment, and such admission is subject to be rebutted by other circumstances connected with the transaction. Emery's Sons v. Irving Nat. Bank, 25 Ohio St. 360, s. c. 18 Am. R. 299; s. p. Beebe v. Mead, 33 N. Y. 587.

[1] Buxton v. Rust, L. R. 7 Exch. 1, 5, s. c. 1 Moak's Eng. 135, 139.

[2] Or to have been received by him before delivery of the goods. Dent v. N. A. Steamship Co. 49 N. Y. 390.

[3] Sutton v. Crosby, 54 Barb. 80; Beebe v. Mead (above).

[4] Though containing such words as "at $ per bushel." Sheldon v. Peck, 13 Barb. 317; or "consigned for six months." George v. Joy, 19 N. H. 544; Benj. on S. § 213.

[5] Potter v. Hopkins, 25 Wend. 417.

[6] Tisdale v. Harris, 20 Pick. 9.

[7] Wadsworth v. Allcott, 6 N. Y. 64; Stapleton v. King, 33 Iowa, 28, s. c. 11 Am. R. 109. Compare Rahilly v. Wilson, 3 Dill. 420.

[8] See Allen v. Schuchardt, 1 Am. L. Reg. 13; Domestic Sewing Machine Co. v. Anderson, 23 Minn. 57.

[9] White v. Corlies, 46 N. Y. 467. Compare Lungstrass v. German Ins. Co. 40 Mo. 201, s. c. 8 Am. R. 100.

[10] Vassar v. Camp, 11 N. Y. 441, affi'g 14 Barb. 341.

[11] Parks v. Comstock, 59 Barb. 16, Trevor v. Wood, 36 N. Y. 307, s. c. 3 Abb. Pr. N. S. 355, rev'g 41 Barb. 255, s. c. 26 How. Pr. 451.

[12] An offer sent by mail by one who must have known that the regular usage of conducting business was to reply by mail, implies authority to communicate acceptance by mail. Wall's Case, L. R. 15 Equity, 18, s. c. 5 Moak's Eng. 686.

[13] As to what is a qualification such as to preclude assent, see Vassar v. Camp, 11 N. Y. 441, affi'g 14 Barb. 341; Clark v. Dales, 20 Barb. 42; Beck's Case, L. R. 9 Ch. App. 392, s. c. 8 Moak's Eng. 929.

thus passed beyond his control the contract was complete,[1] unless the proposal had been revoked, by notice previously actually reaching him,[2] or by the death of the proposer.[3] Where the contract is made by correspondence the original letters or telegrams constituting it are the *primary evidence.* In the case of a letter, the original which was actually sent must be produced or accounted for, or a duplicate made and signed as such at the time. A press copy is not competent in lieu of it without laying proper foundation for secondary evidence.[4] When such foundation is laid, a copy may be put in evidence by calling the person who made it, or some other witness who has compared it with the original, to swear to its accuracy. An entry purporting to be a copy, made in a letter-book by a clerk since deceased, is competent *prima facie* evidence of the contents of the original, upon proof that according to the usual course of the employer's business, letters by him were copied by this clerk; and—if it be a hand copy, not a press copy—that this entry was in the clerk's handwriting, and that in other instances his copies had been examined and found correct.[5] Evidence that it was the usual course of business of the deceased clerk to mail letters thus copied by him, is *prima facie* evidence that the original was mailed.[6] A sworn copy of a letter-press copy is competent secondary evidence of the contents of the letter, without producing the letter-press copy, if production of the letter-book is offered and not required.[7] Where a press copy is produced as secondary evidence, a witness may be asked if it appears to be in the handwriting of the party; then by proving that it is a press copy, it will follow that the letter was his.

If the communication was by *telegraph*, the appropriate primary evidence, in strictness, is sometimes the original message delivered to the telegraph company by the sender, and sometimes the transcript delivered by the company to the receiver. The question depends on whether it is desired to prove the act of the sender as the manifestation of assent,[9] or admission[10] on his

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[1] The leading case is Mactier v. Frith, 6 Wend. 103, 117, rev'g 1 Paige, 434, s. p. Re Imperial Land Co. L. R. 7 Ch. 587; opposed in 7 Am. Law Rev. 433. In the application of this rule observe that it is based on the mail or telegraph being the usual and proper course of communication. If the parties are in the same place, acceptance sent by mail or telegraph, and not actually reaching the party, is not enough, unless that mode of communication was authorized by him, or the proposal was communicated by him in the same way. In general a communication sent in either method may be accepted by assent put on its course in the same method.

[2] Wheat v. Cross, 31 Md. 99, s. c. 1 Am. R. 28, and cases cited.

[3] See Mactier v. Frith (above).

[4] 1 Tayl. Ev. 414. Where the copies are made by manifolding or by printing from a stencil, as in the use of the papyrograph or electric pen, the principle that each is an original seems applicable, as in the case of ordinary printing.

[5] Pritt v. Fairclough, 3 Campb. 305.

[6] Id.; and see 3 Campb. 379; and 61 N. Y. 362.

[7] Goodrich v. Weston, 102 Mass. 362, s. c. 3 Am. R. 469.

[8] Commonwealth v. Jefferies, 7 Allen, 561.

[9] As in Trevor v. Wood, 36 N. Y. 307, s. c. 3 Abb. Pr. N. S. 355.

[10] See Commonwealth v. Jefferies, 7 Allen, 563.

part; or to prove actual notice to the receiver.[1] In the former case, the sender's message as delivered to the telegraph office is primary evidence. In the latter case the company's transcript, as delivered to the receiver is the only primary evidence. In either case the duplicate that is not the primary evidence is competent as secondary evidence, and from it the jury may infer the other.[2] The telegraph clerks are not privileged merely because of the character of their vocation.[3]

A written order, shown, by proof of handwriting,[4] or otherwise, to have come from defendant or his authorized agent, produced from plaintiff's possession, is competent without proof of the *mode of its transmission*, for it will be presumed to have been duly delivered;[5] and if shown to have been received in due course of mail, in answer to letters mailed to the alleged writer, it may be presumed to have come from him.[6] The date of the paper, if it be dated, is *prima facie* evidence of the time it was written,[7] unless its competency as evidence depends on the date, in which case plaintiff should be prepared with other evidence on that point.[8] Evidence that a letter was duly mailed[9] in the post-office or government letter box,[10] or deposited in the box or other place where the person addressed was accustomed to have his letters received,[11] will sustain an inference that he received it,[12] even though he testify that he did not.[13] The post-mark is *prima facie* evidence of the time and place when the communication was in the post-office,[14] but not of the time when it was first put in.[15] Its genuineness should be shown.

The mere fact that a letter or telegram put in evidence was sent in response to a previous one, or was one of a series of *connected correspondence*, nor even the fact that it refers to the previous letter to which it was an answer, does not render it incompetent

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[1] As where the offerer desires to revoke; see Wheat v. Cross, 31 Md. 99, s. c. 1 Am. R. 28.

[2] See Commonwealth v. Jefferies (above).

[3] State v. Litchfield, 58 Me. 267.

[4] See Chapter on BILLS, NOTES AND CHECKS.

[5] See, for this principle, p. 259, paragraph 12; p. 266, paragraph 20.

[6] See Bush v. Miller, 13 Barb. 487.

[7] Livingston v. Arnoux, 36 N. Y. 519, affi'g 15 Abb. P. N. S. 158.

[8] Smith v. Shoemaker, 17 Wall. 637. Compare Jermain v. Dennison, 6 N. Y. 276.

[9] Huntley v. Whittier, 105 Mass. 391, s. c. 7 Am. R. 536, and cas. cited; 3 Dill. 571.

[10] See 2 Abb. New Cas. 70, note.

[11] Howard v. Daly, 61 N. Y. 366.

[12] A stricter rule is applied in some other actions. See p. 224 of this vol., and Carpenter v. Providence Ins. Co. 4 How. U. S. 220. Whether there is a presumption by the law, or only ground for an inference by the jury, compare further, Allen v. Blunt, 2 Woodb. & M. 121, 130; Bank of Bellefontaine v. McManigle, 69 Penn. St. 156, s. c. 8 Am. R. 236.

[13] Huntley v. Whittier (above); Wall's Case, L. R. 15 Eq. 18, s. c. 5 Moak's Eng. 686, 693.

[14] 2 Abb. New Cas. 70, Note. As to its genuineness, see 2 Tayl. Ev. 1229.

[15] Id.

without the other, nor compel him who puts it in to offer that also, although it entitles the other party to offer the connected letter if he desires.[1] But unless the communication on its face appears to embody all the terms intended to be assented to, either party may show that it was sent in answer to a previous one of such nature that it should be read or taken with the answer, in order that the whole contract may appear;[2] and if this be shown, the earlier letter will be a necessary part of the primary evidence of the contract.[3]

If the contract was made by correspondence, and it is not apparent on the face of the communication offered in evidence that it was intended as embodying the terms of the contract at large, then for the purpose of determining whether it constituted the contract within the rule which excludes *oral evidence to vary* a contract, oral evidence is admissible of the circumstances and purpose in which it was sent; and the question is whether, according to the intent and understanding of the parties at the time it was sent and received, it was the expression of the contract, or only a part of it.[4] If the latter, the other terms may be shown by parol.[5] If the correspondence appears to embody the contract, it constitutes the primary evidence, and is within the rule forbidding parol evidence to explain a writing.[6]

7. *Requisite memorandum under Statute of Frauds.*]—If the price is $50 or more, or, where no price was fixed, if the value be clearly proven to be worth that sum,[7] the statute of frauds[8] requires evidence that the agreement, or some note or memorandum thereof, was in writing, and subscribed[9] by the party to be charged therewith,[10] or his lawful agent,[11] unless part payment or delivery is shown. The writing is competent under a general

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[1] Stone v. Sanborn, 104 Mass. 319, s. c. 6 Am. R. 238, disapproving 1 C. & K. 626. And see Cary v. Pollard, 14 Allen, 285.

[2] Beach v. Raritan, &c. R. R. Co. 37 N. Y. 463, 464.

[3] See Hough v. Brown, 19 N. Y. 111; Myers v. Smith, 48 Barb. 614; Brisban v. Boyd, 4 Paige. 17; Clark v. Dales, 20 Barb. 42; Brayley v. Jones, 33 Iowa, 508.

[4] Beach v. Raritan, &c. R. R. Co. 37 N. Y. 463, 464.

[5] Id.

[6] Whitmore v. South Boston Iron Co. 2 Allen, 52, s. c. 1 Am. L. Reg. 403.

[7] See p. 3 of this vol.

[8] N. Y. R. S. 135, § 2 (3 Id. 6th ed. 142).

[9] At the end.

[10] Subscription by both is not essential, even on the ground of mutuality. Justice v. Lang, 42 N. Y. 493, 52 N. Y. 323, 39 Super. Ct. (7 J. & S.) 283. And see Butler v. Thompson, 92 U. S. (2 Otto), 412, 11 Blatchf. 533. And the fact that plaintiff added his signature, and afterward erased it, does not alone prevent his using the paper in evidence. Rhoades v. Castner, 12 Allen, 130. The statute does not apply to agreements for production or manufacture, as distinguished from agreements of sale. For a ready clue to the conflicting cases on this vexed distinction, see Smith v. N. Y. Central R. 4 Abb. Ct. App. Dec. 262; Cooke v. Millard. 5 Lans. 243, 65 N. Y. 352; Deal v. Maxwell, 51 N. Y. 652; Flint v. Corbett, 6 Daly, 429; Pitkin v. Noyes, 48 N. H. 294, s. c. 2 Am. R. 218; Goddard v. Binney, 115 Mass. 450, s. c. 15 Am. R. 112.

[11] 2 N. Y.

allegation of contract without specifying writing.[1] If, however, the complaint does not affirmatively indicate that the contract was void under the statute, and the answer admits the contract, without alleging the facts showing it to be void under the statute, evidence of compliance with the statute is dispensed with by the admission.[2] The note or memorandum may be distinguished from the contract of which it is the evidence.[3]

It matters not how many papers must be taken together to make out the note or memorandum,[4] nor how informal they are,[5] if the statute is substantially complied with; but where several papers are resorted to, each must be subscribed by defendant, or imported, by reference or annexation, into one that is, leaving nothing to be supplied by parol, to complete the memorandum, except evidence of the identity of the paper.[6] Parol proof is competent to supply the reference, where it can be done clearly and with certainty.[7] If the paper is not addressed to plaintiff, oral evidence of its delivery to him is competent; but not always essential.[8] If interlineations appear, oral evidence that they were assented to is competent.[9] The memorandum must be complete, so far as that all elements of the contract or engagement on the part of the defendant, or party sought to be charged, must be stated,[10] or legally presumble from what is stated;[11] and defects cannot be supplied by parol;[12] but the fact of its delivery,[13] and that plaintiff, in consideration, promised to perform on his part, may be proven by parol,[14] as well as the rate of payment, if the

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[1] Washburn v. Franklin, 7 Abb. Pr. 8, s. c. 28 Barb. 27.

[2] Duffy v. O'Donovan, 46 N. Y. 223; Spear v. Hart, 3 Robt. 420.

[3] Boardman v. Spooner, 13 Allen, 353; Benj. on S. 209; Williams v. Bacon, 2 Gray, 387; Marsh v. Hyde, 3 Id. 331. And see 56 N. Y. 503.

[4] As, for instance, the rules of an exchange, and the memoranda of a transaction by its members (Peabody v. Speyers, 56 N. Y. 230); or ordinary commercial correspondence (Thompson v. Menck, 4 Abb. Ct. App. Dec. 400, rev'g 22 How. Pr. 431; Leather Cloth Co. v. Hieronimus, L. R. 10 Q. B. 140, s. c. 12 Moak's Eng. 211).

[5] Same cases; and see Argus Co. v. Mayor, &c. of Albany, 55 N. Y. 495, affi'g in effect 7 Lans. 264.

[6] Pierce v. Corf, L. R. 9 Q. B. 210, s. c. 8 Moak's Eng. 316. Thus, defendant's assent may be proved by his writing in answer to a request from plaintiff for the contract: "I send you a copy of your *letter* of, &c.," inclosing it. This, though not intended as a recognition, is, if signed by him, a sufficient signing of a memorandum. Buxton v. Rust, L. R. 7 Exch. 1, 5, s. c. 1 Moak's Eng. 135, 139. Compare Hicks v. Cleveland, 48 N. Y. 84; Neubery v. Wall. 65 Id. 484; and paragraphs 43 and 44.

[7] Beckwith v. Talbot, 95 U. S. (5 Otto), 289, 292.

[8] Darby v. Pettee, 2 Duer, 139; and see 55 N. Y. 495; Peabody v. Speyer, 56 Id. 236.

[9] Stewart v. Eddowes, L. R. 9 Com. Pl. 311, s. c. 9 Moak's Eng. 405.

[10] Wright v. Weeks, 25 N. Y. 153, affi'g 3 Bosw. 377.

[11] Id.; Warren v. Winne, 2 Lans. 209.

[12] Wright v. Weeks (above); Calkins v. Falk, 1 Abb. Ct. App. Dec. 291, affi'g 39 Barb. 620. But where the terms are stated, an ambiguity as to what they mean may be cleared by oral evidence, if it can be done by showing the surrounding circumstances, as distinguished from the oral stipulations of the parties. Hagan v. Domestic Sewing Machine Co. 9 Hun, 73; and see 25 N. Y. 153, 12 Id. 40.

[13] See 55 N. Y. 504.

[14] This is the sound principle, and goes further than any other view to harmonize

memorandum states the means of determining the rate.[1] So the performance by the plaintiff may be proved by parol; and evidence of a parol modification in this respect does not impair the effect of the memorandum.[2]

8. *General rule as to Explaining writing by Parol.*]—In the present state of the law, the rule excluding parol to vary a writing, in its application to commercial sales, amounts to little more than this principle: viz., that when the parties or their agents have embodied the terms of their agreement in writing, neither can, in an action between themselves (unless impeaching the instrument), give oral evidence that they did not mean that which the instrument, when properly read, expresses or legally implies, or that they meant something inconsistent therewith.

In more detail, the rule and its established exceptions may be stated thus: A written instrument, although it be a contract within the meaning of the rule on this point, does not exclude oral evidence tending to show the actual transaction, in the following cases:

1. Where the action is not between the parties to the instrument, nor those claiming under and in privity with them.[3]

2 Where the object of the evidence is to impeach the validity of the instrument, or any part of it.[4]

3. Where the object of the evidence is to establish a separate oral agreement constituting a condition *precedent* to the existence of an obligation claimed to arise on the instrument.[5]

4. Where the object of the evidence is simply to show the surrounding circumstances of the parties, and of the subject of the contract, and the usages of language under which the instrument was written, in order to enable the court to read the instrument with the same knowledge with which the parties wrote it.[6]

5. Where the language of the instrument leaves its meaning

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the conflict in the cases. See cases above cited, and Justice v. Lang, 52 N. Y. 323, and cas. cited; Williams v. Morris, U. S. Supreme Ct. (17 Alb. L. J.) 56. But of course acceptance with modification cannot be proved by parol. Jenness v. Mount Hope Iron Co. 53 Me. 20; Benj. on S. § 210.

[1] As where it specified "current rates" (55 N. Y. 504), or even left the parties to a *quantum meruit*. Id. Compare Stone v. Browning, 68 N. Y. 598.

[2] Leather Cloth Co. v. Hieronimus (above).

[3] See page 7 of this vol., paragraph 16, and Coleman v. First Nat. Bank, 53 N.Y. 388.

[4] As, for instance, for want of due execution or delivery, or for illegality, fraud, duress, or lack of consideration, or as made under mistake (see chap. 14, and the chapters on these defenses), and the rule is the same whether the party adducing the evidence seeks to avoid the instrument, or to have it reformed. 1 Story's Eq. Jur. § 156, &c.

[5] Pym v. Campbell, 6 E. & B. 370; Wallis v. Littell, 11 C. B. N. S. 369. Otherwise of a deed delivered to the party. Worrall v. Munn, 5 N. Y. 229. A condition *subsequent* cannot be proved by parol. Gridley v. Dole, 4 N. Y. 486.

[6] See p. 130 of this vol.; and Dana v. Fiedler, 12 N. Y. 40, affi'g 1 E. D. Smith, 463: Pollen v. Le Roy, 30 N. Y. 549, affi'g 10 Bosw. 38; Messmore v. N. Y. Shot & Lead Co. 40 N. Y. 422.

doubtful,[1] or extrinsic facts in evidence raise a doubt in respect to its application.[2]

6. Where it appears that the instrument was not intended to be a complete and final statement of the whole transaction, and the object of the evidence is simply to establish a separate oral agreement on a matter as to which the instrument is silent, and which is not contrary to its terms, nor to their legal effect.[3]

7. Where the object of the evidence is to show a usage legally affecting the parties, by which incidents not expressly mentioned in such contracts are annexed to or implied in them, if the usage be not repugnant either to the express terms or the legal effect of the contract.[4]

8. To show, if the contract be unsealed, that it was made for the benefit and on behalf of the party suing or sued upon it, even though he be not named in it; or, if it be sealed, that it was so made, and has been duly ratified by such party.[5]

9. To show that the date was erroneous.[6]

10. To show that the consideration was different from that stated (except for the purpose of defeating the instrument),[7] or that it was not paid, though payment was acknowledged.[8]

11. To show that a transfer absolute on its face was given as security[9] or in trust.[10]

12. To show the mistake which caused a repugnancy appearing on the face of the instrument.[11]

13. Where the object of the evidence is to show a separate *subsequent* valid agreement to rescind, modify, extend, or waive[12] the contract or a provision of it.

The rule that the contract cannot be varied by parol, when it is applicable, excludes evidence which would vary any obligation implied by law from its terms, as well as that which would directly vary its terms.[13]

The admissibility of oral evidence under these rules is subject to the qualification that oral evidence cannot satisfy the demand of the statute of frauds for a memorandum in writing.

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[1] Robinson v. United States, 13 Wall. 363.

[2] Moore v. Meacham, 10 N. Y. 207; Agawam Bank v. Stever, 18 N. Y. 502.

[3] Heineman v. Heard, 39 N. Y. 98; Blossom v. Griffin, 13 N. Y. 569.

[4] See paragraph 9.

[5] See paragraphs 10–12.

[6] Draper v. Snow, 20 N. Y. 331. And so it seems of the place of execution. Id.

[7] McCrea v. Purmort, 16 Wend. 460, affi'g 5 Paige, 620; s. p. 16 N. Y. 538. Compare Halliday v. Hart, 30 N. Y. 474.

[8] Bingham v. Weiderwax, 1 N. Y. 509.

[9] Horn v. Keteltas, 46 N. Y. 605.

[10] Britton v. Lorenz, 45 N. Y. 51, affi'g 3 Daly, 23; and see Chapter XV.

[11] McNulty v. Prentice, 25 Barb. 204.

[12] Stockwell v. Holmes, 33 N. Y. 53; Carroll v. Charter Oak Ins. Co. 1 Abb. Ct. App. Dec. 316, affi'g 40 Barb. 292; but subject to the statute of frauds. Shultz v. Bradley, 57 N. Y. 646.

[13] La Farge v. Rickert, 5 Wend. 187; Thorp v. Ross, 4 Abb. Ct. App. Dec. 416.

9. *General rule as to proof of Usage.*]—The common law rule excluding oral evidence in modification of written, depends, so far as contracts are concerned, upon the presumption that the parties intended their writing to define their rights and liabilities, and adopted the writing because they did not wish to leave any question open to the uncertainty of memory. But in regard to commercial contracts, especially sales, the known and settled usages of business are relied on as a similar safeguard; and from the brevity with which commercial contracts are despatched, in the ordinary course of trade, arises another counter presumption to the effect that the parties did not intend in their memorandum to express what is defined by the usages of the trade, but only those parts of the transaction which usage would not define,[1] together also with any stipulations by which they desired to depart from the usage, and make for this transaction a different rule. The same principles are involved where a transaction is had orally, and usage is relied on to define its effect. Hence, the three chief rules as to what usage is provable to establish or vary a contract of sale.

It must be, 1. A usage which the parties knew or ought to have known; 2. one which is consistent with the general law merchant;[2] and 3, not incompatible, either with the express terms of their contract, or the legal obligations which the law implies from those terms.

One who is engaged in a trade or business is bound to know its usages at the place where he acts, and as against himself is presumed by law to have contracted with reference to them.[3] One who is not engaged in the business, but contracts with those who are, may be presumed, in the absence of evidence to the contrary, to have known its usages, and to have contracted with reference to them;[4] but the presumption is not conclusive, and he may prove his ignorance, even by his own testimony.[5]

Usage must be excluded, not only when adduced for the purpose of nullifying rules of law, but equally when offered for the purpose of establishing presumptively a stipulation which would be valid if expressly made, but which is contrary to the implica-

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[1] Hutton v. Warren, 1 Mees. & W. 474; Wigglesworth v. Dallison, 1 Sm. L. Cas. [675], note in 7th Am. ed. 905.

[2] Local usage cannot be allowed to subvert the settled rules of law. Whatever tends to unsettle the law, and make it different in the different communities into which the State is divided, leads to mischievous consequences, embarrasses trade, and is against public policy. Barnard v. Kellogg, 10 Wall. 383.

[3] Robinson v. United States, 13 Wall. 363.

[4] Walls v. Bailey, 49 N. Y. 464. and cas. cited. Compare Whitehouse v. Moore, 13 Abb. Pr. 142. The extension of this doctrine is disapproved in Partridge v. Ins. Co. 15 Wall. 573.

[5] Walls v. Bailey (above). And the same presumption may be applied in respect to the usage or custom of the contracting parties. Dunbar v. Pettee, 1 Daly, 112.

tion which the commercial law draws from the stipulations the parties have expressed.[1]

Usage of language in a trade may sometimes be competent when evidence of other usages of the trade would not; for where the usage is adduced, not so much to supply what is unexpressed, as to show the meaning of what is expressed, a further principle is involved, viz., that it is always competent to show by parol the usages of language of those who adopted the writing; and thus what it was in their knowledge that its terms referred to.[2] Hence, although the terms used be apparently unambiguous, evidence is competent to show that in the usage of language in the trade or business in which the words were employed, they had a different meaning.[3]

As to the *mode* of its proof,—a usage of trade cannot be proven by the understanding or opinions of witnesses as to the law, or what should be the rule,[4] but the witnesses should testify to the existence of the usage, which, if they are qualified, they may do either from their own knowledge and experience of it, or from information derived through others in the course of trade.[5] The testimony of a single witness is not insufficient to prove a usage of trade, if he has full knowledge and long experience on the subject, and testifies explicitly to the necessary extent and duration of the usage, and is uncontradicted.[6] A reported case in which the court held a commercial usage to be established by evidence, is relevant in other cases between other parties, involving the usage at the same place,[7] and within reasonable limits of proximity in time.

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[1] Thus, since, in the sale of chattels by one not the maker or grower, and not guilty of fraud, and to a buyer having opportunity to examine, the law implies no warranty, evidence of usage is not competent to import a warranty into the contract. Barnard v. Kellogg, 10 Wall. 388 (Bradley and Strong, JJ., dissented). Dickinson v. Gay, 11 Allen, 29; Benj. on Sales, § 215; and see 11 Allen, 426.

[2] See paragraphs 8 and 9.

[3] Myers v. Sarl, 30 L. J. Q. B. 9, s. c. 7 Jur. N. S. 97. For instances see paragraphs 8 and 9. The cases which exclude usage adduced to explain unambiguous terms (see Ins. Co. v. Wright, 1 Wall. 456; and see 15 Id. 573, affi'g 1 Dill. 139), do not overthrow the principle that it is always competent under the strictest rules of interpretation, to show the usages of speech and expression habitual to the writer. Evidence of what he meant in the contract by a certain expression is not competent; but evidence that he was accustomed to use that expression in a particular sense, is; and on the same principle, evidence that the trade in which he was engaged was accustomed to use it in a particular sense, is competent; and when such evidence has been given, the court will read the expression in the contract in the light which the usage throws upon it.

[4] Allen v. Merchants' Bank of N. Y. 22 Wend. 215; and see 15 Id. 482; Hawes v. Lawrence, 3 Sandf. 193, affi'd in 4 N. Y. 345; Collyer v. Collins, 17 Abb. Pr. 467.

[5] Allen v. Merchants' Bank (above), Nelson, J. But compare Mills v. Hallock, 2 Edw. 652.

[6] Robinson v. United States, 13 Wall. 363; Vail v. Rice, 5 N. Y. 155.

[7] Nelson, J., in Allen v. Merchants' Bank (above). Otherwise, if the decision proceeded on the *concession* of the parties that the usage existed. Crouch v. The Credit Foncier of England, L. R. 8 Q. B. 374, s. c. 6 Moak's Eng. 108. How far decisions

Cogent evidence, however, is necessary to establish the existence of a usage of trade;[1] it ought to be so clear as to leave no doubt that the parties contracted in reference to it.[2]

10. *Plaintiff the real party in interest, though not so named in the contract.*]—Whatever may have been the form of the contract, unless under seal, and even in that case if it has been ratified by the plaintiff,[3] the plaintiff may show, even by oral evidence, that a party who executed it, although apparently as the principal, did so as the agent of the plaintiff; and upon such evidence the plaintiff may recover, notwithstanding the statute of frauds applies to the contract, and requires it to be in writing;[4] subject to any question of counterclaim or set-off arising from defendant's dealings with the agent in ignorance of his agency. So, where one carries on business, and sells goods therein in the name of another (although for his own account), the promise to pay may be presumed to have been made to the one in whose name the business was done;[5] and he therefore may recover thereon; although the one by whom the sale was made might equally recover if the other did not object.[6]

Where the plaintiff was the defendant's agent, and ostensibly acted as such, he cannot convert his position into that of a principal to sell to his employer, even by evidence of a usage of trade, unless he also shows that defendant knew and assented to the dealing on the footing of such a usage.[7]

11. *Purchase by defendant's agent.*]—An allegation of sale to defendant will admit evidence of a sale to his agent, and of the agent's authority.[8] The three elements in the proof of purchase by an agent are, the fact that an agency existed; that the scope

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of State courts are evidence in the United States courts, of commercial usage, see Meade v. Beale, Taney, 339, 359.

[1] Citizen's Bank of Baltimore v. Grafflin, 31 Md. 507, s. c. 1 Am. R. 66; Randall v. Smith, 18 Am. R. 200, *note*, 207.

[2] Dawson v. Kittle, 4 Hill, 107; and see Goodyear v. Ogden, Id. 104.

[3] Briggs v. Partridge, 64 N. Y., and cases cited.

[4] Hubbert v. Borden, 6 Whart. (Penn.) 79; Nash v. Toune, 5 Wall. 703; Salmon Falls, &c. Co. v. Goddard, 14 How. U. S. 446; Eastern R. R. Co. v. Benedict, 5 Gray, 561; Alexander v. Moore, 19 Mo. 143; Benj. on S. §§ 210, 219, n.; and see paragraph 8, and cases cited. The rule is the same whether the agency was disclosed in the contract, or only orally or not at all; and whether defendant was seller or buyer. Same cases. For a strong case of presumption of ratification, see Hampton v. Rouse, 22 Wall. 272.

In an action to recover for stock to be given under the terms of a written contract to "J. S., president of the Eastern Railroad Company," in payment for iron sold,—*Held*, that the company suing could prove that the iron belonged to it, and that its president acted merely as its agent in the transaction, and that it could maintain the action in its own name. Eastern Railroad Co. v. Benedict, 5 Gray, 561; Benj. on S., § 219, n.

[5] Alsop v. Caines, 10 Johns. 396; affi'd, as Caines v. Brisban, 13 Id. 9.

[6] Gardiner v. Davis, 2 C. & P. 49, ABBOTT, J. Compare Paddon v. Williams, 1 Robt. 340, s. c. 2 Abb. Pr. N. S. 38; Howe v. Savory, 49 Barb. 403.

[7] Robinson v. Mollett, L. R. 7 H. of L. 802, 815, s. c. 14 Moak's Eng. 177, 189.

[8] For the distinction between general and special agency, see Butler v. Maples, 9 Wall. 766, and 5 Abb. N. Y. Dig. new ed. 243.

of the agent's authority extended to such a transaction as that in question; and that in the transaction he acted as agent and on account of the defendant.[1] In the absence of direct evidence, the existence of an agency may be inferred by the jury, from the fact that the supposed agent was continuously acting in the service of the defendant in the business in which the transaction was had;[2] and the scope of his authority may be inferred from the nature of his usual service.[3] The acts and declarations of the agent cannot alone establish the fact of agency, nor the scope of his authority; but there must either be independent evidence on those points, or there must be something to connect defendant with the particular act or declaration relied on, so as to render it competent against him without first assuming the existence of the relation it is sought to prove.[4]

Evidence of the habit and course of dealing is competent to bind the defendant, by showing his subsequent ratification of the transaction, whether there were original authority or not.[5] The principle is recognized that where an act is done by one person for the benefit of another, though without authority, the latter may be presumed in furtherance of justice to have ratified it, and may take the benefit of it as against third persons.[6] In cases where there is no evidence of original authority, the party relying on ratification must show that the principal after having knowledge of all the material facts, expressly or tacitly acquiesced;[7] but intent to ratify need not be shown.[8] Mere silence, under knowledge, only raises a presumption of ratification[9] after the lapse of a reasonable time for dissenting. Where the alleged agent was a mere stranger, intermeddling, the silence of the alleged principal does not raise a legal presumption of ratification; but at most is a circumstance for the jury.[10] The agency having been sufficiently shown, the fact that the transaction was done by the alleged agent for and on account of the defendant, may be shown by evidence of the admissions, declarations, and repre-

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[1] See Beals v. Merriam, 11 Metc. 470.

[2] Compare Verona Central Cheese Co. v. Murtagh, 50 N. Y. 214, rev'g 4 Lans. 17; and pp. 241, 276, of this vol.

[3] See Id.; and Larter v. Am. Female Guard. Soc. 1 Robt. 598. Principals having held out an agent, who paid for purchases in checks signed as agent, held liable for his purchases on credit. Morey v. Webb, 58 N. Y. 350, aff'g 65 Barb. 22.

[4] Howard v. Norton, 65 Barb. 161; s. p. Stringham v. St. Nicholas Ins. Co. 4 Abb. Ct. App. Dec. 322. See this principle more fully discussed on pp. 209, 218, of this vol.

[5] 2 Greenl. Ev. 13 ed. 51.

[6] Hampton v. Rouse, 22 Wall. 274. Factor is trustee of express trust. Ladd v. Arkel, 37 Supr. Ct. (5 J. & S.) 35.

[7] Id. 53; Booth v. Bierce, 38 N. Y. 463, rev'g 40 Barb. 114.

[8] Hazard v. Spears, 2 Abb. Ct. App. Dec. 353.

[9] Whether this presumption, in the case of agency, is one of law, or merely of fact, is disputed, see 27 Wis. 135, and cases cited.

[10] P. W. &c. R. R. Co. v. Powell, 28 Penn. St. 366, whether it is even that, is questioned by Dixon J. in 27 Wis. 135.

sentations made by the agent in the performance of the transaction;[1] and such evidence is then competent for any other purpose equally as would be the declarations of the principal himself. Whether there is sufficient proof of an agency to warrant the admission of the acts and declarations of the agent in evidence against the principal, is a preliminary question for the court to determine.[2] If authority from defendant to pledge his credit is shown, it is not necessary to show that he had a beneficial interest in the business. On a sale to an agent of a known principal, the agent being insolvent, and doing business in the principal's name by the latter's permission, the presumption is that the seller gives credit to the principal, not to the agent. One who permits another to use his name thus is liable for the debts, although he has no beneficial interest in the business.[3]

If it be shown by plaintiff that he had been previously in the habit of dealing with the principal through the agent in question, and defendant relies on a revocation of the authority, he must show actual notice of the termination of the agency, either directly or by presumptive evidence; or circumstances which constitute, as matter of law, constructive notice, must be shown.[4]

12. *Defendant liable as undisclosed principal.*]—Plaintiff need not show that he knew he was dealing with defendant. Not only where he knew that the apparent buyer was an agent for defendant,[5] or for an undisclosed principal,[6] but equally when he supposed the one with whom he dealt to be dealing for himself,[7] he may,[8] after discovering that the latter was merely an agent for defendant, elect to proceed against defendant,[9] unless, with knowledge that he was dealing with an agent, he elected to give credit to him personally instead of relying on the agency,[10] or unless, after acquiring full knowledge as to the true principal and the power of electing, he has clearly and unquestionably elected to treat the agent as alone his debtor.[11] Suing the agent to judgment, under such circumstances, is conclusive evidence of election.[12] The question whether he originally elected to give credit

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[1] Howard v. Norton, 65 Barb. 161.
[2] Cliquot's Champagne, 3 Wall 114. Compare p. 191 of this vol., note.
[3] Ferris v. Kilmer, 48 N. Y. 300.
[4] Claflin v. Lenheim, 66 N. Y. 301, rev'g 5 Hun, 269.
[5] Hubbert v. Borden, 6 Whart (Penn.), 79, 91.
[6] Truman v. Loder, 11 Ad. & El. 589.
[7] Meeker v. Claghorn, 44 N. Y. 349; McMonnies v. Mackay, 39 Barb. 561.
[8] Within a reasonable time. Smethhurst v. Mitchell, 1 E. & E. 622.
[9] The leading case is Thompson v. Davenport, 9 B. & C. 78, 86.
[10] Addison v. Gandasequi, 4 Taunt. 574; Patterson v. Gandasequi, 15 East, 62; Meeker v. Claghorn, 44 N. Y. 349; Rowan v. Buttman, 1 Daly, 412, and cases cited; McMonnies v. Mackay, 39 Barb. 561; Ranken v. Deforest, 18 Id. 143; and see Inglehart v. Thousand Isle Hotel Co. 7 Hun, 547. The fact that he knew he was dealing with an agent is not alone enough, see 53 N. Y. 388, 394.
[11] Curtis v. Williamson, 10 Q. B. 57, s. c. 11 Moak's Eng. 149.
[12] Priestly v. Fernie, 3 H. & C. 977; s. p. Morris v. Rexford, 18 N. Y. 552; Rodermund v. Clark, 46 Id. 354; Goss v. Mather, 2 Lans. 283; 46 N. Y. 689. But the

to the agent is one of intention, usually to be determined by the jury as a question of fact.[1] The fact that the contract of sale was in writing (if not sealed[2]) does not exclude oral evidence that defendant was the undisclosed principal of the apparent buyer,[3] even where the statute of frauds requires a writing;[4] and such evidence is competent, even though it does not appear in the body of the instrument nor in the signature that the signer acted as agent.[5] In the absence of such evidence, the mere fact that the apparent buyer was an agent and signed with the addition of agent, is not enough.[6]

In these cases, however, in so far as defendant can show that to compel him to pay would change the state of the accounts between him and his agent to his prejudice, plaintiff cannot recover of him.[7]

13. *Defendant liable though acting as agent.*]—In an action on a contract made by defendant in his own name,[8] although it appear that he acted as agent, plaintiff may recover against defendant as a principal,[9] provided, however, that if it appear that not only the fact of his agency, but also the name of his principal,[10] was disclosed at the time of making the contract,[11] plaintiff must show[12] that he gave credit exclusively to the defendant,[13] or that defendant had not at the time[14] the authority he assumed to have,[15] or that he has received from the principal the fund to be recovered.[16] If he simply disclosed his agency without naming a

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mere filing an affidavit of proof against the agent's estate in insolvency is not; though it may be evidence to go to the jury. Curtis v. Williamson, L. R. 10 Q. B. 57, s. c. 11 Moak's Eng. 149.

[1] Green v. Hopke, 18 C. B. 349, and cases cited. As to the case of foreign principal, see the opposing rules in Kirkpatrick v. Stainer, 22 Wend. 244, 259; Hutton v. Bullock, L. R. 8 Q. B. 331 (s. c. 6 Moak's Eng. 89); 9 Id. 572 (s. c. 10 Moak, 184); Armstrong v. Stokes, 7 Id. 598 (s. c. 8 Moak, 217).

[2] Briggs v. Partridge, 64 N. Y. 357, aff'g 39 Sup. Ct. (J. & S.) 389.

[3] Higgins v. Senior, 8 Mees. & W. 834, 844; s. p. Ford v. Williams, 21 How. U. S.; Coleman v. First Nat. Bank of Elmira, 53 N. Y. 388.

[4] Higgins v. Senior, 8 Mees. & W. 834, 844; Dykers v. Townsend, 25 N. Y. 57, Benj. on S. § 218.

[5] Ford v. Williams (above); Lerned v. Johns, 9 Allen, 419; Benj. on S. § 219, n. *Contra*, Fenly v. Stewart, 5 Sandf. 101, s. c. 10 N. Y. Leg. Obs. 40; Auburn City Bank v. Leonard, 40 Barb. 119; Babbett v. Young, 51 Id. 466.

[6] See De Witt v. Walton, 9 N. Y. 571.

[7] See Rowan v. Buttman, 1 Daly, 412; Curtis v. Williamson, L. R. 10 Q. B. 57, s. c. 11 Moak's Eng. 149.

[8] See Hegeman v. Johnson, 35 Barb. 200.

[9] Unless he be a public agent.

[10] Mills v. Hunt, 20 Wend. 431.

[11] McCoomb v. Wright, 4 Johns. Ch. 659.

[12] Plumb v. Milk, 19 Barb. 74.

[13] See Butler v. Evening Mail Ass. 61 N. Y. 634; Coleman v. First Nat. Bank, 53 Id. 388, and cases cited; and see Hall v. Landerdale, 46 N. Y. 70.

[14] Nason v. Cockroft, 3 Duer. 366; s. p. Rossitor v. Rossitor, 8 Wend. 494; Palmer v. Stephens, 1 Den. 471.

[15] Compare Feeter v. Heath, 11 Wend. 477, and Sinclair v. Jackson, 8 Cow. 543.

[16] Compare, on this question, Morrison v. Currie, 4 Duer. 79, and Hall v. Lauderdale, 46 N. Y. 70.

principal, the presumption is, in the absence of other evidence, that credit was given to him, not to the principal.[1] The fact that he was factor for disclosed foreign principals does not raise a presumption of law that the credit was given exclusively to himself;[2] but the question whether he is personally liable is one of intention, to be gathered from surrounding circumstances, usages, etc.[3] Parol evidence is admissible of a trade usage by which, if the principal's name is not disclosed within a reasonable time, the agents, though they acted avowedly as agents, are personally liable.[4] In the absence of such evidence the agent, acting openly for a known foreign principal, is presumed not personally liable.[5]

14. *Assumption of order originally given by a third person.*]—Plaintiff may recover on proof of an order originally given by a third person, and assumed by defendant;[6] but not (without amendment) on mere evidence that the defendant took an assignment of the subject of the order from the one who gave it.[7]

15. *Question to whom credit was given.*]—To prove that credit was given to one or another of several persons, the books of the party giving the credit are not competent evidence *in his own favor*, and against the one sought to be charged,[8] unless upon some ground which would make them competent generally,—as, for instance, where they are admissible as shop books, or as entries made in the course of duty, or against interest by a person since deceased, or as entries attested by the testimony of the maker, or as a contemporaneous memorandum by the witness which he has used to refresh memory, or as part of the *res gestæ*, or as having been communicated to the party against whom they are adduced.[9] The books of the party giving the credit are competent *against him* to show that he gave credit to another than defendant—as, for instance, that he charged the goods to the alleged agent through whom they were bought,[10] or to a third person to whom they were delivered[11]—and are strong evidence that he intended to give credit to the one he charged;[12] but in neither case are they conclusive,[13] but may be rebutted by oral or other evidence ex-

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[1] See Chappell v. Dann, 21 Barb. 17.

[2] Kirkpatrick v. Stainer, 22 Wend. 244, 259, but see, *contra*, Story on Ag. § 268; Armstrong v. Stokes, L. R. 7 Q. B. 578, s. c. 3 Moak's Eng. 217; Hutton v. Bullock, L. R. 8 Q. B. 331; 9 Id. 572, s. c. 6 Moak's Eng. 89; 10 Id. 184; see also Hochster v. Baruch, 5 Daly, 440.

[3] Prof. Dwight's note to Allen v. Schuchardt, 1 Am. L. Reg. N. S. 17.

[4] Hutchinson v. Tatham, L. R. 8 C. P. 482, s. c. 6 Moak's Eng. 230.

[5] Kirkpatrick v. Stainer (above).

[6] Sloan v. Van Wyck, 36 Barb. 335; again, 47 Id. 634.

[7] Barber v. Lyon, 22 Barb. 622.

[8] Somers v. Wright, 114 Mass. 171; Field v. Thompson, 119 Id. 151.

[9] See p. 53 of this vol.; and later paragraphs of this chapter.

[10] See Foster v. Persch, 68 N. Y. 400.

[11] Swift v. Pierce, 13 Allen, 136; Champion v. Doly, 31 Wis. 190.

[12] Ruggles v. Gatton, 50 Ill. 412; Swift v. Pierce (above).

[13] Foster v. Persch, 68 N. Y. 400, and cases above cited.

plaining the charge. It is not necessary for the plaintiff in such a case, in order to rebut the presumption arising from the charge, to show that it was caused by mistake or fraud; but any explanation consistent with the intention to give credit only to another, may be shown.[1]

If it be uncertain, on the evidence, whether the sale was on the credit of one or another, the plaintiff, or his agent who made the sale, may testify directly that he did so on the credit of defendant,[2] and that he intended to give credit to him, although he charged another on his books;[3] but evidence of the declarations of the plaintiff made to the third person, or otherwise, in the absence of the defendant, and not part of the *res gestæ*, is not competent in plaintiff's favor.[4]

Evidence that one of such persons had no property and was entirely irresponsible is inadmissible, for it is too remote to raise a presumption that the sale was not to him.[5] But the fact that the insolvency was communicated to plaintiff, and treated by him as a reason for refusing to sell to the third person, is competent.[6]

16. *Identifying the thing agreed for.*]—In application of the principles before stated[7] respecting oral evidence, it is to be observed that if a written contract or bill of sale specifies the thing sold, oral evidence is not competent to show that it was not intended to pass all that was specified,[8] nor to show that the writing is not satisfied by delivery of the particular lot specified;[9] but it is competent (unless inadequate by the statute of frauds) for the purpose of showing that additional articles were included in the transaction, though not specified in the writing.[10]

17. *Quality and description.*]—In applying the same principles to proof of the quality or description of the goods, it is well settled that extrinsic evidence is competent to show what was understood by persons engaged in the trade, by words[11] or ab-

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[1] Champion v. Doly, 31 Wis. 190. As, for instance, that it was so made at defendant's request (James v. Spaulding, 4 Gray, 451), or at the request of the third person (Burkhalter v. Farmer, 5 Kans. 477), or for temporary purpose, plaintiff not being informed as to the standing of the principal (Maryland Coal Co. v. Edwards, 4 Hun, 432), or inadvertently, the charge being posted from the order book. Fiske v. Allen, 40 Super. Ct. (J. & S.) 76.

[2] Lee v. Wheeler, 11 Gray, 236.

[3] Folsom v. Sheffield, 53 Me. 171; Burkhalter v. Farmer, 5 Kans. 477.

[4] Whitney v. Durkin, 48 Cal. 462; s. p. Moore v. Meacham, 10 N. Y. 207.

[5] Green v. Disbrow, 56 N. Y. 334, rev'g 7 Lans. 381. (*Contra*, Miller v. Brown, 47 Mo. 504, s. c. 4 Am. R. 345; Moore v. Meacham, above.) So also of evidence that defendant, a father, had paid the son's debts to other tradesmen. Ib.

[6] See Bronner v. Frauenthal, 37 N. Y. 166, affi'g 9 Bosw. 350. Compare pp. 240 and 265 of this vol.

[7] Paragraphs 8 and 9.

[8] Ridgeway v. Bowman, 7 Cush. 268: Benj. on S. § 202.

[9] Vail v. Rice, 5 N. Y. 155.

[10] Nedvidek v. Meyer, 46 Mo. 600; s. p. Pierce v. Woodward, 6 Pick. 206. Compare Cram v. Union Bank, 1 Abb. Ct. App. Dec. 461, affi'g 42 Barb. 426.

[11] Such as "gas fixtures," Downs v. Sprague, 1 Abb. Ct. App. Dec. 550; or the "product" of hogs, Stewart v. Smith, 50 Ill. 397.

breviations used;[1] and for this purpose extrinsic evidence is competent to show what varieties or grades are included in the meaning of the generic term used;[2] what manufacture is designated by a particular brand;[3] that an article designated as of a particular material—such as mahogany furniture or horn chains,[4]—was by usage of trade so-called, though only partly of the material indicated, and that the parties intended such article; that the usage of measurement of the size of the articles was peculiar, as that in selling trees as of a certain height it was customary not to include the green top;[5] or that the qualifying words "with all faults" mean all that are not inconsistent with the identity of the goods;[6] and the like.

The fact that the articles delivered were such as to satisfy the contract may be proved by testimony to their quality, or by opinions of qualified witnesses that they corresponded with that which the contract calls for. If they are shown not to have corresponded, and to have been rejected on that account, evidence of a usage to make alterations afterward is not competent.[7]

18. *Quantity.*] — In application of the principles already stated,[8] as to oral evidence explanatory of sales, it is held that parol evidence is admissible to show that by the word "barrels," used in a written contract, was intended vessels of a certain kind and capacity, and not a measure of quantity, and that the parties contracting had reference not to a statute barrel, but to certain vessels of uniform size of different capacity from the statute barrel.[9] So extrinsic evidence of defendant's usage to sell 2,240 lbs. to the ton, instead of the statute number of 2,000 lbs., and that the contract was made in reference to his usage, is competent.[10] So under a contract for shingles by the "thousand," it may be shown that, by usage of the trade, two bundles of a certain size are sold as a thousand without regard to actual count.[11] So where

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[1] Dana v. Fiedler, 12 N. Y. 40, aff'g 1 E. D. Smith, 463.

[2] As, for instance, whether "good merchantable hay" includes clover, Fitch v. Carpenter, 40 Barb. 40; or what is intended by "good custom cowhide boots." Wait v. Fairbanks, Brayt. Vt. 77, 139; or whether "winter strained lamp oil" means sperm oil only, or whale oil as well, Hart v. Hammett, 18 Vt. 127; Benj. on S. § 213, n. In order to prove what article was intended in a contract, by a name used in commerce, it is proper to ask a witness, who is an expert, "how the article is generally known in the market, and how spoken of generally." Pollen v. Le Roy, 10 Bosw. 38, affi'd in 30 N. Y. 549.

[3] Pollen v. Le Roy, 30 N. Y. 549, aff'g 10 Bosw. 38. But not of a usage to accept an equal or better brand in lieu of that agreed for. Beals v. Terry, 2 Sandf. 127.

[4] Sweat v. Shumway, 102 Mass. 365, s. c. 3 Am. R. 471.

[5] Barton v. McKelway, 22 N. J. 165.

[6] Whitney v. Boardman, 118 Mass. 242; Benj. on S. § 213.

[7] Brown v. Foster, 113 Mass. 136; Benj. on S. § 215.

[8] Paragraphs 8 and 9.

[9] Miller v. Stevens, 100 Mass. 518, s. c. 1 Am. R. 139, and cases cited; Benj. on S. § 213, n. Evidence of a usage in the trade, in sales by quantity, to estimate by measuse of one barrel in every ten, taken promiscuously, is competent in an action between members of the trade. Dalton v. Daniels, 2 Hilt. 472.

[10] Many v. Beekman Iron Co. 9 Paige, 188. Compare Hall v. Reed, 1 Barb. ch. 500.

[11] Soutier v. Kellerman, 18 Mo. (3 Bennett), 509, s. p. 1 Greenl. Ev. § 281.

the contract is for a "cargo," [1] or a person's "crop," [2] or for a "season," [3] those words may be explained by parol. But if the writing, properly understood, calls for a certain quantity, evidence of a reservation of a part by parol, is inadmissible.[4]

If the contract is for a specific parcel or lot described as being of a certain quantity, "more or less," evidence of a usage that "more or less" is limited to a certain percentage, is not admissible; [5] nor is evidence that the parties' understanding was that the buyer was to have more or less as might be found necessary to make up a cargo, although it appeared that both parties knew that the goods were brought for that purpose, and that the amount to be required was uncertain.[6] If the contract calls for a specified quantity merely, "more or less" according to the discretion of a designated agent, the fair discretion of the agent is conclusive.[7] A bill-head notice restricting claims for deficiencies is not relevant, if the contract was complete and binding before the delivery of the bill.[8]

A variance between pleading and proof, as to the quantity, if it does not mislead, may be disregarded.[9]

19. *Price agreed.*]—Abbreviations [10] and ambiguous expressions [11] as to price, in a written contract, may be explained by parol. So where the agreement is for a certain advance on "cost," extrinsic evidence is competent to show the intent of the parties in the use of such a term.[12] A contract which was void by the statute of frauds, is good as a proposition of price, and governs, if the goods were subsequently delivered and accepted pursuant to it.[13] Where the testimony is conflicting as to what was the price agreed upon [14] in an oral sale, or as whether there was any agreement as to price,[15] it is competent to show the value of the prop-

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[1] Clark v. Baker, 11 Metc. 186; Hay v. Leigh, 48 Barb. 393; Rhoades v. Castner, 12 Allen, 130; Benj. on S. § 215.

[2] Goodrich v. Stevens, 5 Lans. 230. Compare McDonald v. Longbottom, 1 E. & E. 297, 987, s. c. 28 L. J. Q. B. 293; 29 Id. 256.

[3] Myers v. Walker, 24 Ill. 133.

[4] Austin v. Sawyer, 9 Cow. 39.

[5] Vail v. Rice, 5 N. Y. 155. Compare Sewall v. Gibbs, 1 Hall, 602; Bacon v. Gilman, 4 Lans. 456, s. c. 60 Barb. 640.

[6] Cabot v. Winsor, 1 Allen (Mass.), 546; 1 Pars. 548.

[7] Brawley v. United States, 96 U. S. (6 Otto), 168.

[8] Allen v. Schuchardt, 1 Am L. Reg. N. S. 13, affi'd in 1 Wall. 359.

[9] Potter v. Hopkins, 25 Wend. 417.

[10] Taylor v. Beavers, 4 E. D. Smith, 215; Dana v. Fiedler, 12 N. Y. 40; Benj. on S. § 213, n.

[11] Cole v. Wendel, 8 Johns. 116.

[12] Gray v. Harper, 1 Story, 574, Story, J.; Benj. § 213, n.; Herst v. De Comeau, 1 Sweeney, 590; and see Buck v. Burk, 18 N. Y. 337.

[13] Sprague v. Blake, 20 Wend. 61. But compare Erben v. Lorillard, 19 N. Y. 299, rev'g 23 Barb. 82.

[14] Moore v. Davis, 49 N. H. 45, s. c. 6 Am. R. 460, and cases cited.

[15] Brown v. Cahalin, 3 Oreg. 45. On the question whether an auction sale at a certain figure was for cents or dollars, bystanders who were present as bidders may testify to their understanding of the bids. Ives v. Tregent, 14 Bankr. Reg. 60.

erty at the time of sale as tending to show what the real contract was. Under an allegation of a sale of goods worth a specified sum, plaintiff may prove that sum to have been agreed on as the price. At common law it was the better opinion that, under an allegation of goods sold for money, plaintiff might prove a sale for anything agreed to be treated as cash, or a sale to be paid for in services or goods, the burden being on plaintiff, however, to show that the buyer was in default in the special agreement.[1] Under the new procedure such a variance is to be disregarded, unless it has misled defendant to his prejudice. If the consideration was an evidence of debt or a conveyance, the contents of it may be stated for the purpose of proving that fact, without producing the instrument.[2]

The fact that defendant admitted being indebted, when payment was demanded, is not sufficient evidence of the amount of price, unless there is in the admission, or connected with it, something to indicate the amount, or data from which it may be computed.[3] So, although delivery of a bill of the goods, and the making of a payment on account without objection, gives it the legal effect of an account stated; it is otherwise if there be evidence, that when the defendant made the payment he objected to the bill.[4]

20. *Value.*—Under an allegation of an agreed price, if there is a failure to prove the agreement as to price, evidence of value is competent for the purpose of a recovery of what the article was fairly worth,[5] but not to sustain a recovery beyond the amount alleged.[6] And even in those jurisdictions where this is regarded as a variance, evidence of value is relevant on the question of agreement, if the evidence of agreement is conflicting. And under a complaint seeking to recover what the thing was justly worth, evidence of an agreed price is admissible;[7] and the agreement for price controls,[8] if within the limit marked by the allegation of value and demand of judgment. If the contract or order proved was silent as to the price,[9] or if there was no assent as to price,[10] the law implies a promise to pay at the current market rates, or the fair value. Where the party's shop books are competent in his own favor,[11] the price, if stated in the entry, is *prima facie* evidence in his favor, of the value also.[12]

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[1] Cowen, J., Clark v. Fairchild, 22 Wend. 583.
[2] Reynolds v. Kelly, 1 Daly, 283.
[3] Douglas v. Davie, 2 McCord (So. C.), 218; Hanson v. McKenney, 2 Bay, 412.
[4] Jacques v. Elmore, 7 Hun, 675.
[5] Sussdorf v. Schmidt, 55 N. Y. 319.
[6] See Trimble v. Stilwell, 4 E. D. Smith, 512.
[7] Fells v. Vestvali, 2 Keyes, 152.
[8] See Ludlow v. Dole, 62 N. Y. 617, affi'g 1 Hun, 71, 4 Supm. Ct. (T. & C.) 655.
[9] Konitzky v. Meyer, 49 N. Y. 571.
[10] Booth v. Bierce, 38 N. Y. 463, rev'g 40 Barb. 114.
[11] See paragraph 39.
[12] The Potomac, 2 Black, 581; 1 Greenl. Ev. § 118, p. 150, n.

The value of merchandise which *has no regular market value*, and the price of which must depend on circumstances peculiar to the single transaction, and the purchasers,[1] is to be ascertained by the probabilities of the case, founded on proof of facts which in the ordinary transaction of business would affect the mind of a dealer in similar articles in determining a price to be asked or given.[2] In doubtful cases and in the absence of better evidence, the actual cost of the thing to the seller is relevant to the question of its value, at least as evidence against him as in the nature of an admission of value, especially if the thing have no regular market value.[3] So the price named, by an agent for selling, when offering goods, is competent evidence of value as against his principal.[4] But as against evidence of an agreed price, a mere admission of less value cannot avail.[5]

Comparison of values between the thing in question and others of different quality which are not involved in the litigation is not allowable for the purpose of calculating the value of the one in question.[6] A witness cannot testify that a different article was worth a specified sum, and that the one in question was superior or inferior. And upon the same principle it is not allowable to arrive at the value by testimony that the thing in question, with certain alterations or differences, would be worth a specified sum, thereupon making allowance for the difference; nor that it was worth a different sum at another date, thereupon making allowance for the lapse of time.[7]

The three chief elements in the proof of value are, the intrinsic qualities of the particular thing sold; its usual price, or, if there be none, a valuation of it; and the qualifications of the witness called to testify to either of these points. The intrinsic qualities, and the usual price or proper valuation of a thing of such qualities, may be proved by the same or by different witnesses.

21. *Market value.*—The question of market value is more frequently contested in cases of actions for breach of executory

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[1] As in the case of military accouterments usually bought only by government. As to "fancy prices," in case of animal pets and the like, see 3 Abb. N. Y. Dig. New ed. 81; Bennett v. Drew, 3 Bosw. 355.

[2] Sturm v. Williams, 38 Super. Ct. (J. & S.) 323, 343. So held on a question of overvaluation in insuring.

[3] Id.; and see Smith v. Griffith, 3 Hill, 333. 342; s. p. Wells v. Kelsey, 37 N. Y. 143, s. c. 4 Abb. Pr. N. S. 234, rev'g 38 Barb. 242.

[4] Cliquot's Champagne, 3 Wall. 140, 148; Banks v. Gidrot, 19 Geo. 421.

[5] Davis v. Shields, 24 Wend. 322, rev'd on another point in 26 Id. 341; Havemeyer v. Cunningham, 35 Barb. 515, s. c. 22 How. Pr. 87.

[6] See Gouge v. Roberts, 53 N. Y. 619, s. p. Blanchard v. N. J. Steamboat Co. 59 N. Y. 300, affi'g 3 Supm. Ct. (T. & C.) 771; Color Printing Attacht. Co. v. Brown, 37 Super. Ct. (J. & S.) 433.

[7] This is one of the cases where, in the present state of our law, the processes by which witnesses arrive at their opinions are not allowed to be given to the jury, on direct examination. The case of comparison of handwriting is another. How far it is allowable on cross-examination is not well settled.

contracts or of warranties, but the rules for proving it may be most conveniently stated here, in connection with the general question of proof of value.

To constitute a *market value*, it must appear that similar articles have been bought and sold in the way of trade, in sufficient quantity or frequency.[1] If the contract or conduct of the parties fixed a day, so that the right of recovery, strictly considered, turns on the then market value, the evidence should be directed to the market value on that precise day,[2] and not extend to the ordinary market value at other times.[3] But if there were no sales then,[4] or if the sales had are shown to have been at fictitious prices, or at prices unnaturally inflated or depressed by artificial combination for the purpose of fixing a false price,[5] evidence of prices before and after the day within a reasonable limit resting in judicial discretion,[6] is competent for the purpose of inferring the value on the precise day; and it is no objection to the application of this principle that it admits evidence of sales in the market made after suit brought.[7] The proper limit of time is to be determined by the principle of requiring the best evidence the circumstances permit. In case of commercial merchandise having constant market, the limit is shorter than in the case of less salable goods.[8] This excluding rule is not so strictly applied in actions for price of goods sold and delivered at successive dates, where it does not appear that the market price varied during the general period of the witness' conversance with it.[9]

If the contract or the conduct of the parties fixed a place,[10] by the market rates of which the value is to be ascertained, the evidence should be confined to the market value at that place, and not extend to the value in other markets.[11] But if there were no sales there, evidence of the price at places not distant, or in other

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[1] Harris v. Panama R. R. Co. 58 N. Y. 660. So held in an action against a carrier.

[2] Dana v. Fiedler, 12 N. Y. 40, aff'g 1 E. D. Smith, 463.

[3] Cahen v. Platt, 69 N. Y. 348, 352; Belden v. Nicolay, 4 E. D. Smith, 14.

[4] Dana v. Fiedler, and Cahen v. Platt (above).

[5] Kountz v. Kirkpatrick, 72 Penn. St. 376, s. c. 13 Am. R. 687. But the probable effect on prices, of throwing on the market so large a quantity as that contracted for, is not relevant. Dana v. Fiedler (above).

[6] Dana v. Fiedler (above).

[7] But the motives and interest of the parties, and other circumstances of the sale, may of course be inquired into and considered by the jury in determining the weight to be given to such evidence. Kingsbury v. Moses, 45 N. H. 222.

[8] Thus where sales of such merchandise within two or three weeks of the precise day are shown to have been had, the market price running through two or three months should not be admitted. Dana v. Fiedler (above). On the other hand, in the case of second-hand household goods, the price they brought at auction within three months is relevant. Crounse v. Fitch, 1 Abb. Ct. App. Dec 475. But if anything occurred in the interim materially affecting the value, it is competent for the adverse party to show it. Id.

[9] Kerr v. McGuire, 28 N. Y. 446, s. c. 28 How. Pr. 27.

[10] See Cahen v. Platt, 69 N. Y. 348.

[11] Id., and cases cited. Except when proper as corroborative. Gordon v. Bowers, 16 Penn. St. 226.

controlling markets may be given, not for the purpose of establishing the market price of such other place, but for the purpose of showing indirectly, in the absence of direct evidence, the market price at the place of delivery;[1] and hence, in connection with market value at other places, evidence of the expense of transportation between such places is relevant.[2] Upon the same principle, if the plaintiff's proof of market value at the precise place is uncertain, evidence of the market value in an adjoining town easily and speedily reached, is competent.[3]

The market value at a given time and place may be proved by evidence of actual sales then and there of merchandise of the same quality;[4] and a single sale[5] is relevant and admissible in the absence of better evidence, but not always alone sufficient to establish the market value.[6] For the purpose of proving the rates of a foreign market, statements and declarations of strangers to the action, engaged in that market, and made in the ordinary course of their business—for example, merchants' letters offering their goods at a price—are competent evidence of the market value at the time the declaration was made, without proof of the death of the declarant.[7]

22. *Prices current.*]—The price list or price current issued by a merchant or his agent in the ordinary course of business,[8] or corrected by him for a newspaper,[9] is competent evidence of market value as against himself. In the absence of better available evidence, regular prices current or market reports, published in course, in a commercial journal pursuant to the professional duty of the journalist to ascertain constantly from those engaged in the market the actual current rates, and tabulate and publish them for the information and guidance of the commercial world, are competent *prima facie* evidence of the contemporaneous market price, on production of the newspaper or file, preliminary proof of these conditions, and of the identity of the paper, being given.[10] Without some extrinsic evidence of the sources of the information, or the mode in which the prices current were made up, the publication is incompetent.[11]

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[1] Id., and cases cited; Harris v. Panama R. R. Co. 58 N. Y. 660.
[2] Wemple v. Stewart, 22 Barb. 154, and cases cited.
[3] Siegbert v. Stiles, 39 Wis. 533.
[4] See Lawton v. Chase, 108 Mass. 238. Compare Roe v. Hanson, 5 Lans. 304. Gill v. McNamee, 42 N. Y. 45; Dixon v. Buck, 4 Barb. 70.
[5] See Crounse v. Fitch, 1 Abb. Ct. App. Dec. 475.
[6] Graham v. Maitland, 6 Abb. Pr. N. S. 327, s. c. 37 How. Pr. 307; 1 Sweeny, 149.
[7] Fennerstein's Champagne, 3 Wall. 149; 1 Greenl. Ev. § 120.
[8] Cliquot's Champagne, 3 Wall. 140.
[9] Henkle v. Smith, 21 Ill. 238.
[10] Whelan v. Lynch, 60 N. Y. 469, 474; 1 Whart. Ev. 638, § 674. So on the question of what was the market value, in France, of the champagne of a particular maker, the price current of another maker, prepared and furnished there in the usual course of business, is relevant, and its effect, in connection with other evidence of value, is a question for the jury. Cliquot's Champagne, 3 Wall. 114.
[11] Whelan v. Lynch (above).

A witness cannot testify to value or market price whose knowledge is derived merely from examining newspaper prices current.[1] But if the witness has a knowledge of the value from other proper sources, it is no objection to his testimony that it is based in part upon such prices current,[2] or even upon letters and invoices received by him in the usual course of his business.[3]

23. *Opinions of witnesses as to quality and value.*]—Questions of value are subject to the general rule that in matters requiring special experience or knowledge,[4] not presumably possessed by all the jurors, a witness shown to be peculiarly qualified by such experience or knowledge may testify to his opinion[5] on a question of fact; and a witness who has such experience or knowledge with reference to the value of things of the kind of that in question[6]—such as a dealer,[7] salesman,[8] or book-keeper[9] in the trade—may express his opinion of values of things of the same class as that in question, even though he has not seen the particular thing itself. But a witness having only the ordinary experience of life, and none in the business in which the articles are dealt in,[10] or made or used,[11] and not having bought or sold, and having no special means of information as to market rates,[12] is not qualified. The mere fact that he has once bought or sold the very article in question does not necessarily qualify him to express an opinion on its value; although the price he paid or received may be competent evidence.[13]

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[1] Harris v. Ely, Seld. Notes, No. 1, 35, s. c. 1 Liv. Law Mag. 145.

[2] Whitney v. Thacher, 117 Mass. 527. Compare Sisson v. Cleveland & Toledo R. R. Co. 14 Mich. 489; Cleveland & Toledo R. R. Co. v. Perkins, 17 Id. 296; Laurent v. Vaughan, 30 Vt. 90.

[3] Alfonso v. United States, 2 Story, 421.

[4] For instance, an ordinary witness may testify to the fact that plants were dead; an expert, to his opinion as to what killed them. Stone v. Frost, 6 Lans. 440.

[5] It is no objection to receiving the opinion, that the witness is a party testifying in his own behalf. Dickenson v. Fitchburgh, 13 Gray, 546, 555.

[6] Clark v. Baird, 9 N. Y. 183, 196.

[7] Bush v. Westchester Fire Ins. Co. 2 Supm. Ct. (T. & C.) 629.

[8] Id.

[9] Kerr v. McGuire, 28 N. Y. 446, s. c. 28 How. Pr. 27.

[10] Teerpenning v. Corn Exch. Ins. Co. 43 N. Y. 279; Bush v. Westchester Fire Ins. Co. (above).

[11] Winter v. Burt, 31 Ala. 33.

[12] See Whelan v. Lynch, 60 N. Y. 469.

[13] Compare Chambovet v. Cagney, 35 Super. Ct. (J. & S.) 474, 489; Smith v. Hill, 22 Barb. 656; Watson v. Bauer, 4 Abb. Pr. N. S. 273. There is much difference of opinion and practice in reference to the degree of knowledge or experience which will qualify the witness. Some anomalous rulings are seen to be ill-considered when it is remembered, that if the question is not on the quality of the article, but on the value of articles of a given quality, conversance with the market rates is the qualification; if there is no regular market value, conversance with other things of the kind, and their uses, fitness, or cost, is the qualification; while, on the other hand, if the jury may be supposed conversant with the kind of article and its ordinary values, the object of inquiry, though in form a question as to value, may be really as to the grade or condition of the particular thing at the time of sale. In this class of cases a witness, who has in common with the jury only an ordinary knowledge of values, may by reason of his inspection of a particular thing which ordinary knowledge enables

To testify to the *quality of a particular thing* it is presumptively enough that the witness has long been a maker of or dealer in such articles, or otherwise so engaged as to be practically familiar with the qualities involved in the inquiry,[1] even though he does not know the market prices;[2] but he must have seen the thing within a reasonable time of the date to which evidence of value is to be addressed, a limit varying in the judicial discretion of the court, according to the permanent or perishable character of the thing;[3] and in case of a varied lot of merchandise, the witness must have made a sufficient examination in detail to speak specifically of the various parcels or grades.[4]

After the qualities or grade on which value depends have been proven, a witness qualified by special experience or knowledge to testify to the intrinsic value of the particular article,[5] or to the market price of such articles, (as the case may require), may testify to its value, although he has not seen the article.[6] Such testimony may be founded on the witness having heard or read all the testimony which has been given by the party on the facts of quality, grade, etc., on which value or price depends; in which case the question may be: "Assuming that the goods were as described by plaintiff [or other testimony heard or read by the witness], what were they worth?"[7] Or it may be called forth by an hypothetical question, embracing all the same facts which may fairly be assumed to be sufficiently in evidence.[8]

A witness to *market* values must be shown to be conversant with prices at the market in question,[9] but he need not be a resident there.[10] His testimony is not necessarily made incompetent by the fact that his knowledge of sales and prices was derived from inquiry in the trade,[11] or by examinatation of invoices and ac-

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one to value, be competent to express his opinion of its value as the direct and natural way of describing his judgment of its grade and condition. In this point of view Smith v. Hill and Watson v. Bauer are sounder guides than Chambovet v. Cagney (all above cited), and the ruling in Nickley v. Thomas, 22 Barb. 652, more satisfactory than Low v. Conn. &c. R. R. Co. 45 N. H. 370, § 1. See paragraphs 20 and 21.

[1] Hoe v. Sanborn, 36 N. Y. 93, a. c. 3 Abb. Pr. N. S. 189; 35 How. Pr. 197; Jeffersonville, &c. R. R. Co. v. Lanahan, 27 Ind. 171.

[2] See Beecher v. Denniston, 13 Gray, 354.

[3] See Judson v. Easton, 58 N. Y. 664, affi'g 1 Supm. Ct. (T. & C.) 598.

[4] Brown v. Elliott, 4 Daly, 329, 333, and cases cited.

[5] Sturm v. Williams, 38 Super. Ct. (J. & S.) 323, 344.

[6] Mish v. Wood, 34 Penn. St. 451; Orr v. Mayor, &c. of N. Y. 64 Barb. 106; and see Draper v. Saxton, 118 Mass. 428. *Contra*, where the matter is not one for expert testimony. Hook v. Stowell, 30 Geo. 418, 422; Board v. Kirk, 11 N. H. 397; and see Sunderlin v. Wyman, 1 Supm. Ct. (T. & C.) adden. 17. It is not error to allow the expert who is familiar with the particular thing to designate the similar article he has known sold in general terms, as "like" the thing in controversy, instead of describing it and leaving the jury to judge of its similarity. Hachett v. Boston, &c. R. R. Co. 35 N. H. 390, 398.

[7] See McCollum v. Seward, 62 N. Y. 316.

[8] See Jackson v. N. Y. Central R. R. Co. 2 Supm. Ct. (T. & C.) 653.

[9] Greeley v. Stilson, 27 Mich. 153; but compare Lawton v. Chase, 108 Mass. 238.

[10] Alfonso v. United States, 2 Story, 421.

[11] Lush v. Druse, 4 Wend. 313; Cliquot's Champagne, 3 Wall. 143.

counts;[1] nor by the fact that his general experience and knowledge is not aided by knowledge of sales on the very day in question;[2] nor is it made incompetent by the fact that his knowledge of market value is derived mostly from sales on credit, for by cross-examination the difference in price between cash and credit sales may be ascertained.[3] In cases where there is a market value, the usual mode of proving it is by a general question as to value or price at the particular time and place, without reference to actual sales; but in such cases inquiries as to particular sales are admitted on cross-examination, and for the purpose of testing the accuracy and extent of the witness' knowledge.[4]

24. *Time for performance or payment.*]—If the time for delivery or payment is fixed by the terms of the writing, evidence of a contemporaneous oral stipulation for a different time is incompetent.[5] If by not designating any time in their writing, the parties have made a contract which by implication of law allows a reasonable time, oral evidence of a contemporaneous stipulation fixing a date is incompetent;[6] but the circumstances and conversations of the parties at the time the contract was entered into may be proved for the purpose of showing what they regarded as a reasonable time.[7] Upon the same principle if the writing names no place of delivery, the law fixes it, and oral evidence of a contemporaneous stipulation for a different place is incompetent.[8] So if the terms of the writing contemplate a single quantity or delivery, oral evidence is not competent to show a contemporaneous understanding of the parties that on successive delivery in parcels payment should be made for each parcel as delivered.[9] So if the writing calls for delivery of a specified quantity of merchandise in a month or year, or in each of several successive periods without other limitation, extrinsic evidence is not competent to show that it was intended by the parties that the delivery within any period should be regulated in time and quantity by the exigencies of the purchaser's business.[10]

Upon the question whether the sale was entire, the circumstance

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[1] Alfonso v. United States, 2 Story, 421.

[2] Norman v. Ilsley, 22 Wisc. 27; Belden v. Nicolay, 4 E. D. Smith, 14.

[3] Judson v. Easton, 58 N. Y. 664, affi'g 1 Supm. Ct. (T. & C.) 598. See as to sales in exchange for things in action, or at an inflated estimate, Sturm v. Williams, 38 Supm. Ct. (J. & S.) 323.

[4] Dana v. Fiedler, 1 E. D. Smith, 463, 474. Compare paragraph 21 (above).

[5] Parol evidence that by the custom of merchants, the words "to arrive by the 15th of Nov." meant "deliverable on or before the 15th of Nov." held incompetent. Rogers v. Woodruff, 23 Ohio St. 632, s. c. 13 Am. R. 276; see also Stewart v. Scuder, 4 Zab. N. J. 96.

[6] Greaves v. Ashlin, 3 Camp. 426; Halliley v. Nicholson, 1 Price, 404; Cocker v. Franklin Hemp & Flax Manuf. Co. 3 Sumn. 530.

[7] Cocker v. Franklin Hemp, &c. Co. (above).

[8] La Farge v. Rickert, 5 Wend. 187, and cases cited.

[9] Baker v. Higgins, 21 N. Y. 397. Compare Winne v. McDonald, 39 Id. 233; Gault v. Brown, 48 N. H. 183, s. c. 2 Am. R. 210.

[10] Curtiss v. Howell, 39 N. Y. 211.

that the bargains, though for different lots of the same kind of property, lying at different places, were all made on the same day, is entitled to some weight.[1] So is the fact that all were included in one bill.[2]

Where the contract omits to fix any time for payment, the presumption is that the delivery and payment are to be concurrent acts.[3] If a sale on credit is proved, evidence of a usage to give notes is competent, and if knowledge of it may be imputed to defendant, it will be presumed that the parties contracted with reference to such usage, there being nothing in the contract to the contrary.[4] If a term of credit, or payment in negotiable paper, or the like, was agreed for, the seller may recover immediately, regardless of the stipulation, on proof that the defendant, on being requested to pay the amount due, or give his notes at long periods, or make some arrangement in reference to the debt, absolutely refused to perform,[5] or that defendant induced plaintiff to give the credit by fraud.[6]

25. *Conditions and warranties.*]—Where the obligations are concurrent, either who seeks to enforce the obligation of the other must prove performance of his own, or an offer to perform.[7] But under a stipulation to do an act if called for, or when or as directed by the other, the burden is on the latter to prove that he called for or directed the act.[8] Where there is a complete actual delivery of goods sold on a condition, the burden is on him who claims that the condition was not waived by delivery, of showing that fact.[9] If plaintiff's evidence shows a warranty he must also show that the thing corresponded to it, or that defendant, by failing seasonably to object, or otherwise, waived it. The mode of this proof is stated in connection with warranties.

26. *Options.*]—It is not competent for one sued upon his written contract, to show a parol agreement made prior or contemporaneously with it, that he might countermand it subsequently if he chose, and that he did so. Parol evidence that the commencement of the obligation was suspended, might be received, that is to say, of a condition precedent, but not of a defeasance or condition subsequent.[10] But a mere memorandum, unsigned,

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[1] Biggs v. Whisking, 25 Eng. L. & Eq. 257 (compare Swift v. Opdyke, 43 Barb. 274).

[2] Id. Compare Gardner v. Clark, 21 N. Y. 399; Mount v. Lyon, 49 N. Y. 552.

[3] Tipton v. Feitner, 20 N. Y. 423. Otherwise, perhaps where the seller does not undertake to deliver, as in a contract for sand to be excavated and carried away within a year. Brehen v. O'Donnell, 34 N. J. Law, 408.

[4] Salmon Falls Manuf. Co. v. Goddard, 14 How. U. S. 446.

[5] Lee v. Decker, 6 Abb. Pr. N. S. 392; Wills v. Simmonds, 8 Hun, 189, and cases cited; Hochster v. De La Tour, 2 Ell. & B. 678. And see Snoot's case, 15 Wall. 36.

[6] Weigand v. Sichel, 4 Abb. Ct. App. Dec. 592, affi'g 34 Barb. 84; Roth v. Palmer, 27 Barb. 652, and cases cited.

[7] Dunham v. Pettee, 8 N. Y. 508.

[8] Hollister v. Bender, 1 Hill, 150; West v. Newton, 1 Duer, 277.

[9] Smith v. Lynes, 5 N. Y. 41, rev'g 3 Sandf. 203.

[10] Wemple v. Knopf, 15 Minn. 440, s. c. 2 Am. R. 147.

though indicating a sale, may be explained by parol evidence that it was a sale on return, or a delivery to an agent to sell.[1] Not so of a written contract.[2] But under an optional contract, for which writing is required, the option may be exercised by parol notice.[3] An optional contract for future sale is not presumed to be a gaming contract, but the burden is on him who impeaches it to show the illegal intent.[4]

27. *Subsequent modification.*]—At common law, the fact that the contract was in writing does not exclude oral evidence of a subsequent modification, if the instrument was not under seal;[5] and even if under seal, a subsequent waiver of a stipulation as to time may be proven as an estoppel.[6] If the statute of frauds requires a writing, the modification sought to be proved must be evidenced by writing as well as the original contract.[7] A party alleging a modification of a written agreement to have been made by conduct on the other side amounting to a substitution of another arrangement, must clearly show not only his own understanding as to the new terms, but that the other party had the same understanding.[8]

28. *Delivery or offer.*]—In an action by a seller of goods sold to be paid for on delivery, plaintiff must prove, not only that the buyer failed to pay, but that he himself offered to deliver the goods. The obligations of the parties to such a contract being concurrent, whichever one seeks to enforce it must show a tender of performance on his part. Until that be shown, he is himself in default.[9] If he proves a delivery at the place agreed, and that there remained nothing further for him to do, he need not show an acceptance by the buyer,[10] unless the order or contract was not strictly complied with by plaintiff.[11]

Delivery may be proved by evidence of an admission by the buyer of the correctness of the account against him, there being no dispute on the trial as to the amount;[12] and from evidence that

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[1] Errico v. Brand, 9 Hun, 654.

[2] Marsh v. Wickham, 14 Johns. 167; and see Depew v. Keyser, 8 Duer, 335.

[3] Brown v. Hall, 5 Lans. 177.

[4] Story v. Solomon, 71 N. Y. 420, aff'g 6 Daly, 531.

[5] Benj. on S. § 216.

[6] Hadden v. Dimmick, 16 Abb. Pr. N. S. 140; Fleming v. Gilbert, 3 Johns. 528; Townsend v. Empire Stone Dressing Co. 6 Duer, 208.

[7] Hickman v. Haynes, L. R. 10 C. P. 598, 605, s. c. 14 Moak's Eng. 447, 453; Swain v. Semens, 9 Wall. 271, and cases cited. *Contra*, Cummings v. Arnold, 5 Metc. 486; Gault v. Brown, 48 N. H. 183; and see Benj. on S. § 216, and notes. On the ground that the terms of a sealed agreement cannot be varied by a subsequent parol contract, so as to authorize a suit on the sealed agreement, which suit without the parol contract, could not be sustained; it has been held that the existence of the sealed agreement, in such a case, is no bar to a suit on the parol contract. Sinard v. Patterson, 3 Blackf. 353, 357.

[8] Utley v. Donaldson, 94 U. S. 48, and cases cited.

[9] Dunham v. Pettee, 8 N. Y. 4 Seld. 508; 4 E. D. Smith, 500.

[10] Nichols v. Morse, 100 Mass. 523.

[11] Corning v. Colt, 5 Wend. 253.

[12] N. Y. Ice Co. v. Parker, 21 How. Pr. 302.

he denied having received part of the goods, it may be inferred that he received the other articles mentioned in the bill;[1] and his admission that he had had the goods, is sufficient evidence of delivery, to go to the jury, though it appear they were, in fact, delivered to another person,[2] especially if by his authority.[3] So his promise to pay a draft which had been drawn on him for the price of the goods is, with other evidence tending to show delivery, competent evidence of delivery.[4] An order drawn by defendant for the delivery of the goods to the bearer, or to a person shown to have had possession of the order, is, when produced from the possession of the drawee, and its execution proved, *prima facie* evidence that he delivered the goods.[5] If the order is in favor of a specified person, the receipt of such person is competent against the drawer.[6] Delivery cannot be made out by proof of a usage to treat as a delivery that which is not in law a delivery.[7] Delivery if shown is presumed, in the absence of evidence to the contrary, to be in fulfillment of the contract; but evidence is competent that it was made for the purpose of allowing examination of the goods, and in such case, evidence that this was the usual course of dealing is competent, though it would not be, in the absence of anything else to qualify legal effect of a delivery.[8] If the circumstances relied on as constituting delivery or acceptance are equivocal, the person who performed either act may testify to his intent in doing it.[9]

Evidence of discrepancy in size or weights of packages is met by showing that the buyer waived it by receiving them with knowledge.[10] If the sale was subject to inspection of a third person, there should be evidence of his determination,[11] and in the form contemplated by the contract; but this may be dispensed with by a waiver.[12] Inspection duly had under such a contract is conclusive.[13]

29. *Delivery through carrier.*]—Evidence of the shipping of goods ordered by defendants, and the mailing of the bills of lading to defendants, and that the bills were not returned, and that at the terminus the carrier's servant delivered merchandise

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[1] Power v. Root, 3 E. D. Smith, 70.
[2] Griffin v. Keith, 1 Hilt. 58.
[3] Monroe v. Hoff, 5 Den. 360.
[4] Patterson v. Stettauer, 40 Super. Ct. (J. & S.) 54.
[5] Alvord v. Baker, 9 Wend. 323. *Contra*, Blount v. Starkey, 1 Tayl. N. C. 110, s. c. 2 Hayw. 75.
[6] Rawson v. Adams, 17 Johns. 130.
[7] Suydam v. Clark, 2 Sandf. 133; and see Smith v. Lynes, 3 Id. 203; 5 N. Y. 41.
[8] Haskins v. Warren, 115 Mass. 514.
[9] Hale v. Taylor, 45 N. H. 405; Southwestern R. R. Co. v. Rowan, 43 Geo. 411. Compare Folsom v. Batchelder, 2 Fost. (N. H.) 47.
[10] Fitch v. Carpenter, 40 Barb. 40.
[11] McAndrews v. Santee, 7 Abb. Pr. N. S. 408, s. c. 57 Barb. 193; Stephens v. Santee, 49 N. Y. 35, rev'g 51 Barb. 532.
[12] Clinton v. Brown, 41 Barb. 226; Gillespie v. Carpenter, 1 Robt. 65, s. c. 25 How. Pr. 203; Delafield v. De Grauw, 9 Boew. 1; 1 Abb. Ct. App. Dec. 500.
[13] Severcool v. Farewell, 17 Mich. 308. Otherwise of mere official inspection. Clintsman v. Northrop, 8 Cow. 45; Williams v. Merle, 41 Wend. 80.

such as is described, to defendants, and that they paid the freight bills without objection, is *prima facie*, and, if unexplained, sufficient evidence of delivery.[1] If the seller sent the goods in a manner directed by the buyer, his mistake in addressing them will not defeat his right to recover, unless there be some evidence that the loss was attributed to the error; in other words, that the error was material.[2] If the mode of transportation was not fixed by the contract, evidence of usage is competent on the question of the duty of the seller in respect to taking and forwarding a bill of lading.[3]

30. *Tender.*]—An averment of tender (when it is an act in pais, not part of the contract) simply affirms that the party had done all in his power, toward fulfilling his obligation; and under this averment, proof that the other party had prevented or dispensed with some of the legal requisites of a formal tender, is admissible.[4] Evidence that the person making the tender found at the place of business of the other party a person answering to the name, who said he was the man, and admitted the contract to be his, but refused to pay the money, is competent to go to a jury upon the question of identity, and sufficient to uphold a verdict in the absence of all evidence tending to raise any suspicion of mistake or collusion.[5] Evidence of a refusal[6] or delaration of inability,[7] either by the buyer[8] as to receiving or paying, or by the seller[9] as to delivery, made to the other party[10] on his due demand,[11] dispenses with proof of formal tender.

31. *Packing and freight.*]—In the absence of agreement there is no implied promise to pay for the packing done for the purpose of making delivery as agreed, even though the goods were put into the buyer's cases or bags.[12] But evidence of usage is competent for the purpose of showing which party is chargeable with expenses of packing, wrappers or cases, and freight.[13]

32. *The passing of the title.*]—The question whether the prop-

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[1] Cooper v. Coates, 21 Wall. 110. If delivery to the carrier is full performance, receipt by the buyer need not be shown. 62 N. Y. 272.

[2] Garretson v. Selby, 37 Iowa, 529, s. c. 18 Am. R. 14.

[3] Johnson v. Stoddard, 100 Mass. 306; Putnam v. Tillotson, 13 Metc. 517. Compare Magruder v. Gage, 33 Md. 344.

[4] Holmes v. Holmes, 9 N. Y. 525, affi'g 12 Barb. 137. Compare 5 Duer, 336.

[5] Howard v. Holbrook, 9 Bosw. 237, s. c. 23 How. Pr. 64.

[6] Dana v. Fiedler, 1 E. D. Smith, 463.

[7] Wheeler v. Garcia, 40 N. Y. 584, affi'g 2 Robt. 280.

[8] Bunge v. Koop, 5 Robt. 1.

[9] Wheeler v. Garcia (above).

[10] Otherwise of a mere declaration to a stranger. McDonald v. Williams, 1 Hilt. 365.

[11] Wheeler v. Garcia (above). As to a refusal deliberately made in anticipation of the time for a demand, and with intent that it may be acted on, see 17 Q. B. 127, s. c. 15 Jur. 877, 6 Eng. L. & Eq. 230; 2 El. & B. 678, s. c. 17 Jur. 972, 20 Eng. L. & Eq. 157; 42 N. Y. 246, 61 Id. 362, 69 Id. 293; 16 Abb. Pr. N. S. 428, 1 Abb. New Cas. 93.

[12] Cole v. Kerr, 20 Vt. 21. *Contra*, Burr v. Williams, 23 Ark. 244.

[13] Robinson v. United States, 13 Wall. 363; Howe v. Hardy, 106 Mass. 329; Benj. on S. § 698.

erty had passed at any given time is one of intention, which, if not expressed, is to be collected from all the circumstances, and no single circumstance is necessarily conclusive in all cases, but the conclusion to be drawn must depend on a balance of the various circumstances on one side and the other.[1] The following rules are a guide in ascertaining the intention:[2]

1. Where, by the agreement, the seller is to do anything to the goods for the purpose of putting them into that state in which the buyer is bound to accept them (or, as it is sometimes worded, into a deliverable state), the performance of these things must, in the absence of circumstances indicating a contrary intention, be taken to be a condition precedent to the vesting of the property.[3]

2. Where anything remains to be done to the goods for the purpose of ascertaining the price, as by weighing, measuring, or testing the goods, where the price is to depend on the quality or quantity of the goods, the performance of these things must also be a condition precedent to the transfer of the property, although the particular goods be ascertained, and they are in the state in which they ought to be accepted.[4]

3. Where the buyer is by the contract bound to do anything as a consideration, either precedent or concurrent, on which the property depends, the property will not pass until the condition be fulfilled, even though the goods may have been actually delivered into the possession of the buyer.[5]

4. The giving of earnest does not pass the property in the subject matter of the sale, where the completed bargain if proved in writing, or in any other sufficient manner, would not have equally altered the property.[6]

On the other hand, if the express contract or the acts of the parties manifest a clear intent to vest the title immediately in the buyer, its passing is not postponed by the fact that the seller undertook to make a delivery,[7] or procure necessary authority for the shipment,[8] or even that there had been no actual separation of the thing sold from an entire mass of which it was part.[9]

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[1] A stipulation for "cash on bill of lading" would, in the absence of other circumstances, be sufficient evidence that title was not to pass before payment; but may be countervailed by such circumstances as that the goods were packed in the buyer's sacks, that part payment had been made in earnest, and that the goods were deliverable free on board. Ogg v. Shuter, L. R. 10 C. P. 159, s. c. 11 Moak Eng. 316.

[2] See Benj. on S. 285; Blackb. on S. 151; The Elgee Cotton Cases, 22 Wall. 180, 188.

[3] Id.; Anderson v. Morice, L. R. 10 C. P. 609, 618, rev'g 11 Eng. Rep. 252, s. c. 14 Moak's Eng. 455, 463; Ganson v. Madigan, 15 Vt. 144.

[4] The Elgee Cotton Cases (above); and see Kein v. Tupper, 52 N. Y. 550, affi'g 33 Super. Ct. (1 J. & S.) 465.

[5] Elgee Cotton Cases (above).

[6] Id.

[7] Terry v. Wheeler, 25 N. Y. 520; and see Stiles v. Howland, 32 Id. 309; Bradley v. Wheeler, 44 N. Y. 495, affi'g 4 Rob. 18.

[8] Waldron v. Romaine, 22 N. Y. 368.

[9] Kimberly v. Patchin, 19 N. Y. 330; Russell v. Carrington, 42 N. Y. 118.

On the question of the intent of the parties in the acts performed by them, their declarations, part of the *res gestæ*, are competent,[1] and so is the testimony of each to his understanding at the time of the transaction, if such understanding does not conflict with law.[2] In the absence of express proof of the terms of the contract, evidence is admissible of the course of business in former dealings between the parties, of the same character, in order to show whether, in the acts done under the sale in question, there was an intent to pass title.[3]

33. *Delivery to satisfy the statute of frauds.*]—Where delivery is relied on for the purpose of proving a valid contract, under the statute of frauds, in the absence of a writing or part payment, stricter proof may be required. Mere words of delivery, though the thing were present and pointed out, will not suffice.[4] The delivery of a bill of lading or other written evidence of property and dominion is not enough, unless it is shown or may be inferred that both parties intended that it should pass the property. If it was obtained from the seller without intent on his part to deliver it,[5] or left with the buyer without intent on his part to accept the goods thereby,[6] the statute is not satisfied. Delivery by the seller to a third person pursuant to the buyer's direction is enough,[7] unless the buyer had a right of examination before acceptance,[8] and even then is enough, if such third person was authorized by him to accept so as to conclude him.[9]

Evidence of a delivery to a general carrier not selected by the buyer is not enough; although it might be if there were a valid contract otherwise proved.[10] Evidence of delivery to a carrier designated for the purpose by the buyer is enough, if coupled with evidence that the buyer had previously accepted the goods,[11] or that the carrier had express authority to accept so as to conclude as to quality;[12] otherwise not.

Symbolical delivery of bulky articles may be proved by any act importing a surrender on one side and acceptance on the

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[1] See Clark v. Rush, 19 Cal. 393.

[2] Prescott v. Locke, 51 N. H. 94, s. c. 12 Am. R. 55. Compare Foley v. Mason, 6 Md. 37; Benj. on S. § 213.

[3] Lelar v. Brown, 15 Penn. St. 215. So held in trespass for seizing the goods as the sellers. Compare Richards v. Millard, 56 N. Y. 574.

[4] Shindler v. Houston, 1 N. Y. 261.

[5] Brand v. Focht, 1 Abb. Ct. App. Dec. 185, s. c. 5 Abb. Pr. N. S. 225, aff'g 6 Robt. 426; 30 How. Pr. 313.

[6] Quintard v. Bacon, 99 Mass. 185; and see Rodgers v. Phillips, 40 N. Y. 519.

[7] Dyer v. Forest, 2 Abb. Pr. 282.

[8] See Stone v. Browning, 51 N. Y. 211, rev'g 49 Barb. 244; again 68 N. Y.

[9] Allard v. Greasert, 61 N. Y. 1.

[10] Rodgers v. Phillips, 40 N. Y. 519.

[11] Cross v. O'Donnell, 44 N. Y. 661.

[12] Allard v. Greasert, 61 N. Y. 1; Grimes v. Van Vechten, 20 Mich. 410. Delivery to carrier, if sufficient at common law, is enough under a contract made and to be performed in another State, unless the statute of frauds of that State is proved as a fact. Wilcox Silver Plate Co. v. Green, 9 Hun, 347.

other,[1] such as delivering a schedule of them,[2] or the keys of the repository,[3] with that intent.

It is not essential that a delivery to satisfy the statute be shown to have been contemporaneous with the oral agreement. A delivery even several months afterward may be proved.[4]

Any acts of the parties indicative of ownership by the buyer may be given in evidence by the seller to show the receipt and acceptance of the goods. Conduct, acts and declarations are all competent.[5] An attempt on the part of the buyer in good faith, immediately on receipt and examination of the goods, to communicate to the seller a message declining to accept, is competent as a part of the *res gestæ*, and material as qualifying the act of receiving and retaining the goods.[6] In whatever way the fact is proved, the evidence must show both delivery and acceptance of the thing sold, or some part of it, and that they were intended by the parties to effect a final and complete change of property.[7] If the circumstances be such that the buyer is not finally precluded from objecting that the goods do not correspond with the contract, they are not enough.[8]

34. *Part payment to satisfy the statute of frauds.*]—Upon the same principles mere words of agreement, however effectual they might be, independent of the statute, to establish an accord and satisfaction or payment by application of indebtedness, cannot satisfy the statute.[9] There must be an act of payment or written evidence.[10] But an actual payment made for the purpose of binding the parties, though not made at the time of the oral agreement, is a renewal of it, and effectual.[11]

35. *Various rules admitting documents otherwise incompetent.*]—There are several principles of growing importance in the present state of the law, under which entries or memoranda which are not in themselves competent, are admissible as auxiliary to oral testimony.

36. *Contemporaneous memoranda.*]—When a witness has testified that he made a memorandum of a transaction had in his

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[1] Stanton v. Small, 3 Sandf. 230.
[2] Dixon v. Buck, 42 Barb. 70.
[3] Parker v. Jervis, 8 Abb. Ct. App. Dec. 449; Gray v. Davis, 10 N. Y. 6 Seld. 285.
[4] McKnight v. Dunlop, 5 N. Y. 537.
[5] Where the goods were liquors, and labels intended to be put on the bottles were sold with them as a part of the contract:—*Held*, the delivery and acceptance of the labels was evidence to go to the jury of acceptance of all under the statute of frauds, in connection with a letter from defendants admitting the existence of a contract and implying that the liquors had been sold. Garfield v. Paris, 96 U. S. (6 Otto), 557.
[6] Caulkins v. Hellman, 47 N. Y. 449.
[7] Hewes v. Jordan, 39 Md. 472, s. c. 17 Am. R. 578.
[8] Id.
[9] Mattice v. Allen, 3 Abb. Ct. App. Dec. 248, rev'g 38 Barb. 543.
[10] Brabin v. Hyde, 32 N. Y. 519, rev'g 30 Barb. 265.
[11] Bissell v. Balcom, 39 N. Y. 275, rev'g 40 Barb. 98; Ailis v. Read, 45 N. Y. 142.

presence, the memorandum may be read in evidence,[1] if it was read to or by the parties and assented to as embodying their agreement, or certain terms of it, or if the making of it was part of the *res gestæ* of an act of the witness already properly in evidence.[2] But if neither, the mere fact that it was a contemporaneous memorandum does not render it competent.[3]

37. *Memoranda refreshing memory.*]—A witness whose recollection is not sufficient to enable him to answer a question[4] may, notwithstanding he is under examination at the time, refresh his memory by referring to a writing or other record or document[5] as a memorandum, in the following cases:

1. If the memorandum was made by himself (or by another person at his dictation),[6] at the time of the transaction concerning which he is questioned, or so soon afterward that the judge considers it likely that the transaction was at that time fresh in his memory;[7] or if made by any other person, and read by the witness within the same limits as to time, and if, when he read it, he knew it to be correct.[8] If the witness testifies that he knew the writing to be correct at the time he made or read it,[9] the competency of testimony made by its aid is not impaired by the fact that he relies not on his memory of the fact itself, but on his confidence in the accuracy of the memorandum.[10]

A memorandum which is proper under this rule, and is used accordingly, becomes competent, and may be read as evidence of the facts testified to from it,[11] if it be the original entry, not a copy,[12] and if the witness' memory, after being refreshed, does not enable him to testify to the facts without the memorandum.[13] It is not error, however, to allow a copy made by the witness from his original entry, or reproduced by him in substance, from memory, after the loss of the original, to be read to the jury, not as evidence of the facts contained in it, as in case of an original entry, but as a statement in detail of what the witness has testified to directly.[14]

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[1] Lathrop v. Bramhall, 64 N. Y. 372.

[2] See p. 228 of this vol.

[3] Flood v. Mitchell, 68 N. Y. 507; Moore v. Meacham, 10 N. Y. 207.

[4] The use of memoranda to refresh memory is confined to cases where the witness' memory is at fault without it. Young v. Catlett, 6 Duer, 437; Sackett v. Spencer, 29 Barb. 180. He should be allowed time. Key v. Lynn, 4 Litt. 338, 340.

[5] Any memorandum (Guy v. Mead, 22 N. Y. 462), even such as his marks on a board. See Marcly v. Shults, 29 N. Y. 351, where, however, the memorandum offered was excluded on other grounds.

[6] Filkins v. Baker, 6 Lans. 518; or from his memoranda, and subject to his immediate supervision; Krom v. Levy, 1 Hun, 173.

[7] Steph. Dig. Ev. Art. 136. [8] Id.

[9] Lewis v. Ingersoll, 3 Abb. Ct. App. Dec. 55; Van Buren v. Cockburn, 14 Barb. 181.

[10] Cole v. Jessup, 10 N. Y. 96; 9 Barb. 395, s. c. 10 How. Pr. 515; Filkins v. Baker, 6 Lans. 518.

[11] Halsey v. Sinsebagh, 15 N. Y. 485.

[12] Marcly v. Shults, 29 N. Y. 348; and see 49 N. Y. 316.

[13] Id. Id.

[14] McCormick v. Pennsylvania Central R. R. Co. 49 N. Y. 316.

Hence in an action for goods sold, a witness who testifies that he made correct original entries of the transaction, and he has forgotten the transaction, may be shown his original entries, and read them as evidence.[1] The correctness of the entries may be shown either by his testimony of his own knowledge, or his testimony that he entered correctly what others told him, if such others are produced and testify that they gave him, correctly, facts within their own knowledge.[2]

2. Original memoranda made contemporaneously with the fact,[3] —usually such as accounts, bills of parcels, and the like,—although not shown to have been made by the witness,[4] and copies or abstracts made by him from his inspection of such memoranda,[5] may be referred to by him while on the stand, if his memory, refreshed by them, enables him to testify from recollection of the original facts, independent of his confidence in the accuracy of the memoranda.[6] He is not in such case to read from the memorandum, nor does the memorandum become admissible in corroboration.[7]

3. In cases requiring many details of date, quantity, &c., it is common practice to allow a witness to consult, but not to read from, memoranda made by him of facts within his own knowledge, to which he cannot speak in sufficient detail without such aid, although the memoranda were made in preparation for trial. But such memoranda, if not within the preceding rules, are not admissible in evidence,[8] unless they are of a character—such as maps, diagrams or tabular statements—reasonably necessary to render the testimony intelligible, and are proven to be correct.

Any thing referred to by a witness to refresh memory must, if required, be shown to the adverse party; and he may cross-examine the witness thereupon,[9] but is not bound to put the paper in evidence.[10]

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[1] Philbin v. Patrick, 3 Abb. Ct. App. Dec. 605; S. P. 9 Hun, 347, and cases cited. It is not necessary that the memorandum be a formal account. Any record, however rude, made to mark the event or as an aid to memory, may serve. See Marcly v. Shults (above).

[2] Payne v. Hodge, 7 Hun, 612. It has been recently held in Shear v. Van Dyke, 10 Hun, 528, in extension of this rule, that a witness having testified that a quantity, which he had now forgotten, he had, at the time of delivery, reported correctly to another, the other might be called and testify what the quantity was thus reported; that is to say, a human memory may serve as a book of original entries. So, where a temporary memorandum, made by a witness who had since forgotten what was written, had been destroyed by another witness who in the course of duty transcribed it in more permanent form, the latter was permitted to produce his copy and testify to what he transcribed. Adams v. People, 3 Hun, 654.

[3] This contemporaneous character is not always strictly to be required.

[4] Sturm v. Atlantic Ins. Co. 38 Super. Ct. (J. & S.) 286, 296, 318; Huff v. Bennett, 6 N. Y. 337.

[5] Howland v. Sheriff Willetts, 5 Sandf. 221; and see Sturm v. Atlantic Ins. Co. (above).

[6] Wilde v. Hexter, 50 Barb. 448.

[7] Russell v. Hudson River R. R. Co. 17 N. Y. 134. Compare note 14, above.

[8] Stuart v. Binuse, 7 Bosw. 195.

[9] Peck v. Lake, 3 Lans. 136; Steph. Dig. Art. 137; Tibbetts v. Sternberg, 66 Barb. 201.

[10] Peck v. Lake (above).

38. *Memoranda made by a third person in the usual course of business.*]—An entry or memorandum, whether in a book or in any other form,[1] made in the usual course of business, and at or about the time of the transaction, by a person not a party to the action, who is shown to have had means of personal knowledge[2] of the fact recorded, is competent evidence of such fact;

1. If the person who made it is produced, and verifies the handwriting as his own,[3] and testifies that it was so made, and correct when made, although he may have no present recollection whatever of the transaction;[4] or,

2. If the person who made it is dead, and his signature or handwriting is proved, and he does not appear to have had any interest to falsify.[4] If living, though he be without the jurisdiction, he must be produced.[5]

It is not necessary that the person should have been under an absolute duty to make the entry; it is enough if it was the natural concomitant of the transaction to which it relates, and usually accompanies it.[6]

39. *Shop books and other Accounts of a party offered in his own favor.*]—The statutes allowing parties to testify have revolutionized the practice, by making the party the witness and allowing him commonly to use his book as a memorandum to refresh his memory;[7] but the rule admitting his account as primary evidence, with certain preliminary proof, is still in force;[8] and it

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[1] Livingston v. Arnoux, 56 N. Y. 518. Not a copy. James v. Wharton, 3 McLean, 492.

[2] The entries are not admissible under this rule if made on information received from a third person, although communicated by him in the course of duty; Thomas v. Price, 30 Md. 483; White v. Wilkinson, 13 La Ann. 359; even though the person who made the entry testify that his informant (not shown to be deceased) saw and corrected it. In such case the latter should be produced. See Gould v. Conway, 59 Barb. 355; Chenango Bridge Co. v. Lewis, 63 Id. 111. The informant not having adopted the entry as his own, the mere fact that he is dead does not admit the entry made by the witness on his information. Brain v. Price, 11 Mees & W. 773. As to the effect of ignorance of some of the entries, see Burke v. Wolfe, 38 Super. Ct. (J. & S.) 263.

[3] Gilchrist v. Brooklyn Grocers' Asso. 59 N. Y. 499.

[4] Price v. Torrington, Salk, 285, s. c. 1 Smith's L. C. 390; Merrill v. Ithaca, &c. R. R. Co. 16 Wend. 586. The rule applies, although the entries were only of each order in gross, without stating the items. Gilbert v. Sage, 57 N. Y. 639, affi'g 5 Lans. 287.

[5] Ocean Nat. Bank v. Carll, 55 N. Y., 440; again, 9 Hun, 239, and cases cited. In some States permanent insanity, in others permanent absence from the State, is equivalent to death for this purpose. For instances, see 1 Smith's L. Cas. 139; note to Price v. Torrington

[6] Fisher v. Mayor, &c. of N. Y. 67 N. Y. 77; Morrow v. Ostrander, 13 Hun, 219. It has lately been held that in a conflict of evidence as to whether the witness performed an alleged act, his book, testified to by him to be a complete record of all his transactions of the nature of that alleged, is admissible, for the purpose of inferring from the absence of an entry of the alleged transaction, that it did not occur. Morrow v. Ostrander, 13 Hun, 219.

Alterations, &c. seriously impair the credit of the entry, Gilchrist v. Brooklyn Grocers' Asso. 59 N. Y. 499, but do not necessarily render it incompetent. Adams v. Coulliard, 102 Mass. 167.

[7] Henry v. Martin, 1 Weekly Cas. (Pa.) 277; Barnet v. Steinbach, Id. 335.

[8] Stroud v. Tilton, 4 Abb. Ct. App. Dec. 324; Burke v. Wolfe, 38 Super. Ct. (J. & S.)

is convenient to rely upon it in some cases where the right to read the account, as having refreshed the witness's memory, may be doubtful.[1] It is not essential under this rule to produce the party himself as a witness, even since the disqualification of parties has been removed.[2]

The general rule is that in actions for goods sold (and some others), not founded on special contract,[3] the party's books of account are admissible in evidence for the consideration of the jury, in his own favor, upon due preliminary proof; 1. That they are his books of account kept in the regular course of business; 2. That there was a course of dealing between the parties; 3. That some article or service charged was actually furnished; 4. That the party had no clerk or book-keeper; 5. That he kept fair and honest accounts.[4]

In more detail observe: 1. The record must be shown to have been the party's account, kept in the regular course of business. Formal book-keeping is not important. The record derives whatever respect it receives, from the fact that it it is the personal record of the party, kept according to his usage and degree of intelligence, for the purpose of preserving the memory of moneys due him for goods or labor.[5] The account is not to be excluded because kept in ledger form, so that the charges against defendant are on a separate page from those against others;[6] although entries scattered through an account in the journal or day-book form are more cogent evidence. But if shown not to be the book of original entries, it is not competent without producing or accounting for those entries.[7] If it appear either from the books them-

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[1] The value and importance of the party's account are asserted in Butler v. Cornwall Iron Co. 22 Com. 360, and denied in Larue v. Rowland, 7 Barb. 107, and Tomlinson v. Borst, 30 Id. 46.

[2] Tomlinson v. Borst, 30 N. Y. 42. This is the New York Rule. In those jurisdictions where the suppletory oath of the party himself is required, the general rule is, that if part of the transaction was done by one partner, and part by another, as where one delivered the goods and another made the entries, each may testify to his own share in the transaction. If the person who kept the books is dead, the suppletory oath may be made by the executor or administrator speaking to the best of his knowledge and belief; and testifying also that the books came to his hands as the genuine and only account books of the deceased; but in such case, there must also be proof of the handwriting of the deceased. If the person who kept the books is insane, the question of insanity being one for the judge, the books are admissible on the like suppletory oath of the committee or guardian, with proof also of handwriting.

[3] Merrill v. Ithaca, &c. R. R. Co. 16 Wend. 586; *Contra*, Cummings v. Nichols, 13 N. H. 420.

[4] Vosburgh v. Thayer, 12 Johns. 461; Stroud v. Tilton, 4 Abb. Ct. App. Dec.; Knight v. Cumington, 6 Hun, 100; Foster v. Coleman, 1 E. D. Smith, 85; and see further, 1 Smith's L. Cas. 142; 1 Greenlf. Ev. § 118; 1 Whart. Ev. §§ 678, &c. 700.

[5] Thus a notched stick kept for this purpose was admitted in Rowland v. Burton, 2 Harr. (Del.) 288; scraps of paper in Smith v. Smith, 4 Id. 532, 533; Taylor v. Tucker, 1 Geo. 231. But these are exceptional cases. See Hall v. Glidden, 39 Me. 445; Jones v. Jones, 21 N. H. 219. On the other hand, a pocket memorandum book has been excluded. Richardson v. Emery, 23 N. H. (3 Fost.) 220; Thayer v. Deen, 2 Hill (So. Car.)

[6] Faxon v. Hollis, 13 Mass. 428. A tabular form may be admissible. Mathes v. Robinson, 8 Metc. 269. And alterations are suspicious. Lloyd v. Lloyd, 1 Redf. 392

[7] Vilmar v. Schall, 35, Super. Ct. (J. & S.) 67.

selves, or extrinsic evidence,[1] that they are a part of a system of books involving others which may be necessary to a complete view of the state of accounts,[2] the others must be produced or accounted for.[3] Thus where the ledger is relied on, a day-book shown to have been kept must be produced.[4] The charge should be made under an existing right to charge, not merely in anticipation of such a right,[5] and must appear to have been made for the purpose of charging,[6] for specific things,[7] the person upon whose credit the transaction was had,[8] as distinguished from memoranda of orders, or deliveries, or of things to be subsequently done.[9]

2. There must have been some course of dealing between the parties. A single sale, though of more than one article, is not enough to constitute that relation between the parties which allows the books to be admitted.[10]

3 Independent evidence that some article or service charged was furnished, is indispensable.[11] Proof of this prior to the time covered by the account is insufficient.[12] One article delivered and one item of work done, as charged, satisfy this requirement.[13]

4. The rule we are now considering does not apply to admit the books of a party to the suit, if they were kept by a regular clerk or book-keeper,[14] whose business it was to notice sales and enter them in the books:[15] such entries are admissible under other rules already stated. But the books of daily entries made by the party himself are not rendered incompetent by the fact that his servant, porter or messenger noted in temporary form the deliveries made by him, and reported them to the party, who, upon such information, or copying from the temporary memoranda, made the entries in question.[16] If there were partners, it is

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[1] Pendleton v. Weed, 17 N. Y. 72; see also, Schenck v. Wilson, 2 Hilt. 92.

[2] As for instance where a journal is produced, and it bears marks indicating that the entries have been posted into a ledger. Prince v. Sweet, 2 Mass. 569. Compare Hervey v. Hervey, 15 Me. 357.

[3] And the testimony of a witness that the reference in the book produced, to others not produced, was a mistake, does not justify the admission of the former alone. Larue v. Rowland, 7 Barb. 107.

[4] McCormick v. Elston, 16 Ill. 204.

[5] Heughley v. Brewer, 16 Serg. & R. 133. And should bear some date, though not necessarily the day. Cummings v. Nichols, 13 N. H. 420.

[6] Lynch v. Petrie, 1 Nott. & Mc. 130; Walter v. Bolman, 8 Watts, 544.

[7] Hughes v. Hampton, 2 Const. 745.

[8] Rogers v. Old, 6 Serg. & R. 454. Mistake in the person may be explained. Schettler v. Jones, 20 Wis. 412.

[9] Fairchild v. Dennison, 4 Watts Pa. 258; Bradley v. Goodyear, 1 Day Ct. 104; Terrill v. Beecher, 9 Conn. 344.

[10] Corning v. Ashley, 4 Den. 354.

[11] Morrill v. Whitehead, 4 E. D. Smith, 239.

[12] Conklin v. Stawler, 8 Abb. Pr. 395, s. c. 2 Hilt. 422.

[13] Linnell v. Sutherland, 11 Wend. 568.

[14] Gould v. Conway, 59 Barb. 355; Merill v. Ithaca, &c. R. R. Co. 16 Wend. 587.

[15] Sickles v. Mather, 20 Wend. 72.

[16] Within reasonable limit of time for the keeping of such accounts, see Id.; Stroud v. Tilton, 4 Abb. Ct. App. Dec. 324; Hauptman v. Catlin, 1 E. D. Smith, 729.

enough to produce the one who kept the book; but if he is dead, the book may be admitted on the oath of the other, if he can testify to his knowledge of the correctness of the entries.[1]

5. To show that the party kept fair and honest books, the testimony of one witness is enough, who has dealt with the party, and settled with him by his account;[2] but he should be not an employee, but a customer,[3] or a witness to settlement by customers.[4] A settlement by the ledger is enough, though the witness did not see the day-books.[5] The evidence of fair and honest accounts should be directed, in part at least, to the period covered by the dealings in question.[6]

The competency of an account under these rules is a preliminary question for the court.[7]

An account offered in evidence under these rules should be submitted to the judge for inspection.[8] But if the books are shown to have been lost or destroyed, secondary evidence of their contents may be received.[9] Without laying a foundation for secondary evidence, a copy is not admissible.[10] Abbreviations[11] and symbols[12] may be explained by parol, by testimony other than that of the party himself.[13] The party may explain by stating his usage, not by stating a secret intent. The fact that the book has been mutilated in a part not appearing to be material to the issue, such as having leaves torn out, etc., does not make it incompetent, but goes to its credit.[14] But apparent alterations or erasures in a part material to the cause must be explained before the account can be admitted.[15] Any fact showing the books unworthy of credit may be proved, such as bad method of bookkeeping; or bad *business* character of the party; or erasures,

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[1] Krom v. Levy, 1 Hun, 172; and see Butler v. Cornwall Iron Co. 22 Conn. 360.

[2] Beattie v. Qua, 15 Barb. 137.

[3] Hamptman v. Catlin, 1 E. D. Smith, 729.

[4] McAlister v. Real, 4 Wend. 483. Or any witness who can prove actual accuracy. Woodruff, J. in Foster v. Coleman, 1 E. D. Smith, 85.

[5] Stroud v. Tilton, 4 Abb. Ct. App. Dec.

[6] Foster v. Coleman, 1 E. D. Smith, 85.

[7] Larue v. Rowland, 7 Barb. 107. Objections to its admissibility must be made on the trial, or cannot be considered on appeal. Peck v. Richmond, 2 E. D. Smith, 380; Brahe v. Kimball, 5 Sandf. 237. Where the books of a party are read in evidence for him without objection, they are evidence by consent, and are to be weighed by the jury. Brahe v. Kimball. 5 Sandf. 237.

[8] It cannot be proved by deposition without production in court. Churchill v. Fulliam, 8 Iowa, 45.

[9] Holmes v. Marden, 12 Pick. 169. And see Hilderbrant v. Crawford, 6 Lans. 600; Prince v. Smith, 4 Mass. 455.

[10] Reddington v. Gilman, 1 Bosw. 235.

[11] Curnen v. Crawford, 4 Serg. & R. 3.

[12] Rowland v. Burton, 2 Harr. (Del.) 288.

[13] Cummings v. Nichols, 13 N. H. 420. His own testimony for this purpose ought to be received if it goes to show habitual usage, not merely a secret intent on the particular case.

[14] Jones v. Dekay, 2 Penn. 955 N. J. (Ed. of 1835, p. 695).

[15] Churchman v. Smith, 6 Whart. 106.

mutilations, etc.[1] But not the *general* bad moral character of the party.[2]

An account properly in evidence under this rule is competent evidence of the facts of sale, of the dates,[3] of the price or value,[4] and of the delivery;[5] but not evidence of any other matter than the issue of debt and credit between the parties.[6]

Pass books, kept by one party and written up by the other, are competent, irrespective of whether the entries were original memoranda, or copies.[7]

40. *When using part of an account admits the rest.*]—If a party uses books of account against his adversary, he makes them evidence for the adversary on the same subject. They are like any declaration or admission by writing or orally; if part is used, the whole qualifying the same matter is admissible. He cannot offer his books in evidence, to establish some things, under the restriction that they should not be received to prove others, to show which they were equally competent.[8] After they have been introduced in evidence, they are available as the property of both parties, as evidence, and he who adduced them cannot withdraw them from the consideration of the jury, without consent of the adverse party.[9] Hence when one party has used the account to establish credits in his favor, it is competent for the other plaintiff to read from the same books, entries, although they were made by himself, which show that those credits have been exhausted by counter-charges of debit, made at about the same time and afterward.[10]

41. *Memoranda as part of the* res gestæ.]—In connection with the last few paragraphs reference should be had to the rule admitting entries and declarations as part of the *res gestæ* of an act already properly in evidence, a rule which has been sufficiently illustrated elsewhere.[11]

42. *Admissions and promises to pay.*]—In proving oral admissions, etc, the witness must state the facts, and the conversation in substance at least; and not his own conclusion derived therefrom.[12] An admission or declaration made by a party in writing[13]

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[1] Larue v. Rowland, 7 Barb. 107.
[2] Tomlinson v. Bort, 30 Barb. 42.
[3] Sickles v. Mather, 20 Wend. 72.
[4] Morrill v. Whitehead, 4 E. D. Smith, 289.
[5] See also paragraphs 4 and 28.
[6] Batchelder v. Sanborn, 22 N. H. (2 Fost.) 325, rev'g cases.
[7] Burke v. Wolfe, 38 Super. Ct. (J. & S.) 263.
[8] Pendleton v. Weed, 17 N. Y. 72; Winans v. Sherman, 3 Hill, 74. But he may contradict items. Walden v. Sherburne, 15 Johns. 409.
[9] Clinton v. Rowland, 24 Barb. 634, and cases cited.
[10] Dewey v. Hotchkiss, 30 N. Y. 497. Detached items in accounts, however, are not necessarily so connected that the one drags in the other. 1 Whart. Ev. 591, § 620.
[11] Pages 170, 245, 253, 264, 269, 275; and see Arms v. Middleton, 23 Barb. 571.
[12] Parsons v. Disbrow, 4 E. D. Smith, 547.
[13] Even though dictated to plaintiff's agent, and unsigned by defendant. Wollenweber v. Ketterlinus, 17 Penn. St. 389.

is competent against him, without calling him. If a memorandum of defendant's admission was made by plaintiff or his agent, it need not be produced, unless it was communicated to defendant.[1] Upon the question, whether a transaction was a sale or not, it is competent to prove an entry made by the plaintiff in his books, of the transaction as a sale, if accompanied by proof that the entry was subsequently read to the defendant, and he admitted its correctness.[2] The existence, and defendant's knowledge of the demand being shown by other evidence, defendant's acknowledgment of an indebtedness is presumed to have referred to the demand proven, in the absence of proof that other demands existed, to which the acknowledgment might apply.[3] A promise "to settle," if made in reference to a demand of a liquidated amount, is equivalent to a promise to pay.[4] On a promise to pay in a contingency, though indefinite—such as to pay when able—plaintiff should show that the contingency has occurred.[5]

The admissions and declarations of defendant's agent are competent only when shown to have been made by him at the time of making the agreement about which he was employed, or while acting within the scope of his authority.[6] Upon proof that defendant referred plaintiff or his agent to a third person for information,[7] the admissions and declarations of the latter, made pursuant to the reference to him, are competent against defendant.[8]

An admission of a distinct fact, such as the correctness of an account presented to the party, may be proved against him, though made during a negotiation for settlement, and coupled with an offer to allow the account on a condition;[9] and after the correctness of the items has thus been proved, the account, and entries and vouchers concerning the items, are admissible.[10]

43. *Auction sales.*]—An auctioneer suing in his own name need not prove that he has a special property or interest, for that follows from his position as an auctioneer.[11]

Under the statute of frauds, as applicable to auctions,[12] one who has to prove compliance with the statute must produce or account for the memorandum,[13] and show that it was made by the

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[1] Parsons v. Disbrow, 1 E. D. Smith, 547.
[2] Tanner v. Parshall, 4 Abb. Ct. App. Dec. 356, a. c. 5 Abb. Pr. N. S. 373; and 35 How. Pr. 472.
[3] McNamee v. Tenny, 41 Barb. 495. Sugar v. Davis, 13 Ga. 462. The sufficiency of this evidence, alone, is questionable.
[4] Barker v. Seaman, 61 N. Y. 648.
[5] 2 Abb. N. Y. Dig. 2d ed. 209.
[6] Vail v. Judson, 4 E. D. Smith, 165.
[7] Allen v. Killinger, 8 Wall. 480.
[8] Folsom v. Batchelder, 2 Fost. (N. H.) 47.
[9] Bartlett v. Tarbox, 1 Abb. Ct. App. Dec. 120.
[10] Id.
[11] Minturn v. Main, 7 N. Y. 220.
[12] 2 N. Y. R. S. 136, § 4 (3 R. S. 6th ed. 143).
[13] Davis v. Robertson, 1 Mill (So. Car.) 71.

auctioneer or his clerk at the time of the sale,[1] that is to say, before other business intervened after the auction, so that nothing was left to memory.[2] In case of a continued sale of many parcels, it is sufficient to prove that the memorandum was kept complete as to everything but subscription, as the sale progressed from day to day, and was subscribed (where necessary) immediately upon the close of the sale.[3]

The memorandum must show everything necessary to establish the existence of the contract without having recourse to extrinsic evidence.[4] For the purpose of making out the facts required by the statute of frauds, the printed terms of sale or other separate papers cannot be used, unless referred to in the memorandum which was subscribed,[5] or unless physically annexed at the time of sale.[6] A coincidence in the contents of separate papers is not enough to connect them;[7] nor is evidence that the papers were actually intended by the parties to be read together.[8] A mistake in the given name of the buyer may be corrected by parol, if, rejecting the erroneous words or letters, enough remains to identify the person by, with the aid of extrinsic evidence.[9] And the identity of the property may be ascertained if the memorandum contains the means of identification by aid of extrinsic evidence.[10]

The written or printed terms of sale cannot be varied by evidence of the parol declarations of the auctioneer.[11] The quantity or amount of property offered in a lot may be proved by parol;[12] and so may the fact that misdescriptions in the catalogue were publicly corrected.[13] But the rules excluding oral evidence to explain or vary the contract, which have already been stated in the case of other modes of contract under the statute of frauds, apply to sales by auction.

44. *Sales through a broker.*]—The broker's authority must be shown,[14] if his entry or memorandum is relied on as the evidence of the sale; but it need not be in writing.[15] If it appears that he

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[1] Frost v. Hill, 3 Wend. 386; Price v. Durin, 56 Barb. 647; Hicks v. Whitmore, 12 Wend. 548; Walker v. Herring, 21 Gratt. 679, s. c. 8 Am. R. 616.

[2] Hicks v. Whitmore (above); Goelet v. Cowdrey, 1 Duer, 140.

[3] Price v. Durin, 56 Barb. 647.

[4] First Bapt. Ch. v. Bigelow, 16 Wend. 31, and cases cited.

[5] Norris v. Blair, 39 Ind. 90, s. c. 10 Am. R. 135.

[6] Tallman v. Franklin, 14 N. Y. 583, rev'g 3 Duer, 395.

[7] So held of a mere coincidence of dates, between the catalogue containing terms of sale of specified lots for a day named, and a memorandum of sale of a lot by the catalogue number. Peirce v. Corf, L. R. 9 Q. B. 210, s. c. 8 Moak Eng. 316; and see First Ch. v. Bigelow, 16 Wend. 32.

[8] Johnson v. Buck, 35 N. J. 338, s. c. 10 Am. R. 243, and cases cited.

[9] Pinckney v. Hagadorn, 1 Duer, 97.

[10] Tallman v. Franklin, 14 N. Y. 584, rev'g 3 Duer, 395.

[11] Shelton v. Livius, 2 Crompt. & J. 411; Wright v. Deklyne, Pet. C. C. 199. Compare Hadley v. Clinton, 13 Ohio St. 502.

[12] Wright v. Deklyne (above).

[13] Eden v. Blake, 13 M. & W. 614.

[14] Moses v. Banker, 7 Robt. 441.

[15] Merritt v. Clason, 12 Johns. 102, aff'd in 14 Johns. 484.

was employed by one party, the question whether he was also agent for the other, is usually one of fact; and the presumption that he was, if any such arises from his character of broker, is repelled by evidence that the other party had another agent or broker in the transaction.[1] Although his original authority was only from one, his authority to bind the other may be shown by the ratification by the latter of his act.[2]

In respect to the mode of proving the contract, especially where the statute of frauds requires a memorandum, the following rules are guides:

1. The broker's entry in his book, subscribed by him,[3] satisfies the statute. If authorized, it constitutes the contract between the parties, and is binding on both.[4] And it need not be shown that he communicated it to the defendant,[5] if it be shown that he was authorized to make it by defendant.[6] And if communicated, a variance in the terms as communicated, does not impair its validity.[7]

2. If the broker subscribed such an entry, bought and sold notes, delivered by him, do not constitute the contract.[8]

3. The bought and sold notes, when they correspond with each other and state all the terms of the contract, are complete and sufficient evidence to satisfy the statute, even though there be no entry in the broker's book, or, what is equivalent, only an unsigned entry.[9]

4. Though the broker made such an entry, if he did not subscribe it, and did not deliver a note, the terms of the contract may be proved by parol if the statute of frauds can be otherwise satisfied.[10]

5. Either a bought or sold note alone may satisfy the statute;[11] and though both are shown to have been delivered, the plaintiff need only produce the one delivered to him, unless a variance appears.[12]

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[1] Dilworth v. Bostwick, 1 Sweeney, 588, Monell, J.

[2] Hankins v. Baker, 46 N. Y. 666. It may be proved by evidence that he sent a note of the bargain to the buyer, who kept it without objection until called on to fulfill the contract, when he objected merely on the ground that the broker did not sign it, Thompson v. Gardiner, 1 C. P. Div. 777, s. c. 18 Moak's Eng. 328; or sent a warehouse order, which he retained, and upon which he authorized an effort to sell the goods. Hankins v. Baker (above).

[3] Davis v. Shields, 26 Wend. 341.

[4] Sivewright v. Archibald, 17 Q. B. 115, s. c. 20 L. J. N. S. Q. B. 529; Benj. on S. § 290, etc. (*Contra*, 1 Tayl. Ev. 416. Stephen says the question is unsettled. Steph. Dig. Ev. Art. 64, n.) Unless apparently made only for another purpose. Gallagher v. Waring, 9 Wend. 28. A memorandum made, for his own convenience of charges, by a broker who merely brought together the parties who contracted, is not the contract. Aguirre v. Allen, 10 Barb. 74, affi'd, on other points, in 7 N. Y. (3 Seld.) 543.

[5] Merritt v. Clason, 12 Johns. 102; 14 Id. 484; Sivewright v. Archibald (above).

[6] See Davis v. Shields, 26 Wend. 341, 350.

[7] Sivewright v. Archibald (above).

[8] Same authorities and same conflict.

[9] Id.

[10] Waring v. Mason, 18 Wend. 425.

[11] This conclusion seems supported by the doctrine of Butler v. Thompson, 92 U. S. (1 Otto), 416; and Parton v. Crofts, 16 C. B. N. S. 11 (recognized in 42 N. Y. 520); Hankins v. Baker, 46 N. Y. 666.

[12] Durrell v. Evans, 1 H. & C. 174, s. c. 31 L. J. Ex. 337; 1 Tayl. Ev. 416.

6. Where one note only is offered in evidence, the party sought to be charged has a right to offer the other note, or the subscribed entry in the book, to prove a variance.[1]

7. If the bought and sold notes correspond with each other, but vary from the subscribed entry in the book, the jury may find that the acceptance by the parties of the bought and sold notes constituted a new contract modifying that which was entered in the book.

8. If the bought and sold notes differ with each other in substance,[2] and there is no subscribed entry showing the terms of the contract in the broker's book, the papers do not satisfy the requirement of the statute.[3]

The understanding of a mere mutual agent, not a broker, as to the terms of sale, unless communicated by him to one party, and acceded to, or not objected to, by the other, is not evidence of a contract which will bind both.[4]

If the broker was agent for only one of the parties, parol evidence is competent to show that the contract he actually made with the other was not truly stated in the memorandum.[5] If he was agent for both parties such parol evidence is not competent;[6] but it may be shown by parol that the terms stated in the memorandum exceeded his authority.[7] If all the terms appear on the notes, the question whether the transaction was a sale or for some other purpose, may be determined by the aid of a separate writing though addressed to a third person, if subscribed by the party to be charged.[8]

45. *Demand.*[9]]—The fact that the contract fixed a time and place for payment, does not require plaintiff to prove demand before suit;[10] but if the contract is so expressed as to make demand a condition precedent,[11] or the price was payable in specific articles, to be furnished by the debtor, a demand and refusal must be shown,[12] unless the contract is so expressed as to put him in default without them. And where the defendant is entitled to a reasonable time to comply with a demand, the demand must be made a reasonable time before suing.[13]

46. *Interest.*]—Unless a credit is proven, a sale is presumed to

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[1] Sivewright v. Archibald (above).

[2] Variances may be explained by parol to be not material. Bold v. Rayner, 1 Mees. & W. 343; Kempson v. Boyle, 3 Hurlst. & C. 763.

[3] Sivewright v. Archibald (above).

[4] Fiedler v. Tucker 13 How. Pr. 9, Mitchell, J.

[5] See Davis v. Shields, 26 Wend. 341.

[6] Coddington v. Goddard, 16 Gray, 436.

[7] Id.; Peltier v. Collins, 3 Wend. 459.

[8] Peabody v. Speyers, 56 N. Y. 230.

[9] See also pp. 265 and 281 of this vol.

[10] Locklin v. Moore, 57 N. Y. 360, affi'g 5 Lans. 307.

[11] Id.

[12] Smith v. Tiffany, 36 Barb. 23; Hunt v. Westervelt, 4 E. D. Smith, 225.

[13] Boutwell v. O'Keefe, 32 Barb. 434, 439.

have been for cash,[1] and if it be shown that the price was fixed, either by the contract[2] or by the buyer promising, on receiving information of the amount, that he would pay,[3] interest is recoverable from the time of demand.

A draft drawn by plaintiff upon defendant for the price, which he refused to accept, is equivalent to a demand of payment for this purpose.[4]

Where there is a general usage in the particular trade or branch of business, or among merchants of the place, to charge and allow interest, parties having knowledge of the usage are presumed to contract in reference to it.[5] Evidence that the buyer was one of the seller's customers, and that plaintiff always charged interest after a certain time, is *prima facie* enough.[6]

47. *Non-payment.*]—Unless the contract is special, plaintiff need not allege[7] or prove[8] non-payment; but the sale and delivery being proved or admitted, the burden is on defendant of proving payment if he rely on that fact.[9] Negotiable paper of the buyer,[10] or of his agent,[11] or of either of several joint buyers,[12] received by the seller, for price, whether at the time of the sale or at any other time, or negotiable paper of any other person[13] received by the seller after the sale, at a time when the price may be regarded as a pre-existing debt,[14] is presumed not to have been received in payment. Negotiable paper of another than the buyer or his agent, received at the time[15] of sale and delivery, it is presumed was received in payment.[16]

These presumptions may be rebutted by evidence of an express agreement to the contrary,[17] even though a receipt was passed acknowledging that the paper was given in payment.[18]

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[1] Pollock v. Ehle, 2 E. D. Smith, 541.

[2] Beers v. Reynolds, 11 N. Y. 97, affi'g 12 Barb. 288.

[3] Pollock v. Ehle (above).

[4] Cooper v. Coates, 21 Wall. 111.

[5] Esterly v. Cole, 3 N. Y. 502.

[6] Reab v. McAllister, 8 Wend. 109, affi'g, 4 Id. 483. The admission of evidence of the usage does not become improper, because the party fails subsequently to furnish the necessary proof that the other had knowledge of the usage. Esterly v. Cole (above); but compare Trotter v. Grant, 2 Wend. 413; Wood v. Hickok, 2 Id. 501; and cases cited under paragraph 9, above.

[7] Salisbury v. Stinson, 10 Hun, 242.

[8] Id; Buswell v. Poineer, 37 N. Y. 312.

[9] Id.; Id.

[10] Murray v. Gouverneur, 2 Johns. Cas. 438.

[11] Porter v. Talcott, 1 Cow. 359; Davis v. Allen, 3 N. Y. 168; Higby v. N. Y. & Harlem R. R. Co. 3 Bosw. 497, s. c. 7 Abb. Pr. 259.

[12] See Bates v. Rosecrans, 37 N. Y. 409, s. c. 4 Abb. Pr. N. S. 276, affi'g 23 How. Pr. 98.

[13] Vail v. Foster, 4 N. Y. 312; Smith v. Applegate, 1 Daly, 91.

[14] See Gibson v. Tobey, 46 N. Y. 637; 53 Barb. 191.

[15] Gibson v. Tobey, 46 N. Y. 637; 53 Barb. 191, and cases cited.

[16] Noel v. Murray, 13 N. Y. 167, affi'g 1 Duer, 385; see also Darnall v. Morehouse, 45 N. Y. 64, rev'g 36 How. Pr. 511.

[17] Young v. Stahelin, 34 N. Y. 258; Steamer St. Lawrence, 1 Black, 522, 532.

[18] So held of a receipt attached to a bill of parcels, acknowledging that the seller

Such an agreement may be inferred from circumstances, such, for instance, as that the buyer guaranteed the paper.[1] But the fact that the buyer did not indorse the paper does not raise a presumption that there was no agreement to take it in payment.[2]

If negotiable paper given did not amount to payment under these rules, the seller must produce and offer to surrender it at the trial,[3] or prove that it is lost or destroyed.[4] If he produces it for cancellation, the fact that it had meanwhile been held by another does not avail.[5]

Evidence that the seller agreed, as part of the contract of sale, to receive negotiable paper of a third person in payment,[6] unless he agreed to take the risk,[7] does not preclude him from refusing a tender of it, if the insolvency of the makers became known thereafter and before delivery.[8] In such case he may recover the price. Otherwise, if it was not known to either party till after delivery.[9] Evidence that, after the sale, he expressly accepted the note as payment of the pre-existing debt, does not preclude him from proving that the maker was then insolvent, and that he was ignorant of the fact; and thereupon he may recover the price.[10]

II. Defendant's Case.

48. *Denial of Contract.*]—Under a general denial,[11] or denial of the making of the contract alleged,[12] evidence is admissible that the goods were delivered under a special contract which was substantially and materially different from that alleged, and was unperformed by plaintiff.[13] The rules as to contradicting an apparent written agreement of sale have already been stated.[14] If the seller has testified as a witness to prove his sale, he may be im-

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has "received payment by note." Buswell v. Poineer, 37 N. Y. 312, s. c. 4 Abb. Pr. N. S. 244; 35 How. Pr. 447. Otherwise of a receipt "on account, without recourse." Graves v. Friend, 5 Sand. 568; see also Richard v. Wellington, 66 N. Y. 308.

[1] Butler v. Haight, 8 Wend. 535. Even though the guaranty was void, for not expressing a consideration (Monroe v. Hoff, 5 Den. 360), for it shows the intent equally well.

[2] Whitbeck v. Van Ness, 11 Johns. 409.

[3] Holmes v. D'Camp, 1 Johns. 34; Burdick v. Green, 15 Johns. 247.

[4] Id.

[5] Patterson v. Stettauer, 40 Super. Ct. (J. & S.) 69.

[6] Benedict v. Field, 16 N. Y. 595.

[7] Id. (And even then if he was induced to do so by fraud. Pierce v. Drake, 15 Johns. 475.)

[8] Id.

[9] Des Arts v. Leggett, 16 N. Y. 582.

[10] Roberts v. Fisher, 43 N. Y. 159.

[11] Manning v. Winter, 7 Hun, 482.

[12] Wheeler v. Billings, 38 N. Y. 263; Hawkins v. Borland, 14 Cal. 412; Marsh v. Dodge, 66 N. Y. 533, rev'g 4 Hun, 278.

[13] Manning v. Winter (above). If the answer sets up that defendant was to pay when he could, the burden of the proof is upon him to make out the defense. Johnson v. Plowman, 49 Barb. 472.

[14] See paragraphs 8, 9, &c.; Lent v. Hodgman, 15 Barb. 274; Groot v. Story, 44 Vt. 200; George v. Foy, 19 N. H. 544.

peached on cross-examination by asking if he has not offered to sell again.[1]

49. *Set-off against Plaintiff's Agent.*]—To let in the state of the accounts between defendant and an alleged agent of plaintiff, with whom defendant dealt as if he were the principal, it should be shown that the plaintiff had intrusted the alleged agent with the possession of the goods, that such person had sold them as his own, in his own name; that defendant dealt with him as, and believed him to be, the principal in the transaction, and that before he was undeceived the set-off accrued. It is not necessary for defendant to show that he had no means of knowing that such person was only in appearance the owner.[2] The fact that the alleged agent charged the defendant a commission, and the fact that in the invoice rendered to defendant he did not charge him as purchaser from him, but for goods bought by his order and on his account, are relevant; but not conclusive against letting in the state of the accounts between the defendant and the agent.[3]

50. *Denial of agency binding Defendant.*]—Under a general denial defendant may contest the authority of a person who is claimed to have bought as his agent, and may show that the agency, if once existing, had been revoked, and that plaintiff had notice of such revocation.[4] Evidence of the way in which the alleged agent carried on business is competent for that purpose.[5] But if the existence of agency is admitted, excess of authority is not provable unless alleged in the answer.[6] If it appear that the goods were purchased on credit by a known agent, for use of a known principal, the presumption is that the credit was given to the principal, and he can rebut this by affirmative evidence that it was given exclusively to the agent.[7] This fact must appear clearly.[8] The fact that the alleged agent has not recognized the claim as his debt, is not competent in favor of defendant.[9]

51. *Plaintiff an agent for Defendant.*]—If it appear that plaintiff was the agent of defendant to buy, he must prove that he made a full disclosure to plaintiff of the fact that he was the owner of the goods charged, or the nature of his adverse interest in the transaction.[10] It is not enough to prove that he made such

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[1] Knight v. Forward, 63 Barb. 311.
[2] Bo-ries v. Imperial Ottoman Bk. L. R. 9 C. P. 38, s. c. 7 Moak's Eng. 138.
[3] Armstrong v. Stokes, L. R. 7 Q. B. 598, s. c. 3 Moak's Eng. R. 217.
[4] Heir v. Grant, 47 N. Y. 278.
[5] Id.
[6] See Merchant's Bank v. Griswold, 9 Hun, 561.
[7] Butler v. Evening Mail Ass. 61 N. Y. 634, rev'g 34 Super. Ct. (J. & S.) 58.
[8] Meeker v. Claghorn, 44 N. Y. 349.
[9] Turner v. See, 57 N. Y. 667. Compare Springer v. Drosch, 32 Ind. 486, s. c. 2 Am. R. 356.
[10] Conkey v. Bond, 36 N. Y. 427, s. c. 3 Abb. Pr. N. S. 415, affi'g 34 Barb. 276; Dunne v. English, L. R. 18 Eq. Cas. 524; 10 Moak's Eng. 837. For this purpose the testimony of the agent is not alone enough to countervail that of the principal to the contrary, if their credibility appears equal. Dunne v. English (above).

statements as should put the principal on inquiry.[1] Agency and failure to disclose interest being shown, the facts that the agent acted without compensation, and without intent to defraud, and made no false representations,[2] or acted according to a usage of trade, not shown to be known to, and assented to by the defendant,[3] are not material. The fact that plaintiff made, or assented to a charge for commissions, is conclusive against him to show that to some extent the relation of principal and agent existed.[4]

52. *Defendant Not the Buyer, but agent for another.*]—Under a general denial, defendant may show that, in making an oral contract sued on, he acted as agent for another, and on his credit, plaintiff knowing of the agency;[5] and for this purpose defendant may prove the relations between himself and his alleged principal;[6] but the subsequent admissions of the latter, that he was the real debtor, if not part of the *res gestæ* of an act properly in evidence, are not competent against the plaintiff.[7] If, however, the contract was in writing, and defendant appears in it as principal, parol evidence cannot be admitted for the purpose of exonerating him, even though he should propose to show, if allowed, that he disclosed his agency and mentioned the name of his principal at the time the contract was executed;[8] or even that he was known to the other party to be an auctioneer or broker, who is usually employed in selling or buying property as agent,[9] or an attorney for a party named on the record.[10]

53. *By bidding at Auction.*]—Where a buyer at auction defends on the ground of by bidding, the burden of proof is on him to prove the fraud; but if there be proof that the fraud was practiced for the purpose by the auctioneer, it is not essential that he should prove that the owner knew of it.[11] But it should appear that defendant was actually misled; though this may be inferred by the jury from the intent to mislead, and the nature of the method pursued.[12]

54. *Rescission.*]—When the maker, or seller, of an article takes it back after delivery, because the price remains unpaid, the legal presumption is that the sale is rescinded, unless there is

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[1] Dunne v. English (above).
[2] Conkey v. Bond (above).
[3] Robinson v. Mollett, L. R. 7 Ho. of L. 802, s. c. 14 Moak's Eng. 177.
[4] Armstrong v. Stokes, L. R. 7 Q. B. 598, s. c. 3 Moak's Eng. 217.
[5] Merritt v. Briggs, 57 N. Y. 651.
[6] McDougall v. Hess, 68 N. Y. 620; Fuller v. Wilder, 61 Me. 525.
[7] Wilson v. Sherlock, 36 Me. 295. Compare Black v. Richards, 2 Stew. & P. (Ala.) 338.
[8] Nash v. Towne, 5 Wall. 703; Higgins v. Senior, 8 Mees. & W. 844; Babbett v. Young, 51 Barb. 466. Except, perhaps, where he or his principal was a public officer, and known to be dealing as such. Walker v. Christian, 21 Gratt. (Va.) 291.
[9] Mills v. Hunt, 20 Wend. 431; McComb v. Wright, 4 Johns. Ch. 659.
[10] Chappell v. Dann, 21 Barb. 17.
[11] Curtis v. Aspinwall, 114 Mass. 187, s. c. 19 Am. R. 332.
[12] Id.

some evidence to show an intent to take it for the purpose of resale on the buyer's account, or otherwise not to discharge the debt for the price.[1] Even if a modification or rescission of an executory contract may be proved by parol, notwithstanding the statute of frauds, still, after a sale has been executed, the taking back is a new contract within the meaning of the statute, and its terms must be proved by the statute evidence.[2] Evidence of the insolvency of the buyer, and notice of it given by him, coupled with the facts that after such insolvency no steps were taken indicating an intention to stand by the contract, and that time for several installments passed without delivery or payment, will sustain an inference that the seller had a right to conclude that the insolvent had abandoned the contract, and if he did so conclude, had a right to abandon it himself.[3] Where the seller has been defrauded, lapse of time without rescinding is some evidence that he has determined to affirm the contract; and when the lapse of time is great, it may be treated as sufficient evidence to show that he has so determined.[4]

A general agent to buy (though in a particular business only), is presumed to have had power to rescind.[5] Otherwise, of a special agent.

55. *Recoupment.*]—The breach of a valid agreement between the same parties, which might itself be the subject of a cross action against the plaintiff, may always be given in evidence (under proper pleading), either in mitigation of damages or in bar of an action on the agreement of which it formed either the whole or part of the consideration. If the stipulation on plaintiff's part was a condition precedent to defendant's obligation, evidence of its breach is generally admissible under a general denial; but otherwise should be pleaded by defendant.[6]

56. *Defects in title, quantity or quality.*]—If delivery or acceptance is in issue on the pleadings, evidence that the thing tendered did not correspond with the contract, or that plaintiff could not give title, will be admissible, though not specially pleaded; but if acceptance is admitted, or proved, and a price fixed by contract is relied on by plaintiff, evidence of deficiency in quality is not admissible, unless set up in the answer.[7] If the

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[1] Sloan v. Van Wyck, 4 Abb. Ct. App. Dec. 250, aff'g 47 Barb. 634, and rev'g 36 Id. 335.

[2] Blanchard v. Trim, 38 N. Y. 228. Compare 9 Wall. 272, and p. 314 of this vol.

[3] Morgan v. Bain, L. R. 10 C. P. 15, s. c. 11 Moak's Eng. 220, and cases cited. Compare Freeth v. Burr, L. R. C. P. 208, s. c. 9 Moak's Eng. 393.

[4] Clough v. London & North Western R. Co. L. R. 7 Exch. 26, 35, s. c. 1 Moak's Eng. 148, 158.

[5] Nelson, Ch. J. Anderson v. Coonley, 21 Wend. 279; and see Dillon v. Anderson, 43 N. Y. 231.

[6] The leading cases are Reab v. McAllister, 8 Wend. 110; Batterman v. Pierce, 3 Hill, 171; Harrington v. Stratton, 22 Pick. 510. Compare Seymour v. Davis, 2 Sandf. 239.

[7] McCormick v. Sarson, 1 Sweeney, 161, s. c. 33 How. Pr. 190; Fetherly v. Burke, 54 N. Y. 646.

plaintiff sues on a *quantum meruit*, evidence of deficiency in quality is admissible, if alleged, even though acceptance under a contract fixing a price be proved.[1] If the defendant sets up warranty, or false representation,[2] either directly, or by denying that there was a purchase except upon terms specified in the answer,[3] the burden is on him to prove the defense.

The mode of proving defects is stated below.

57. *Deceit.*]—The rules regulating the mode of proof of false representations are substantially the same as in an action for damages.[4]

58. *Inconsistent remedies.*]—The pendency of replevin by the same plaintiff to recover the goods, goes in bar of an action subsequently brought for the price.[5] The pendency of a mechanic's lien foreclosure, for the same goods, against the same defendant, is also a defense.[6]

59. *Wager contract.*]—Unless the terms of the contract show the contrary, it is presumed that delivery was intended.[7] The burden is on defendant[8] to show that neither party[9] intended delivery. What was said at the time of contracting is competent;[10] and a party may be asked what was his intent.[11] The buyer's lack of means to pay,[12] if known to the seller,[13] or the fact that both were endeavoring to make "a corner"[14] is relevant: but the seller's lack of the property, though known to the buyer,[15] or that one party made wager contracts with other persons,[16] is not.

III. Action against Buyer, for Damages for not Accepting.

60. *General principles.*]—Plaintiff may be put to proof of the contract, the performance of all conditions precedent on his part, the refusal to receive, and the amount of damage.[17] The rules already stated as to the mode of proof of these facts are in general applicable. Indeed, under a complaint alleging sale and delivery, plaintiff may recover on proof of sale and wrongful

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[1] Moffett v. Sackett, 18 N. Y. 522.
[2] Dorr v. Fisher, 1 Cush. 271.
[3] Goodwin v. Hirsch, 37 Super. Ct. (J. & S.) 508.
[4] See paragraph 68, &c., and the Chapter on Actions for Deceit.
[5] Morris v. Rexford, 18 N. Y. 552. Compare Kinney v. Kiernan, 49 N. Y. 164.
[6] Ogden v. Bodle, 2 Duer, 611.
[7] Story v. Salomon, 71 N. Y. 420, affi'g 6 Daly, 538.
[8] Bigelow v. Benedict, 70 N. Y. 206, affi'g 9 Hun, 429; Clarke v. Foss, 7 Biss. 540.
[9] Gregory v. Wendell, 40 Mich. 432, s. c. 9 Cent. L. J. 76; Warren v. Hewitt, 45 Geo. 501; Clark v. Foss (above); Pixley v. Boynton, 79 Ill. 351; Rumsey v. Berry, 65 Me. 570.
[10] Caisard v. Hinman, 6 Bosw. 14.
[11] Yerkes v. Salomon, 11 Hun, 471.
[12] Kilpatrick v. Bonsall. 72 Penn. St. 155.
[13] *In re* Green, 7 Bill. 338.
[14] Exp. Young, 6 Biss. 53.
[15] Rumsey v. Berry (above).
[16] Gregory v. Wendell (above).
[17] Rosc. N. P. 495.

refusal to accept, if defendant is not misled to his prejudice, for the variance is amendable.[1]

61. *Readiness to perform.*]—Where delivery and payment were to be concurrent acts, an averment that at the time and place fixed plaintiff was ready and willing to deliver, &c., is enough;[2] and under this allegation, if put in issue, plaintiff must show that he had the article ready for delivery, and that it corresponded with that contracted for,[3] and either that he offered to deliver, or that defendant dispensed with delivery, or made it an idle and useless form to attempt to deliver. The averment involves the ability of the plaintiff to deliver.[4] Evidence that a sufficient quantity of goods were at the place fixed for delivery, without proving that they were plaintiff's property,[5] or that he had a right to sell them,[6] is not enough to show performance. Excuse for breach is not admissible under an allegation of performance. But if the defendant notified his intention to refuse, and forbade the plaintiff to deliver goods ordered to be made, then plaintiff need not proceed to complete the contract on his part, and may show this under an allegation of refusal to accept, although the goods were not ready for delivery, and could not be delivered; for the plaintiff is thereby discharged from proceeding further; and such a notice to the plaintiff will support an allegation that the defendant prevented and discharged the plaintiff from supplying the goods and executing the contract.[7] To support an allegation of plaintiff's readiness to manufacture articles ordered by defendant, it is enough, in the first instance, to show that defendant had countermanded the manufacture while in progress and after delivery of some, and had notified his refusal to accept any more.[8]

IV. Action against Seller for Non-Delivery.

62. *General Principles.*]—The general principles which apply to the various facts to be proved are already stated. It only remains to notice some rules specially applicable in this class of actions.

63. *Orders, and Acceptance.*]—Evidence that defendant, in acknowledging the receipt of an order, added qualifications as to undertaking to fill it, rebuts the presumption of assent raised by retaining the order, and throws on plaintiff the burden of showing that he communicated to defendant his assent to any new

[1] See paragraph 1.
[2] Rosc. N. P. 510.
[3] Boyd v. Lett, 1 C. B. 222.
[4] Id. citing Lawrence v. Knowles, 5 N. C. 399; De Medina v. Norman, 9 M. & W. 820; Spotswood v. Barrow, 1 Exch. 804.
[5] Cobb v. Williams, 7 Johns. 24.
[6] See Nixon v. Nixon, 21 Ohio St. 114.
[7] Rosc. N. P. 511, citing Cort v. Ambergate Ry. Co. 17 Q. B. 127, 144.
[8] Id. citing also Baker v. Farminger, L. J. 28 Ex. 130. See also paragraph 30.

conditions thus made.[1] The holder, by assignment, of an order on defendant, may recover, on parol evidence, that defendant had verbally accepted the order when in the hands of the payee, and that the latter's assignee had stipulated to and had duly performed the conditions of it.[2] A variance in the consideration is not material, unless shown to have misled defendant to his prejudice.[3]

64. *Readiness to perform.*]—Under an agreement to deliver at a particular place, for payment on delivery, the buyer must allege[4] and prove[5] readiness and willingness to receive and pay at that place, or show that so doing was waived or prevented by some act of the seller;[6] and this is so whether the defendant was at the place ready to deliver or not.[7] But he need not prove tender and demand.[8] Any satisfactory evidence that plaintiff was able and willing to fulfill the terms of the contract, on his part, is sufficient.[9] If the seller refused to deliver, and put it out of his power to do so, it is unnecessary for the buyer to offer to pay the unpaid price before suing;[10] and if having put it out of his own power ever to perform, he disavows and repudiates the contract, this, although done before the time for performance, is a breach without further demand.[11]

Under an allegation of defendant's non-delivery, evidence of his tender properly refused by plaintiff, is admissible, unless defendant shows he was actually misled.[12]

65. *Object of buying.*]—Plaintiff may prove that defendants were informed that the object of the order was to enable plaintiff to fill a contract made by him with others, and that defendants

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[1] Briggs v. Sizer, 30 N. Y. 647.

[2] Bailey v. Johnson, 9 Cow. 115. But a written acceptance of a written order for mere delivery of goods is not a sale, but a promise to deliver on request; and so to be declared on. Burrall v. Jacot, 1 Barb. 165.

[3] See, for instance, Meriden Britannia Co. v. Zingsen, 4 Robt. 312, affi'd in 48 N. Y. 247. At common law, evidence of a sale, and payment by a sight-draft, duly paid, will support a declaration of a sale for so much "in hand paid." Nash v. Towne, 5 Wall. 690.

[4] Clark v. Dales, 20 Barb. 42.

[5] Topping v. Root, 5 Cow. 404; Vail v. Rice, 5 N. Y. 155; Bronson v. Wiman, 8 Id. 182.

[6] Cornwell v. Haight, 8 Barb. 327. In strictness, such waiver or prevention is not appropriate evidence under an allegation of readiness. Crandall v. Clark, 7 Barb. 169, 171; Cherrey v. Newby, 11 Tex. 457. But, properly, it is a question of variance, to be disregarded or amended, unless defendant is misled.

[7] Porter v. Rose, 12 Johns. 209.

[8] Coonley v. Anderson, 1 Hill, 519; Crosby v. Watkins, 12 Cal. 85. Compare Dunham v. Pettee, 8 N. Y. (4 Seld.) 508. According to the English authorities, a demand of the goods is sufficient evidence that the plaintiff was ready and willing to pay. Wilks v. Atkinson, 1 Marsh. 412; Levy v. Herbert, Lord, 7 Taunt. 318; and this, though the demand may be by the plaintiff's servant; Squier v. Hunt, 3 Price, 68, cited in Rose. N. P. 517.

[9] Vail v. Rice, 5 N. Y. 155.

[10] Hawley v. Keeler, 53 N. Y. 114, affi'g 62 Barb. 231.

[11] Sears v. Conover, 4 Abb. Ct. App. Dec. 179; *contra*, Daniels v. Newton, 114 Mass. 530, s. c. 19 Am. R. 384.

[12] Seaman v. Low, 5 Barb. 337.

contracted in reference to that fact, as evidence affecting the rule of damages.[1]

66. *Defendant's Case—Only an Agent.*]—If the nominal seller, in contracting, did not disclose his principal, he may, if he disclosed the fact that he was acting as agent, exonerate himself from liability by showing a payment over to his principal, or other special circumstances rendering it inequitable, as between the parties, to hold him responsible.[2]

67. *Intermediate destruction of thing sold.*]—Under an executory contract of sale, the presumption is, in the absence of evidence of a different intent, that the parties contemplated the continued existence of the thing sold, until the time for delivery, so that if it is destroyed by accident before delivery, without the seller's fault, he is not liable for failure to fulfill.[3]

V. Actions and Defenses arising on Breach of Warranty.

68. *Grounds of the action.*]—For a false warranty the action may be either on contract or for deceit.[4] If warranty, as distinguished from a mere representation,[5] is alleged and proved, *scienter* need not be averred, nor proved if averred;[6] but plaintiff may recover on proof of the false warranty, express or implied, if alleged as his cause of action, although allegations of fraud are unproved.[7] If the complaint is so framed as to make fraud the cause of action, a warranty being alleged as the means of the fraud, the warranty should be proved;[8] and plaintiff cannot abandon the charge of fraud and recover on mere false warranty.[9] A recovery for fraud alone, however, may be sustained.[10] If the complaint sets forth only a warranty, recovery for fraud alone is not allowable.[11]

69. *Pleading.*]—Warranty, if relied on, must be alleged,[12] even though it be implied by law;[13] but, under an allegation not stating whether the warranty was express or implied, proof of

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[1] Messmore v. N. Y. Shot & Lead Co. 40 N. Y. 422.
[2] Morrison v. Currie, 4 Duer, 79; and cases cited.
[3] Dexter v. Norton, 47 N. Y. 62, affi'g 55 Barb. 272. Compare 52 Id. 96.
[4] Schuchardt v. Allens, 1 Wall. 368, and cases cited.
[5] Quintard v. Newton, 5 Robt. 72.
[6] Schuchardt v. Allens (above); Case v. Boughton, 11 Wend. 106; Holman v. Dord, 12 Barb. 336.
[7] Ledwich v. McKim, 53 N. Y. 307, affi'g 35 Super. Ct. (J. & S.) 304; Ross v. Terry, 63 N. Y. 613. *Contra*, now by N. Y. Code Civ. Pro. § 549.
[8] Snell v. Moses, 1 Johns. 96; and see Perry v. Aaron, Id. 129.
[9] Ross v. Mather, 51 N. Y. 108, rev'g 47 Barb. 582.
[10] Indianapolis, &c. R. R. Co. v. Tyng, 63 N. Y. 653, affi'g 2 Hun, 311.
[11] Fisher v. Fredenhall, 21 Barb. 82. For other illustrations, and the reasons of these distinctions, see pp. 272, 273, and 285 of this vol.
[12] Diefendorff v. Gage, 7 Barb. 18.
[13] Prentice v. Dike, 6 Duer, 220.

either is admissible, and sufficient.[1] Evidence of a warranty is not to be excluded because the language proved does not strictly follow the allegation;[2] and if there be a substantial variance, an amendment should be allowed, unless the adverse party has been misled to his prejudice.

70. *Warranty of things in action.*]—On a transfer of negotiable paper, or things in action, for a valuable consideration, there is, unless circumstances raise a contrary presumption, an implied warranty, not only of title, but of genuineness, and that there is no defense arising out of the seller's own act,[3] and that he has no knowledge of any fact which makes it worthless, such as usury,[4] payment, insolvency of the maker,[5] &c. There is, however, no implied warranty as to legal validity, beyond this.[6]

71. *Warranty of title.*]—On a sale of chattels in the seller's possession, a warranty of title is implied,[7] unless the circumstances are such as to give rise to a contrary presumption.[8] Where the seller is not in possession of the chattel at the time of sale, a warranty of title is not implied. It should only be implied where good faith requires it.[9]

72. *Express warranty.*]—To constitute an express warranty, there must be some expression by the seller amounting to an unequivocal affirmation, relied on by the buyer, that the goods are of some certain quality. It is not enough to prove mere expressions of opinion.[10] But it is not necessary that the word "warrant" should be used. Any affirmation amounting to it is sufficient.[11] No particular phraseology is necessary. Any distinct assertion of the quality of the thing, made by the seller as an in-

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[1] Hoe v. Sanborn, 21 N. Y. 552; Hannum v. Richardson, 48 Vt. 508, s. c. 21 Am. R. 152.

[2] Oneida Manuf. Soc. v. Lawrence, 4 Cow. 440; Hastings v. Lovering, 2 Pick. 214. *Contra*, Summers v. Vaughan, 35 Ind. 323, s. c. 9 Am. R. 741.

[3] Delaware Bank v. Jarvis, 20 N. Y. 226.

[4] Fake v. Smith, 7 Abb. Pr. N. S. 106.

[5] Brown v. Montgomery, 20 N. Y. 287.

[6] The authorities are not agreed. Compare Ross v. Terry, 63 N. Y. 615; and Otis v. Cullom, 92 U. S. (2 Otto), 447. According to the latter case, the only liability, *ex contractu*, is for title and genuineness; and any other liability is in tort for bad faith. On an assignment of a judgment for value, without disclosing payments, there is an implied warranty that it is unpaid. Furniss v. Ferguson, 15 N. Y. 437; 34 Id. 485; but not that it will not be reversed. Glass v. Reed, 2 Dana (Ky.) 168.

[7] Calye's Case, 1 Smith's L. Cas. 241, 342; Burt v. Dewey, 40 N. Y. 283, rev'g 31 Barb. 540; Hoe v. Sanborn, 21 N. Y. 552.

[8] As where the seller merely sells such right as he has, without either having or undertaking to give actual or constructive possession, Id.; or is a pawnbroker, selling unredeemed pledges. Morley v. Attenborough, 3 Exch. 500.

[9] McCoy v. Artcher, 3 Barb. 323; Edick v. Crim, 10 Id. 445; Hopkins v. Grinnell, 28 Barb. 533; Scranton v. Clark, 39 N. Y. 220, affi'g 39 Barb. 273.

[10] Swett v. Colgate, 20 Johns. 196; 1825, Oneida Manuf. Soc. v. Lawrence, 4 Cow. 440.

[11] Whitney v. Sutton, 10 Wend. 412; 1835, Cook v. Mosely, 13 Id. 277; Wilbur v. Cartwright, 44 Barb. 536; Wells v. Selwood, 61 Id. 238.

ducement to purchase, and relied on by the buyer, may be ground for finding a warranty.[1] Evasive or equivocal language may be left to the jury, to determine whether it was intended to be understood as a warranty or affirmative representation.[2] Any positive affirmation, understood and relied on by the buyer, is a warranty, or, at least, evidence to go to the jury.[3] The description of the goods, in a bought and sold note, advertisement, bill of parcels, invoice, or in an oral assurance to the buyer, is evidence of a warranty.[4]

If the words used were such as might have been understood and intended by the parties as a warranty, the question whether they actually were, is a question of fact for the jury.[5] If the contract be in words clearly constituting a warranty, the seller cannot avoid it by evidence that he did not intend to be understood as intending what his language declares.[6]

Where the sale was oral, evidence of everything that took place between the parties, upon the subject, before and at its final completion, is competent.[7] If the warranty relied on was made after the seller had completed the sale, so that the consideration already given had been exhausted by a transfer without warranty, a new consideration must be proved.[8]

Upon a sale with *express* warranty, whether the sale be executed or executory, the buyer is not bound to rescind and return, on discovering a breach,[9] but in such case clearer proof of breach is required than if he did return the thing.[10] In respect to defects that were not open and visible, the buyer, with express warranty, is not bound to prove that he applied tests before consuming it in use.[11]

73. *Agent's authority to warrant.*]—Evidence of authority conferred on an agent, general or special,[12] or a broker,[13] to sell, (restrictions not appearing), raises a legal presumption of authority to warrant. Otherwise of a mere servant.[14] But the pre-

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[1] Chapman v. Murch, 19 Johns. 290; Gallagher v. Waring, 9 Wend. 20.

[2] See, for instance, Cook v. Mosely, 13 Wend. 277; Burge v. Stroberg, 42 Geo. 88.

[3] Hawkins v. Pemberton, 51 N. Y. 198, rev'g 6 Robt. 42, and modifying earlier cases.

[4] Id.; Wolcott v. Mount, 9 Vroom, N. J. 496, s. c. 20 Am. R. 425, affi'g 13 Am. R. 438; Dounce v. Dow, 64 N. Y. 16, rev'g 6 Supm. Ct. (T. & C.) 653. So of an order for a specified kind of goods, followed by delivery of a thing as such. White v. Miller, 7 Hun, 427.

[5] Duffee v. Mason, 8 Cow. 25; Whitney v. Sutton, 10 Wend. 412; Blakeman v. McKay, 1 Hilt. 266; Hawkins v. Pemberton, 51 N. Y. 198, rev'g 6 Robt. 42.

[6] Hawkins v. Pemberton, 51 N. Y. 198, rev'g 6 Robt. 42.

[7] Pierson v. Hoag, 47 Barb. 243; Cunningham v. Parks, 97 Mass. 172.

[8] Summers v. Vaughan, 35 Ind. 323, s. c. 9 Am. R. 741.

[9] Day v. Pool, 52 N. Y. 416, affi'g 63 Barb. 506; Ross v. Terry, 63 N. Y. 613.

[10] Day v. Pool (above).

[11] Dounce v. Dow, 57 N. Y. 16, rev'g 6 Supm. Ct. (T. & C.) 653; Gautier v. Douglass M'f'g Co. 13 Hun, 514.

[12] Schuchardt v. Allens, 1 Wall. 369, and cases cited.

[13] Nelson v. Cowing, 6 Hill, 336.

[14] Woodin v. Burford, 2 Cr. & M. 391.

sumed authority is not to be stretched to unusual warranties.[1] Evidence of the usage of the trade is admissible as one means of defining the scope of the apparent authority of the agent or broker.[2] If there was neither express nor implied authority, it is not enough to show that the principal received and retained the price, without showing that he knew of the unauthorized warranty.[3]

74. *Implied Warranty on an Executed Sale.*]—An *executed* sale of chattels—that is, a sale executed when made—does not of itself imply any warranty of quality. To establish such an implied warranty there must be evidence of circumstances not essential to sale, which afford ground for presuming a warranty to have been within the intention of the parties.[4] It cannot be imported into the contract merely by evidence of commercial usage to recognize an implied warranty.[5] Evidence that the buyer's purpose was communicated, does not alone raise an implied warranty that the thing was fit for the purpose,[6] for it is enough if the known, defined, described thing bought, was delivered.[7] Neither the silence of the seller at the time of sale,[8] nor the fact that a sound price was paid,[9] will alone imply a warranty. But if the article was contracted to be furnished for a particular use, there is an implied warranty that it should be suited for that use.[10]

The exposure or offer of goods for sale by a *manufacturer* as being of his build or workmanship (whether truly so or not), implies a warranty or representation that they are made properly, and that the fault, if any, is a latent one, arising from causes which he could not control.[11] Hence even on an executed sale by one assuming to be the maker, he is liable upon an implied warranty that the article is free from any defect produced by the manufacturing process itself.[12] Where the defect in the article arises from a defect in the materials employed, the warranty is

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[1] Smith v. Tracy, 36 N. Y. 79; 2 Greenl. Ev. 13 ed. 50 n.

[2] 2 Whart. Ev. § 967. *Contra*, Dodd v. Farlow, 11 Allen, 421.

[3] Smith v. Tracy, 36 N. Y. 79. Compare Brower v. Lewis, 19 Barb. 574; Sweet v. Bradley, 24 Id. 549.

[4] See Redhead v. Midland Rw. Co. L. R. 4 Q. B. 392; Bywater v. Richardson, 1 Ad. & E. 508.

[5] Barnard v. Kellogg, 10 Wall. 383.

[6] Crogate's Case, 1 Sm. L. Cas. 247, 250; Jones v. Just, L. R. 3 Q. B. 197; Bartlett v. Hoppock, 34 N. Y. 118.

[7] See Dounce v. Dow, 64 N. Y. 416.

[8] Calye's Case, 1 Sm. L. Cas. 241, 243.

[9] Wright v. Hart, 18 Wend. 449, affi'g 17 Id. 267.

[10] Brown v. Sales, 27 Vt. 227, 232; Howard v. Hoey, 23 Wend. 350; Gallagher v. Waring, 9 Id. 20. Where the allegation is that plaintiffs were accustomed to use the best, &c., and defendants falsely represented and sold, &c., knowing it was bought for use in their business, plaintiff may prove what kind he was accustomed to use; and for this purpose may ask his broker what kind he had been in the habit of buying. Schuchardt v. Allens, 1 Wall. 368.

[11] Chandelor v. Lopus, 1 Sm. L. Cas. 299, 316.

[12] Hoe v. Sanborn, 21 N. Y. 552. Compare Beck v. Sheldon, 48 N. Y. 365; Bartlett v. Hoppock, 34 N. Y. 118.

implied, for the same reason, only where he is shown, or may be presumed to have known, the defect.[1]

In the case of *provisions*, for human food, there is an implied warranty that they are sound and wholesome, if they are sold for domestic consumption,[2] but not if they are sold as *merchandise*, and not for immediate domestic use.

Where there is no other liability as to quality, none is implied from a warranty of quantity; but the quantity is made up by unsound and sound together.[3]

In aid of evidence of an implied warranty, the buyer may testify to the fact that he purchased relying on the existence of the supposed quality.[4]

Where the warranty is an implied one, or the breach is a condition of the sale, as distinguished from a warranty, retaining the article after opportunity to ascertain the defect, raises a presumption of acquiescence in the quality,[5] which is usually conclusive, unless induced by fraud.[6] If fraudulent acts inducing acceptance are alleged, and proved, it is no objection that other such acts also alleged remain unproved.[7]

75. — *on sale partly or wholly Executory.*]—An executory contract, unless the circumstances indicate a different intent, implies a warranty that the thing delivered shall be of such quality as to be merchantable or salable—that is, at least of medium quality or goodness.[8]

76. *Sale by Sample.*]—The mere exhibition of a sample at the time of sale is not evidence of a sale by sample; it is evidence only of a representation that the sample has been taken from the bulk in the usual way.[9] If such a sale was not expressly agreed to be by sample, it is a question of intent whether it was a sale by sample.[10]

A sale, though evidenced by a bill of parcels,[11] or a bought and sold note,[12] not referring to a sample, may be shown by parol to have been by sample, especially if the designation in the writing is not a sufficient description;[13] and evidence of the usage of the

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[1] Hoe v. Sanborn, 21 N. Y. 552. Compare Beck v. Sheldon, 48 N. Y. 365; Bartlett v. Hoppock, 34 N. Y. 118.

[2] Van Bracklin v. Fonda, 12 Johns. 468; Jones v. Murray, 3 Monr. (Ky.) 83; Moses v. Mead, 5 Den. 617; and see Divine v. McCormick, 50 Barb. 116.

[3] Jones v. Murray, 3 Monr. (Ky.) 83.

[4] Ross v. Terry, 63 N. Y. 615.

[5] Reed v. Randall, 29 N. Y. 358.

[6] Dutchess Co. v. Harding, 49 N. Y. 324.

[7] Id.

[8] Howard v. Hoey, 23 Wend. 350; Renaud v. Peck, 2 Hilt. 137; Lawton v. Kiel, 61 Barb. 558; Hamilton v. Ganyard, 2 Abb. Ct. App. Dec. 314, affi'g 34 Barb. 204. Compare Chandelor v. Lopus, 1 Sm. L. Cas. 299, 318 [251.]

[9] Waring v. Mason, 18 Wend. 425, 434; Hargous v. Stone, 5 N. Y. 85, 90.

[10] Waring v. Mason (above).

[11] Bradford v. Manly, 13 Mass. 139.

[12] Boorman v. Jenkins, 12 Wend. 566; 18 Id. 435; Koop v. Handy, 41 Barb. 454.

[13] Pike v. Fay, 101 Mass. 134. Otherwise under special contract. Thomas v. Hunt, 4 Abb. Ct. App. Dec. 416.

trade to make all such sales by sample, is competent for this purpose.[1] But if the circumstances of the sale are such that there was no express warranty, and the law does not imply one, a warranty cannot be established (even to the extent of conformity to samples exhibited), by mere proof of a usage of the trade to contract, with such warranty, in the manner proven.[2] Whether the sale was by sample or not, is a question of fact, on which evidence of usage is competent; but the liability resulting is a question of law, on which usage can have no weight. But no usage can be sustained in opposition to the established principles of law, so as make the seller of manufactured goods, by sample, liable to the purchaser for damages occasioned by latent defects in the goods sold, not discoverable either in them or the sample by ordinary care.[3] Sale by sample, and warranty, may both be proved, and one does not necessarily merge or supersede the other.[4] Sale by sample is only one kind of warranty, and does not preclude others.

To have the effect of proving sale by sample, the evidence must show that the parties mutually understood that they were dealing with the sample upon an agreement on the part of the seller that the bulk of the commodity corresponded with the sample.[5] If the sale is by agent, in the ordinary course of trade, special authority to use a sample, or otherwise warrant, need not be proved, even though the agency be special.[6]

77. *Presumption of knowledge.*]—The law presumes that every dealer in articles brought to market is acquainted with all the circumstances, such as tendencies to deterioration, usually[7] attendant on cargoes composed of those articles; but a mere dealer is not presumed to know the precise quality of goods of a particular brand.[8]

78. *Parol evidence of warranty on written sale.*]—If the parties have reduced their contract to writing, the instrument cannot be varied by oral evidence of a warranty[9] or representation[10] not expressed or implied in the writing,[11] unless fraud be shown,

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[1] Syers v. Jonas, 2 Exch. 111.

[2] Beirne v. Dord, 5 N. Y. 102.

[3] Randall v. Smith, 63 Me, 105, s. c. 18 Am. R. 200, and cases cited; s. p. Barnard v. Kellogg, 10 Wall. 383.

[4] Murray v. Smith, 4 Daly, 273; and see Sands v. Taylor, 5 Johns. 410; but a written agreement of sale may exclude oral evidence of warranty.

[5] Beirne v. Dord, 5 N. Y. 95.

[6] Andrews v. Kneeland, 6 Cow. 354; see also Boorman v. Jenkins, 12 Wend. 572.

[7] Hargous v. Stone, 5 N. Y. 94.

[8] Dounce v. Dow, 57 N. Y. 16, rev'g 6 Supm. Ct. (T. & C.) 653.

[9] Dean v. Mason, 4 Conn. 428.

[10] Rice v. Forsyth, 41 Md. 389.

[11] Pickering v. Dowson, 4 Taunt. 779; Benj. on S. § 621. But compare paragraph 9. So held of a bill of sale, Mumford v. McPherson, 1 Johns. 414; Pender v. Forbes, 1 Dev. & B. 250; Sparks v. Messick, 65 No. Car. 440: of an assignment of a patent right, Van Ostrand v. Reed, 1 Wend. 424; Rose v. Hurley, 39 Ind. 77: of a letter, Whitmore v. South Boston Iron Co. 2 Allen, 52, s. c. 1 Am. L. Reg. N.

nor can the warranty be established by extrinsic written evidence of a prior representation, such as the letters of negotiation,[1] or the advertisement of sale.[2] The writing may be deemed to contain the whole contract.[3] But this rule is greatly limited, where the statute of frauds does not require a writing,[4] and the instrument is one which does not purport to embody all the terms of the contract.[5] A bill of parcels, or sold note, given apparently as a receipt for the price,[6] or an invoice made out by the seller after an oral warranty,[7] is not a contract within the rule, and does not preclude evidence of oral warranty. And if there be a written contract, the fact does not preclude evidence of a warranty made by parol, subsequent to the execution of the written contract.[8]

An express warranty does not preclude an implied warranty to the same effect.[9] And an express warranty may be helped out or enlarged by a warranty implied from knowledge of the purpose for which the thing was ordered.[10]

79. *Parol evidence to explain warranty.*]—Upon principles already stated, ambiguous expressions in the warranty may be explained by parol.[11]

80. *Variances in the contract, and breach.*]—Variances between the allegation and proof, in respect to other parts of the contract,—the title to the goods,[12] the consideration of the sale,[13]

S. 403; and of the printed conditions of sale subscribed by the auctioneer, Powell v. Edmunds, 12 East, 6. Otherwise of unsigned conditions. Eden v. Blake, 13 Mees. & W. 614. Where the sale was not in writing, a warranty may be proved, though made during negotiations, some days before the sale. Wilmot v. Hurd, 11 Wend. 584.

[1] Randall v. Rhodes, 1 Curt. C. Ct. 90.

[2] Mumford v. McPherson (above).

[3] Van Ostrand v. Reed, 1 Wend. 427.

[4] See 1 Para. on Contr. 547.

[5] Thus where the writing consists of a written undertaking to ship, with an acknowledgment of previous receipt of payment, parol evidence is admissible to show what the terms of contract of sale were, and that the goods were those actually ordered. Hogins v. Plympton, 11 Pick. 97, SHAW, Ch. J.

[6] Filkins v. Whyland, 24 N. Y. 338; 24 Barb. 379; Allen v. Pink, 4 Mees. & W. 140. *Contra*, where the statute of frauds required the bill. Lamb v. Crafts, 12 Metc. 353.

[7] Foot v. Bentley, 44 N. Y. 166.

[8] Brewster v. Countryman, 12 Wend. 446.

[9] Ross v. Terry, 63 N. Y. 615. *Contra*, Whitmore v. South Boston Iron Co. 2 Allen, 52, 60, s. c. 1 Am. L. Reg. N. S. 403. Compare Boothby v. Scales, 27 Wis. 626.

[10] See Parks v. Morris Tool Co. 54 N. Y. 586, affi'g 4 Lans. 103, s. c. 60 Barb. 140.

[11] Paragraphs 9, 10. Thus on a warranty that a machine could do certain work "with a good team," parol evidence of the declarations of the party is admissible, to show whether a two horse or four horse team was meant. Sanson v. Madigan, 15 Vt. 144. And see Pike v. Fay, 101 Mass. 134. Otherwise of evidence contradicting the language. Yates v. Pym, 6 Taunt. 446.

[12] Starr v. Anderson, 19 Conn. 338.

[13] Smith v. Battams, L. J. 26 Exch. 232; Turner v. Huggins, 14 Ark. 21. The fact that the money was paid by plaintiff's agent who had not been reimbursed, is not material. Indianapolis, Peru & Chicago Railw. Co. v. Tyng, 63 N. Y. 653, affi'g 2 Hun, 311, s. c. 4 Supm. Ct. (T. & C.) 524.

and the like,—are of secondary importance in proving the warranty, and are indulgently treated.

Under the allegation of warranty and breach, evidence of defendant's subsequent promise to cure the defect is admissible, and he may be held liable on that promise;[1] but mere proof of a subsequent agreement to rescind the original contract and return the money,[2] is not sufficient, at least without amendment.

81. *Breach.*]—To sustain an action upon a warranty, it is not necessary to prove that all the representations made by defendant were false, or actionable. It is enough to prove that any were so.[3] And it is not necessary to prove that the seller knew of the defect.[4] The question whether the article corresponds with the warranty, is usually one for the jury.[5] If the qualities of the article be proved by the testimony of a witness to whom it has been submitted for inspection, there must be direct evidence that the thing of which the witness speaks was the same as that delivered or offered.[6] If fraud is alleged, evidence that other goods were fraudulently sold by the seller to other persons, is relevant to the question of scienter within the limits marked by the rules applicable in actions for deceit. So if the seller has adduced evidence that he never made or sold inferior goods to any one, evidence of sales, etc., to third persons is competent in rebuttal.[7] And in other cases, on a conflict of evidence as to quality, evidence of the bad quality of other things of the same production and condition of keeping, may be relevant as raising a presumption that the thing in question, parcel of the same batch or crop, had the like alleged defect.[8] Where the article is contracted for, to serve a specified use, evidence is admissible of the difference in the results produced in such use, by the sample or model ordered, and the imitation, as corroborative of their inherent difference.[9] If the parties agreed on submitting the question of conformity to the warranty to the arbitrament of a third person,[10] or to a specific test,[11] the decision so had, is conclusive,[12] unless fraud or bad faith is shown.[13] Where the thing sold consists of a large quantity of merchandise, it is not necessary in the first instance

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[1] Dennis v. Coman, 61 N. Y. 642.
[2] Dickinson v. Lane, 107 Mass. 548.
[3] Sweet v. Bradley, 24 Barb. 549.
[4] Carley v. Wilkins, 6 Barb. 557. Otherwise as to a mere representation, as distinguished from a warranty. Id. Compare Edick v. Crim, 10 Id. 445.
[5] Even if the thing be produced in court. Morton v. Fairbanks, 11 Pick. 368.
[6] Perry v. Smith, 22 Vt. 301.
[7] Durst v. Burton, 2 Lans. 137, aff'd in 47 N. Y. 167.
[8] Buchanan v. Collins, 42 Ala. 419.
[9] Tilton v Miller & Co. 66 Penn. St 388, s. c. 5 Am. R. 373.
[10] McParlin v. Boynton, 8 Hun, 449.
[11] Sharpe v. Great Western Rw. 9 Mees & W. 6, s. c. 2 Am. Rw. Cas. 722.
[12] See for the cases on the general question, Schencke v. Rowell, 3 Abb. New Cas. 42.
[13] See Bowery Nat. Bank v. Mayor, &c. 63 N. Y. 363, rev'g 3 Hun, 632.

to prove that every lot or package was examined. It is enough that, of a quantity of similar parcels, a reasonable number were opened and all found alike defective.[1] The general character or quality of the thing beyond the limits of that called for by the warranty, is not relevant.[2]

In an action on a warranty of title to a chattel, breach is usually proved by an eviction by recovery;[3] but the buyer may recover on proof of a demand made on him by virtue of a paramount claim to which he voluntarily surrendered; in such case, however, the burden of proving the claim is on him.[4] If eviction by recovery is relied on, the judgment against the buyer is competent.[5] It has been held incumbent on the defendant to plead and prove fraud or collusion in the judgment of eviction, if he would avoid its effect, even where the plaintiff did not attempt to prove notice of the suit to the warrantor;[6] and if the warrantor had adequate notice of the action, and an opportunity to litigate it, the judgment recovered on the merits is conclusive against him.[7] But mere knowledge of the action and a notice to attend the trial are not enough.[8]

82. *Opinions of witnesses.*]—Where a qualified expert is examined as to the quality of the article, it is competent to ask the general question—as for instance, whether the machine in question was made in a workmanlike manner. The facts may be called for in detail, and in the case of any other than a skilled witness, they should be called for;[9] but in examining a skilled witness, the party may, if he choose, rest upon the general statement alone, and leave it to his adversary to call for more specific objections to the work by cross-examination, and he has a right to do so.[10]

A liberal rule is applied in regard to opinions as evidence as to diseases of animals, as it is rare that persons are found who make the treatment of diseases of domestic animals a distinct profession, or attain to great skill or science therein. The best skill and science that can be expected will be the evidence of persons who have had much experience, and have been for years made acquainted with such diseases and their treatment.[11]

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[1] Renaud v. Peck, 2 Hilt, 137.

[2] Thus under a warranty that a furnace should heat the building to 70°, the requisite degree of heat for ordinary dwellings is irrelevant. Bristol v. Tracy, 21 Barb. 236.

[3] And it was formerly held that this was the only evidence, unless there was affirmative proof of guilty knowledge. Case v. Hall, 24 Wend. 103.

[4] Bordwell v. Collie, 45 N. Y. 494, aff'g 1 Lans. 141.

[5] Atkins v. Hosley, 3 Supm. Ct. (T. & C.) 322.

[6] Blasdale v. Babcock, 1 Johns. 517; Barney v. Dewey, 13 Id. 224.

[7] Fake v. Smith, 2 Abb. Ct. App. Dec. 76.

[8] Somers v. Schmidt, 24 Wis. 417, s. c. 1 Am. R. 191.

[9] Strevel v. Hempstead, 44 Barb. 518.

[10] Curtis v. Gano, 26 N. Y. 426; Beekman v. Johnson, 35 Ala. 252.

[11] Slater v. Wilcox, 57 Barb. 604. Compare McDonald v. Christie, 42 Barb. 36;

The qualification of the witness is a question of law for the court; but in proportion as his character as an expert is contested, it is important that his testimony should be confined to facts rather than opinion. In a case of breach of warranty, by disease, a medical witness, who has stated that he has read various standard authors on the subject of disease, and has given his own opinion in respect to the character of the disease of which the animal died, may be asked: "What is the best opinion, according to the best medical authority?"[1]

83. *Admissions and declarations.*]—Evidence that the buyer on being complained to that he had given a warranty, and that it was broken, only denied the breach, is sufficient evidence to sustain a finding that he gave the warranty.[2] Whether declarations of an agent are competent depends on the test applicable in other cases. An authority to receive payment for goods sold, does not make the agent's declarations in regard to the condition of the goods, evidence against his principal.[3] But where one is employed by the seller to remedy the alleged defect after delivery, his declarations, made as part of the *res gestæ*, while engaged in the work, are competent.[4]

84. *Omission to return the article.*]—If a warranty has been proved, keeping the goods, delaying to give notice of the defect, &c., may furnish a strong presumption against an alleged breach of warranty; but cannot bar the buyer from suing for, or recouping his damages for such breach, if proved.[5]

85. *Damages.*]—A breach having been proved there must be some evidence of difference in value between the article as furnished and the article as agreed to be furnished.[6] A mere offer to prove the value of the thing furnished, unconnected with evidence of that of the thing agreed for, may be excluded.[7] The witness cannot speak directly to the amount of damages recoverable; but, if the thing have a market value, a qualified witness may give an opinion of its value, and of the difference between its actual value, and what would have been its value had it corresponded to defendant's representations.[8] If the thing or its

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Joy v. Hopkins, 5 Den. 84; Willis v. Quimby, 11 Fost. (N. H.) 485. *Contra*, Graves v. Moses, 13 Minn. 335; and see Spear v. Richardson, 34 N. H. 428.

[1] Pierson v. Hoag, 47 Barb. 243.

[2] Miller v. Lawton, 15 C. B. N. S. 834; Salmon v. Ward, 2 Carr. & P. 211.

[3] Hyland v. Sherman, 2 E. D. Smith, 234.

[4] Kimball Manuf. Co. v. Vroman, 35 Mich. 310.

[5] Muller v. Eno, 14 N. Y. (4 Kern.) 597; Feilder v. Starkin, 1 H. Blackst. 17; Coner v. Dempsey, 49 N. Y. 665; Smeltzer v. White, 92 U. S. (2 Otto), 390, 395. But under executory contract, acceptance after opportunity to examine, waives objections to patent defects. Gaylord Manuf. Co. v. Allen, 53 N. Y. 515. Compare Grimoldby v. Wells, L. R. 10 C. P. 391, s. c. 12 Moak. Eng. R. 451, and cases cited.

[6] Fales v. McKeon, 2 Hilt. 53.

[7] Leonard v. Fowler, 44 N. Y. 296.

[8] Rogers v. Ackerman, 22 Barb. 134; Nickley v. Thomas, Id. 652; Miller v. Smith, 112 Mass. 470.

condition be such that it has no known or market value, the damages are necessarily special, and the items of actual loss should be proved, and the whole left to the jury.[1] To charge with consequential damages there should be evidence either that the object of the buyer was specially brought to the notice of the seller,[2] or that circumstances were known to the seller, from which the intention ought in reason to be inferred, so that the object may be taken to have been within the contemplation of both parties.[3]

In an action for breach of the warranty implied or expressed in the assignment of a judgment, the *prima facie* value of the judgment is the amount of money which the debtor in the judgment appears liable to pay thereon.[4] The amount of the consideration of the assignment is immaterial.[5] But evidence of the less value of property which could have been taken on execution at the time of the assignment, may be competent in mitigation.[6] The expenses of attempting to enforce the judgment against one who had been released, if pleaded, are recoverable.[7]

86. *Disproof of implied warranty.*]—Proof of express and unqualified[8] refusal to warrant, negatives the implied warranty that otherwise might arise.[9] The implied warranty of title, and the implied warranty of amount unpaid upon a security assigned, rest upon the presumption of law that the vendor knows the facts which he impliedly warrants; and this is a conclusive presumption, and cannot be contradicted.[10]

87. *Buyer's knowledge of defect.*]—In an action on a written warranty of soundness of a chattel, parol evidence is admissible, to show that the defects complained of were made known to the plaintiff at the time of the sale. A warranty does not extend to defects which are visible.[11] And when it is proved affirmatively, that the purchaser knew of the defect at the time of the sale, he cannot recover damages.[12] But an offer to show that he had means of knowledge is not enough.[13]

88. *Seller's good faith.*]—A breach of warranty, as distinguished from a mere false representation having been proved, evidence of facts showing that defendant made it under misinformation[14] and in good faith, is irrelevant.

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[1] Whitney v. Taylor, 54 Barb. 536.
[2] As in Messmore v. N. Y. Shot and Lead Co. 40 N. Y. 422.
[3] Smith v. Green, L. R. 1 C. P. Div. 94, s. c. 16 Moak's Eng. 443.
[4] Furniss v. Ferguson, 34 N. Y. 485, affi'g 3 Robt. 269.
[5] Sweet v. Bradley, 24 Barb. 549.
[6] Jansen v. Ball, 6 Cow. 628.
[7] Weston v. Chamberlain, 56 Barb. 415.
[8] Wood v. Smith, 5 M. & Ry. 124.
[9] So held as to genuineness of note. Bell v. Dagg, 60 N. Y. 528.
[10] Furniss v. Ferguson, 34 N. Y. 485, affi'g 3 Robt. 269.
[11] Schuyler v. Russ, 2 Cai. 202.
[12] Chandelor v. Lopus, 1 Smith's L. Cas. 299, 320, and cases cited.
[13] Furniss v. Ferguson, 34 N. Y. 485, affi'g 3 Robt. 269.
[14] Brisbane v. Parsons, 33 N. Y. 332.

89. *Former adjudication.*]—Judgment in an action of deceit, for a false statement as to quality, is a bar to an action of contract on a false warranty of the same quality, and so of the converse.[1] Judgment in an action for the price is also, if the buyer, by his answer in that action or his course on the trial of it, admitted the validity of the seller's claim; otherwise not.[2]

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[1] 2 Whart. Ev. § 779, citing Ware v. Percival, 61 Me. 391; Norton v. Doherty, 3 Gray, 372. But partly *contra*, now by N. Y. Code Civ. Pro. § 529.

[2] Whart. Ev. § 790, citing Davis v. Talcott, 12 N. Y. 184; Mondel v. Steel, 8 Mees. & W. 858; Davis v. Hedges, L. R. 6 Q. B. 687; Bascom v. Manning, 52 N. H. 132; Burnett v. Smith, 4 Gray, 50; Ihmsen v. Ormsby, 32 Penn. St. 198.

CHAPTER XVII.

ACTIONS FOR USE AND OCCUPATION OF REAL PROPERTY.

1. Grounds of the action.
2. The relation of landlord and tenant.
3. Express contract.
4. Parties.
5. Defendant's occupation.
6. Measure of recovery.
7. Admissions and declarations.

1. *Grounds of the action.*]—The gist of the action is that defendant has had the use and occupation of plaintiff's real property, by virtue of an agreement therefor, express or implied, made between them, under which plaintiff is entitled to a reasonable compensation.

2. *The relation of landlord and tenant.*]—There must be proof that the conventional relation of landlord and tenant existed.[1] It is not enough to show privity of estate; there must be privity of contract.[2] The contract, however, need not be expressed, but may be implied from circumstances, such as defendant's entering, or holding over, after notice from plaintiff that he should expect a rent;[3] or from the defendant's recognition of the plaintiff as landlord, as, for example, by repeatedly paying rent to the agent of the plaintiff, and taking receipts from him as landlord.[4] An implied obligation to pay is not, however, raised from mere possession; there must be an implied agreement for the use. The evidence must imply that the relation of landlord and tenant was created by agreement or understanding of the parties.[5] Where defendant has entered and occupied by permission of plaintiff, without any express agreement, the law implies a promise on his part to pay a reasonable compensation, but such presumption does not arise when an arrangement is proven showing that the parties did not intend to constitute the relation of landlord and tenant.[6] Evidence that after the determination of a lease, the tenant held over and paid rent, is conclusive evidence of a tenancy,[7] and the

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[1] 6 Abb. N. Y. Dig. New Ed. 54; Carpenter v. U. S. 17 Wall. 489, 493; City of Boston v. Binney, 11 Pick. 1; Thompson v. Bower, 60 Barb. 463; Dennett v. Penobscot Fair Co. 57 Me. 425, s. c. 2 Am. R. 58.

[2] Glover v. Wilson, 2 Barb. 264.

[3] Coit v. Planer, 4 Abb. Pr. N. S. 140, s. c. 7 Robt. 413; Despard v. Walbridge, 15 N. Y. 374.

[4] McFarlan v. Watson, 3 N. Y. 286.

[5] Id., and cases cited.

[6] Carpenter v. U. S. 17 Wall. 489, 493.

[7] Rosc. N. P. 340, citing Bishop v. Howard, 2 B. & C. 100; and see Bayley v. Bradley, 5 C. B. 326. But where a tenant from year to year, after the expiration of his landlord's title continued in possession for one quarter, and paid rent for that

action lies for rent subsequent to the term, although the lease was sealed.[1] Any evidence of indebtedness for rent in an immediately preceding period is competent, in connection with evidence of continued occupation.[2]

3. *Express agreement.*]—If the occupation was under an express agreement which is void under the statute of frauds, the agreement may be proved for the purpose of showing the intended relation of landlord and tenant.[3] If, however, it was under a valid sealed agreement the action must be upon the deed itself.[4] The statute,[5] which permits an action of assumpsit for use and occupation where the agreement was express, but not by deed, allows the agreement, if it reserves a certain rent, to be used as evidence of the amount recoverable.[6] Under the new procedure, the distinction between this action and an action on the sealed contract is formal; and if the proper parties are joined, an amendment may be allowed at the trial, if there has been no surprise on defendant, in not counting on his contract.[7] Either an oral or unsealed written agreement for hiring, or, in case there was no express agreement, such facts as will raise an implied contract, may be proved under a general allegation of indebtedness for use and occupation.[8] If the agreement was not made in writing a witness may be asked to "state the terms." It is not necessary to ask him to state what was said.[9] If it appears from the plaintiff's evidence that defendant held under a written agreement not produced or accounted for, plaintiff will not be allowed to give parol evidence of the holding.[10] But if the plaintiff has made out a *prima facie* case, without proof of the existence of a writing, and defendant seeks to show that he held under a written agreement, he must produce the instrument, or his objection is untenable.[11] To what extent a written agreement

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quarter to the reversioner, but quitted at the end of it, the payment is not evidence of a tenancy for more than the quarter. Id.; citing Freeman v. Jury, M. & M. 19; Jenner v. Clegg, 1 M. & Rob. 213.

[1] Abeel v. Radcliff, 13 Johns. 297; and see Bishop v. Howard, 2 B. & C. 100.

[2] See Withington v. Warren, 12 Metc. 114; Morris v. Niles, 12 Abb. Pr. 103.

[3] See Eccles. Commis. v. Merral, L. R. 4 Exch. 162; and see Greton v. Smith, 33 N. Y. 245, affi'g 1 Daly, 380.

[4] Kiersted v. Orange, &c. R. R. Co. 69 N. Y. 343, 346, rev'g 1 Hun, 151; Abeel v. Radcliff, 13 Johns. 297; Pierce v. Pierce, 25 Barb. 243. For the rule that debt will lie for use and occupation under a deed, compare 6 Am. Law Rev. 17, 18.

[5] 11 Geo. II. c. 19, § 14; 1 N. Y. R. S. 748, § 26.

[6] See Abeel v. Radcliff and Pierce v. Pierce (above); Williams v. Sherman, 7 Wend. 109.

[7] Bedford v. Terhune, 30 N. Y. 453, a. c. 27 How. Pr. 422, affi'g 1 Daly, 471.

[8] Waters v. Clark, 22 How. Pr. 104; Morris v. Niles, 12 Abb. Pr. 103.

[9] Frost v. Benedict, 21 Barb. 247. Thus a witness may testify that he leased the property to defendant at a certain rent, reserving the right to sell it at any time, and that defendant accepted it on such terms. Id.

[10] Brewer v. Palmer, 3 Esp. 213; Ramsbottom v. Mortley, 2 M. & S. 445, cited in Rosc. N. P. 334.

[11] Id.; citing Fielder v. Ray, 6 Bing. 332; R. v. Padstow, 4 B. & Ad. 208; 1 Greenl. Ev. 13th ed. 111 § 87.

of lease excludes oral evidence of the terms is considered in connection with Actions on Leases.

4. *Parties.*]—Tenants in common may join as plaintiffs, upon evidence that the tenant has always paid the rent to their joint agent; for this is evidence of a joint letting.[1] But a lessee of one tenant in common is not liable to the other without proof of a joint letting or an attornment.[2]

The mere fact that one of two joint lessees holds over does not charge both.[3] But where two persons sign an agreement to become tenants, and one enters under it, it may be presumed that he entered for both; and use and occupation against both will lie.[4] The fact that one tenant in common has had the entire occupancy of the common estate, and his co-tenants have not occupied it, with proof of value, is not enough to sustain their action against him for the value of the use of their interests.[5] Each is entitled to occupy; and the presumption of law is that either is in possession under his own title, until evidence is adduced that he holds as tenant of the others.[6] For this purpose the fact that he is holding over after the expiration of a lease from his co-tenants is not enough. The fact of his not leaving the possession does not authorize the inference that he still intends to hold under the lease; the presumption is that he holds under his own title; but this presumption may be rebutted.[7]

5. *Defendant's occupation.*]—Evidence of an agreement to take the premises and pay rent, is not alone enough.[8] There must be evidence of beneficial enjoyment, or of constructive possession or dominion. It is not necessary to prove defendant to have been in manual occupation during the time for which recovery is sought. It is enough to show that the power to occupy and enjoy was given by the landlord to the tenant.[9] Hence (agreement having been proved) evidence of delivery and acceptance of the key, though without proof of continued actual possession, is enough to sustain a finding;[10] and the occupation so shown will be presumed to have continued until the contrary appears.[11] Payment of rent by defendant to plaintiff is presumptive evidence of occupation.[12] Such payment during the occupancy of

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[1] Last v. Dinn, L. J. 28 Ex. 94.
[2] Austin v. Ahearne, 61 N. Y. 14.
[3] Draper v. Crofts, 15 M. & W. 166.
[4] Rosc. N. P. 340, citing Glen v. Dungey, 4 Exch. 61.
[5] Everts v. Beach, 31 Mich. 136, s. c. 18 Am. R. 169.
[6] Dresser v. Dresser, 40 Barb. 300.
[7] McKay v. Mumford, 10 Wend. 351. NELSON, J.
[8] Wood v. Wilcox, 1 Den. 37, and cases cited. Otherwise in an action on the contract. Gilhooly v. Washington, 4 N. Y. 217, aff'g 3 Sandf. 330.
[9] Hall v. Western Trans. Co. 34 N. Y. 284, and cases cited.
[10] Id.; Little v. Martin, 3 Wend. 220.
[11] Seaman v. Ward, 1 Hilt. 52, 55.
[12] Bishop v. Howard, 2 B. & C. 100; Harden v. Hesketh, 4 H. & N. 175.

a third person is presumptive evidence that the occupant held under defendant, which is the same as actual occupancy by defendant.[1] If defendant was an under-tenant, still an agreement to pay rent to the original lessor may be inferred from continuous payments of the previous rents to him.[2] The receipt by the defendant of the rents and profits, or an attornment from an under-tenant, is evidence of use and occupation by the defendant.[3] Occupancy by a third person who was put into possession by the defendant. is evidence from which the jury may infer occupancy by defendant.[4] And subleases and similar writings, made by defendant to third persons, are competent evidence.[5] But there does not appear to be any authority for the proposition that use and occupation can, in the absence of an actual demise, be maintained on a constructive occupation after the tenant has in fact ceased to occupy, and has offered to surrender the premises to the landlord.[6]

If defendant denies privity with the occupant, and alleges possession by the occupant under a stranger, evidence of employment of the occupant by the stranger is competent, although the transaction was not had in plaintiff's possession. Defendant may show that the occupation attributed to him was *res inter alios acta*.[7]

6. *Measure of recovery.*]—Where there has been a lease at an annual rent and the tenant held over after its expiration, without any new agreement as to the rent, the law implies that he held from year to year and at the original rent.[8] The landlord is not necessarily entitled to an increased rent, because the lease contemplated a renewal at an appraisement.[9] But if the former rent was not upon the basis of an annual value, as, for instance, where it was for a fraction of a year only,[10] or where it is only a ground rent, the value of buildings being otherwise stipulated for,[11] evidence of actual value can be received. If during occupancy after expiration of a lease, the title is in dispute, and there is no recognized landlord, the rate of rent fixed by the lease is not conclusive on either party.[12]

Where the agreement of tenancy (even though proved merely by the tenant's tacit assent to terms stated by the lessor), fixed

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[1] Moffatt v. Smith, 4 N. Y. 126.
[2] McFarlan v. Watson, 3 N. Y. 286.
[3] Rosc. N. P. 338, citing Neal v. Swind, 2 C. & J. 377.
[4] Dimock v. Van Bergen, 12 Allen, 551.
[5] Cornwall v. Hoyt, 7 Conn. 420, 428.
[6] Rosc. N. P. 337.
[7] Lewis v. Havens, 40 Conn. 361. For the same principle see p. 334 of this vol.
[8] Abeel v. Radcliff, 15 Johns. 505.
[9] Holsman v. Abrams, 2 Duer, 435.
[10] Evertson v. Sawyer, 2 Wend. 507.
[11] Abeel v. Radcliff (above).
[12] Van Brunt v. Pope, 6 Abb. Pr. N. S. 217.

the rent for the period in question, evidence of actual value is irrelevant.[1] If defendant occupied under a lease fixing the rent, the fact that the lease was not valid as against him, for example, by reason of want of sealed authority in the agent who executed it, does not prevent its use against him as furnishing an admission establishing the measure of recovery.[2] If one holding over under a prior lease retains only a part of the premises, or if part of the premises have been recovered from the tenant by title paramount, plaintiff may recover a reasonable compensation for the part defendant enjoyed.[3]

7. *Admissions and declarations.*]—Evidence that a bill for the rent was presented to defendant, and that he promised to pay it, is, in connection with very slight evidence of occupation, sufficient to sustain a verdict.[4] If a valid agreement of hiring be proven, defendant's general admissions of occupation may be referred to that agreement; but if it be shown to be void, the burden is on the tenant of proving that the occupation referred to was under that agreement, if he relies on it to defeat the action.[5] Acts and declarations characterizing possession may be proven;[6] but the meaning of the terms of a written lease cannot be varied by the declarations of the parties as to their understanding of them.[7]

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[1] Despard v. Walbridge, 15 N. Y. 374.
[2] Morrell v. Cawley, 17 Abb. Pr. 76.
[3] Christopher v. Austin, 11 N. Y. 216, aff'g 2 E. D. Smith, 203. As to a mere trespress by the landlord, see Lounsbery v. Snyder, 31 N. Y. 514.
[4] Treadwell v. Bruder, 3 E. D. Smith, 596.
[5] Buell v. Cook, 5 Conn. 206. Otherwise if valid.
[6] Corbett v. Costello, 8 La. Ann. 427.
[7] Bigelow v. Collamore, 5 Cush. 226.

CHAPTER XVIII.

ACTIONS FOR THE HIRE OF PERSONAL PROPERTY.

1. Agreement to pay. 2. Measure of recovery.

1. *Agreement to pay.*]—In the absence of evidence that the use, by one person, of the chattels of another, was intended to be gratuitous, the law implies a promise to pay fair value of such use. The fact that such use was under the mutual expectation that the user would buy them, does not raise a presumption that the use was gratuitously given.[1] Declarations of either party or his agent, which form part of the *res gestæ* of the delivery or return of the property are competent, if relevant to the question.[2] Evidence that defendant after being informed that plaintiff's charge would be at a specified rate for the time, took the thing into his possession and kept it for a certain time is sufficient *prima facie*.[3] But if plaintiff relies on an executory agreement, he may be required to prove readiness and offer to perform.[4]

The general rules, elsewhere stated as applicable to proof of agreements for sale of goods, and for work, labor and services, apply to these contracts.[5]

2. *Value.*]—If there is uncontradicted evidence of an express contract fixing the rate of compensation, evidence of value is irrelevant.[6] If the rate was not fixed, evidence of the value of the article before and after the use, is competent on the value of its use, for it shows the wear and tear.[7] A witness who has bought, sold and used similar articles may testify to his opinion of the value of the use.[8] The opinion of a witness who has not seen the thing, nor heard the testimony describing it, is not competent, unless there is a market value, or it appears or may be presumed that all apparatus answering such general description is alike valuable for the purposes for which it was employed.[9]

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[1] Rider v. Union Rubber Co. 28 N. Y. 379, affi'g 5 Bosw. 85.
[2] Knauss v. Shiffert, 58 Penn. St. 152.
[3] Reilly v. Rand, Mass. Supm. Ct. Mar. 1877.
[4] See Babcock v. Stanley, 11 Johns. 178.
[5] See pp. 284 and 357 of this volume. As to parol evidence to explain a written contract, see also Bradley v. Washington, &c. Steam Packet Co. 13 Pet. 89, 99; as to usage, Sipperly v. Stewart, 50 Barb. 62, 68.
[6] Sherman v. Champlain Trans. Co. 31 Vt. 162, 176.
[7] Wilcox v. Palmeter, 2 Hun, 517.
[8] Brady v. Brady, 8 Allen, 101.
[9] Dixon v. La Farge, 1 E. D. Smith, 722.

CHAPTER XIX.

ACTIONS ARISING ON CONTRACTS FOR SERVICES.

I. ACTIONS FOR COMPENSATION BY THE PERSON EMPLOYED.
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3. Implied contract,
4. Presumption that service was gratuitous.
5. Admissions and promises.
6. Question who was employer.
7. Declarations of employees.
8. Express contract when admissible under general allegation.
9. Express contract if subsisting must be put in evidence.
10. What are contracts within the rule.
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17. Term of service, holidays, day's work, &c.
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III. ACTIONS FOR WRONGFUL DISMISSAL OR REFUSAL TO RECEIVE.
42. Dismissal or refusal, &c.
43. Defenses.

I. ACTIONS FOR COMPENSATION BY THE PERSON EMPLOYED.

1. *Grounds of action.*]—A claim for articles made and delivered for a specified sum pursuant to agreement, may be recovered on a complaint for work, labor and materials, as well as on a complaint for goods sold,[1] subject however to the rules as to variance, and surprise. Under the general allegation of work and labor, plaintiff may give evidence of a particular kind of service and of materials.[2] A recovery of damages for breach of the con-

[1] Prince v. Down, 2 E. D. Smith, 525. Compare Union India Rubber Co. v. Tomlinson, 1 Id. 364, and see p. 285 of this vol. *Contra*, at common law, Rosc. N. P. 555. The distinction between these two classes of causes of action is chiefly illustrated by the cases arising under the statute of frauds which requires a writing in certain sales, but not in contracts for manufacture. See 48 N. Y. 17, and cas. cit. As to recovery in some cases on proof of money paid, see Knowlman v. Bluett, L. R. 9 Exch. 307, a. c. 10 Moak's Eng 466.

[2] For example, the services of a farrier, and the medicines administered. Clarke v. Mumford, 8 Camp. 37. Or scientific experiments, and materials used in making them. Grafton v. Armitage, 2 C. B. 336; 2 Rosc. N. P. 555.

tract of employment by discharging the plaintiff, ought not to be allowed without amendment.[1]

2. *License.*]—If a license is necessary to render the services legal, it will be presumed that plaintiff had one until the contrary appears.[2] In the case of services rendered in another State, the court will not presume that its statute requires a license because ours does.[3]

3. *Implied contract.*]—In general, there must be evidence that defendant requested plaintiff to render the services, or assented to receiving their benefit under circumstances negativing any presumption that they were to be gratuitous.[4] The evidence usually consists, either in, 1, an express request, precedent to the service, or, 2, circumstances justifying the inference that plaintiff in rendering the service expected to be paid, and defendant supposed, or had reason to and ought to have supposed, that he so expected, and still allowed him to go on in the service without doing anything to disabuse him of this expectation; or, 3, proof of benefit received, not on an agreement that it was gratuitous, and followed by an express promise to pay. Evidence that defendant voluntarily accepted and availed himself of valuable services rendered for his benefit by plaintiff, when he had the option whether to accept or reject them, especially when he had reason to know that plaintiff rendered them with the expectation of payment by defendant, will sustain a finding by the jury that defendant promised to pay for them,[5] although there may have been no actual request or promise.[6] Where work is done on property of a married woman under contract with her husband and on his credit, the mere fact that she knew the work was in progress and did not object, is not evidence of agency on his part sufficient to charge her.[7]

If benefit to defendant by the service is clear, slight evidence

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[1] Wiseman v. Panama R. R. Co. 1 Hilt. 300. For the distinction between action for wages and for wrongful discharge, see Howard v. Daly, 61 N. Y. 362; Clark v. Mayor, &c. of N. Y. 4 N. Y. 338, rev'g 3 Barb. 288; Colburn v. Woodworth, 31 Barb. 381; Routledge v. Hislop. 2 E. & E. 549; and see L. R. 10 C. P. 29, s. c. 11 Moak's Eng. 232.

[2] So held in case of physicians. Thompson v. Sayre, 1 Denio (N. Y.) 175, 180; Crane v. McLaw, 12 Rich. (S. C.); 129 s. p. p. 287 of this vol. *Contra*, Adams v. Stewart, 5 Harr. (Del.) 144; Bower v. Smith, 8 Geo. 74.

[3] Downs v. Minchew, 30 Ala. 86.

[4] Mumford v. Brown, 6 Cow. 475. On what evidence one who becomes a joint owner, after the employment of services, may be held liable, compare Belfast, &c. Plank R. Co. v. Chamberlain, 32 N. Y. 621; Fuller v. Rowe, 57 N. Y. 23, rev'g 59 Barb. 344; Smith v. Douglass, 4 Daly, 191.

[5] Day v. Caton, 119 Mass. 513, s. c. 20 Am. R. 347.

[6] Abbott v. Inhabitants of Hermon, 7 Greenl. 118; Morris v. Burdett, 1 Campb. 218.

[7] Jones v. Walker, 63 N. Y. 612, compare Fowler v. Seaman, 40 N. Y. 522; Ainsley v. Mead, 3 Lans. 116; Fairbanks v. Mothersell, 60 Barb. 406, s. c. 41 How. Pr. 274.

will justify the finding of a request.[1] The fact that the services were for the sole benefit of a third person, is not material, if an original request and agreement to pay is shown;[2] otherwise, if only a request is shown.[3] An agreement to contribute, with others, for the purpose of a work, does not necessarily imply a request to whomsoever may do the work.[4] The evidence must connect the defendant with the request.

4. *Presumption that service was Gratuitous.*]—The law will not imply a promise to pay for board or services as among members of the same family, and persons more or less intimately or remotely related, where they are living together as one household, and nothing else appears.[5] Evidence of the situation of the parties, and of the surrounding circumstances is freely received, for the purpose of determining the question whether there was an understanding that payment should be made. If the person receiving the service is deceased, the executor or administrator is not bound to establish a negative in order to defeat the claim. The relation existing between the parties, as parent and child, step-parent and step-child, brother and sister, and the like, is itself strong negative proof, and raises a presumption that no payment or compensation was to be made beyond that received by the claimant at the time. The evidence to the contrary must sustain the conclusion that the services were rendered, not in the ordinary relation of parent and child, or of brother and sister, nephew and uncle, and the like, but in that of debtor and creditor, or of master and servant.[6]

The further removed the parties are from the filial relation, the less need there is of evidence of intention to compensate.[7] If a child rendering service was of full age, the presumption that the service was gratuitous is weaker than if he were a minor.[8] If the child continued in the same filial service, after majority, as before, there must be evidence of a mutual understanding that payment was to be made,[9] so as to constitute the relation of master and servant. Evidence of mere loose, verbal declarations, made to a third person, by the one who had enjoyed the service, that he intended to compensate it, are not alone sufficient in case of pa-

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[1] Sinclair v. Tallmadge, 35 Barb. 602.

[2] Quackenbos v. Edgar, 34 Super. Ct. (2 J. & S.) 333.

[3] As where one calls a physician to attend another.

[4] Van Rensselaer v. Aikin, 44 N. Y. 126, rev'g 44 Barb. 547; Berchorman v. Murken, 2 E. D. Smith, 98; Smith v. Duchardt, 45 N. Y. 597. Compare Gray v. Murray, 3 Johns. Ch. 167; Rourke v. Story, 4 E. D. Smith, 54.

[5] Wilcox v. Wilcox, 48 Barb. 327, and cases cited; Williams v. Hutchinson, 3 N. Y. 312; and see Bartley v. Richtmyer, 4 Id. 38; Nicholls v. Hodges, 1 Pet. 562.

[6] Hall v. Finch, 29 Wis. 278, s. c. 9 Am. R. 559, Dixon, C. J. But compare Robinson v. Raynor, 28 N. Y. 494. The agreement may be valid even against intermediate creditors of the deceased. Brown v. Pyle, 4 Weekly Notes (Penn.) 394.

[7] Gardner v. Heffley, 49 Penn. St. 163.

[8] Moore v. Moore, 3 Abb. Ct. App. Dec. 303, s. c. 21 How. Pr. 211.

[9] Green v. Roberts, 47 Barb. 521.

rent and child; but are competent as tending to show a contract relation.[1]

5. *Admissions and promises.*]—Evidence having been given that work was done by plaintiff for defendant, it is enough to prove that defendant, on presentation of plaintiff's bill therefor, promised to pay it, or admitted its correctness;[2] but mere declarations to a third person, of intent to pay for services, are not equivalent to a promise.[3]

6. *Question who was employer.*]—To determine by which of two persons the plaintiff was employed, it is proper to ask a witness for whom, or on whose behalf were the services rendered;[4] though it is not proper to ask the same question with the qualification, "as you supposed."[5] Evidence of the insolvency of either of the alleged employers is not competent for the purpose of raising a presumption that the credit was not given to him.[6] Defendant cannot set up that he acted only as agent, &c., without evidence that he disclosed the fact of the agency at the time of making the contract.[7] General reputation as to the agency is not competent.[8] Where plaintiff may prove defendant's dominion over the property benefited, as one element in the evidence that defendant was the real employer, it is competent to show that other persons had received orders from the defendant to do work on the same property, without showing that the plaintiff knew of these orders at the time he did the work.[9]

Declarations made by plaintiff while at work, and part of the *res gestæ*, and tending to show for which of several he was working, may be competent on that point,[10] though they cannot, of course, be evidence of employment, unless brought home to defendant.[11]

When defendant, in making the contract, acted as agent, and within the authority conferred, and disclosed his principal at the time, he is not personally bound, unless upon clear and explicit evidence of an intention to interpose his personal liability.[12] In

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[1] See Robinson v. Raynor, 36 Barb. 128, rev'd in 28 N. Y. 494; Gordner v. Heffley, 49 Penn. St. 163; Hertzog v. Hertzog, 29 Id. 465. For the presumption that the whole services were gratuitous, if part were, see Ross v. Ross, 6 Hun, 182.

[2] Haymaker v. Haymaker, 4 Ohio St. 272; Houston v. Crutcher, 31 Miss. 51, 56. Compare as to imperfect performance of part, Hollis v. Wagar, 1 Lans. 4.

[3] Ditch v Wilkinson, 10 Louis. 205.

[4] Sweet v. Tuttle, 14 N. Y. 465, affi'g 10 How. Pr. 40.

[5] Denman v. Campbell, 7 Hun, 88; Murray v. Deyo, 10 Id. 3, and cases cited. For other cases, see pp. 240, 265, and 302, of this vol. A witness cannot be asked whether plaintiff "*knew*" the work was not done for defendant. The fact from which knowledge is to be inferred must be proved. Major v. Spies, 66 Barb. 576.

[6] Trowbridge v. Wheeler, 1 Allen, 162.

[7] Cabre v. Sturges, 1 Hilt. 160.

[8] Trowbridge v. Wheeler, 1 Allen, 162.

[9] Woodward v. Buchanan, L. R. 5 Q. B. 285. Compare Fuller v. Clark, 3 E. D. Smith, 302.

[10] Printup v. Mitchell, 17 Geo. 558, 562; Autauga County v. Davis, 32 Ala. 703, 708.

[11] Erben v. Lorillard, 19 N. Y. 299, rev'g 23 Barb. 82.

[12] Hall v. Lauderdale, 46 N. Y. 70.

the case of a public agent, much stronger evidence is required of such an intention.[1] If it is sought to charge him on the ground that he acted as agent without authority, the burden is on plaintiff to show that defendant had not the authority under which he professed to act.[2]

7. *Declarations of employees.*]—The mere relation of employment does not render evidence of the admissions and declarations of the employee competent against the employer.[3] Where the servants of one party are, under the contract, at work for the other, this may preclude the latter from using their declarations against the former.[4]

8. *Express contract when admissible under general allegation.*]—Under a general complaint for a *quantum meruit*, for work, labor and services, plaintiff cannot prove a contract which remains executory on his part,[5] nor one which, though fully performed on his part, is special in respect to the time or manner of payment, so that it cannot be said that nothing remains but the payment of money already due.[6] A variance in this respect, nevertheless, may be cured by amendment. He may, however, under such a complaint, prove that a price was fixed by agreement;[7] or may give in evidence any express or special contract payable presently in money, together with evidence either of full performance on his part,[8] or an excuse exonerating him from full performance,[9] such as illness;[10] or that he has, in good faith, fulfilled, but not in the manner, or not within the time prescribed by the contract, and that the other has sanctioned or accepted the work;[11] or that he has fully, or partly, performed, and that the contract has been abandoned by mutual consent, or has been rescinded and become

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[1] Hall v. Lauderdale, 46 N. Y. 70.

[2] Plumb v. Milk, 19 Barb. 74. The cases holding the burden to be on defendant are where the contract purported to be that of the defendant. Id.

[3] Cook v. Hunt, 24 Ill. 535; Corbin v. Adams, 6 Cush, 93; Maher v. Chicago, 38 Ill. 266, 273. A contractor for building a ship is not the agent of the owner within the rule, so as to make his admission that materials were used in the construction, admissible against the owner. Happy v. Mosher, 48 N. Y. 313, rev'g 47 Barb. 501. Compare Fleming v. Smith, 44 Barb. 554, where the contrary principle seems to have been applied in the case of a contractor for building a house.

[4] Dennis v. Belt, 30 Cal. 247, 253.

[5] Dermott v. Jones, 2 Wall. 9; 2 Greenl. Ev. 82, § 104.

[6] Champlin v. Butler, 18 Johns. 169; Ludue v. Seymour, 24 Wend. 59. Although the work may have been in part done, if the stipulations of the contract have not been fully performed—as, for instance, if the work has not been approved by a third person, whose approval was made a condition precedent—the plaintiff cannot recover under a general allegation. Atkinson v. Collins, 30 Barb. 480, s. c. 9 Abb. Pr. 353; 18 How. Pr. 235.

[7] Fells v. Vestvali, 2 Keyes, 152.

[8] Hurst v. Litchfield, 39 N. Y. 377; Dermott v. Jones, 2 Wall. 9. *Contra*, Adams v. Mayor, &c. of N. Y. 4 Duer, 295.

[9] Hosley v. Black, 28 N. Y. 438, s. c. 26 How. Pr. 97; Farron v. Sherwood, 17 N. Y. 227.

[10] Wolfe v. Howes, 20 N. Y. 197, aff'g 24 Barb. 174, 666.

[11] Dermott v. Jones (above); Hutchinson v. Cullum, 23 Ala. 622; Dubois v. Delaware & Hudson Can. Co. 4 Wend. 285.

extinct by act of the other.[1] In all these cases the contract is no longer executory on his part, nor a hindrance to a money judgment for price or value.

9. *Express contract, if subsisting, must be put in evidence.*]—If it appear by plaintiff's evidence that a special agreement exists, even though not pleaded, it must be produced or accounted for, and its contents proved, for the purpose of seeing whether it has been performed by the plaintiff, and whether the stipulated time and mode of payment were such as to warrant a recovery.[2] And if the contract was not in writing, plaintiff must nevertheless prove its substance before he can recover.[3] The contract so proved will be applied as far as its application can be traced; but if, by the defendant's fault the cost of the work or materials has been increased, in so far the jury will be warranted in departing from the contract prices.[4]

If, after parol evidence has been taken of an agreement, a written agreement is produced embodying the contract, the parol evidence may be struck out on motion.[5]

10. *What are contracts within the rule.*]—If the contract refers to another document for details of the work to be done, the plaintiff in order to prove performance must produce it,[6] or account for its non-production, and prove its terms; but it is enough to identify it without proving its execution.[7] A document specifying the work or other conditions, and communicated by one party, and accepted by the other, as the terms of employment, although not signed by either, is a written contract within the rule requiring production,[8] but it does not necessarily exclude oral evidence of other terms. If, however, assent is proven, ignorance of the contents is not material.[9] An unexecuted draft contract, drawn up by a third person at the request of the parties, is not necessarily competent.[10]

11. *Extra work.*]—An independent oral order for separate work may be proved in an action for compensation for such

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[1] 2 Greenl. Ev. 82, § 104; Burlingame v. Burlingame, 7 Cow. 92.
[2] Ladue v. Seymour, 24 Wend. 59; Alger v. Raymond, 7 Bosw. 418.
[3] Smith v. Smith, 1 Sandf. 206.
[4] Dermott v. Jones, 2 Wall. 9.
[5] Newkirk v. New York & Harlem R. R. Co. 38 N. Y. 158.
[6] Bryant v. Stilwell, 24 Penn. St. 314, 317. Compare, to the contrary, Coles v. Holmes, 2 Spears (So. Car.) 360.
[7] Page 288 of this vol.
[8] Whitford v. Tutin, 10 Bing. 395, p. 34 of this vol.; Rice v. Dwight M'f'g Co. 2 Cush. 80, 87, p. 288 of this vol. Otherwise, of terms read to one party by the other from a writing not shown.
[9] Rice v. Dwight M'f'g Co. (above).
[10] Flood v. Mitchell, 68 N. Y. 507, confirming 4 Hun, 813, but rev'g it on other points. Compare p. 53 of this vol. If an offer by one to the other has been proven, a letter signed by the former and produced by the latter, although not addressed, agreeing on the sum specified in the offer, is admissible. Bagliolo v. Scott, 5 Mo. 341, 343.

work, although given during the performance of a written contract which is not produced.[1] But if it is not clear that the work was entirely separate from that called for by the written contract, the latter must be produced,[2] or accounted for; and even a distinct promise to pay for the work does not dispense with this necessity.[3] If the existence of an express contract appears, the employer's request for extra work is deemed, in the absence of further evidence, to be merely a notice of his claim that the contract calls for such work.[4] The contract is the proper evidence to show what are extras.[5]

12. *Variances.*]—In pleading a contract by its legal effect, the omission to state conditions which altered the liability or obligation may be a variance,[6] but the omission to state a contingent condition, which never took effect, is not.[7] Under an allegation of a special contract for work and materials, a contract for work only may be proved.[8]

13. *Requisite memorandum under statute of frauds.*]—The general principles applicable have been already stated.[9] It is essential that the writing should be final, as distinguished from a statement of some terms, leaving others to be subsequently agreed on.[10] But the memorandum is not vitiated by omitting to designate the kind of service, even though on familiar principles the obligation of the employee will consequently depend on oral evidence of surrounding circumstances and of usage.[11] The party who is sought to be charged, having subscribed the memorandum, the assent of the other may be proved by parol.[12] If the terms of the contract do not negative the feasibility or right of performance within the year, evidence that it was not completely performed, or as the event proved, could not have been so performed, is not enough. If the terms require more than a year, evidence that it actually was performed within the year does not avail. If a contract for a year's service does not express the time for commencement of the term of service it commences in contemplation of law immediately, and is valid without writing.[13] If

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[1] Reid v. Batte, Moody & M. 413.
[2] Parton v. Cole, 6 Jur. 370.
[3] Vincent v. Cole, Moody & M. 257.
[4] Collyer v. Collins, 17 Abb. Pr. 467.
[5] Jones v. Howell, 4 Dowl. 176; Buxton v. Cornish, 12 M. & W. 426; Rosc. N. P. 552. A promise to pay for extra material may be implied from the employer's own act, which rendered the extra material necessary to conform the work to the conditions of the contract. Messenger v. City of Buffalo, 21 N. Y. 196.
[6] See, for instance, Sheafe v. Locke, 1 Allen (Mass.) 369; compare Bruce v. Greenbanks, 33 Vt. 226.
[7] Cobb v. West, 4 Duer, 38; Short v. McRea, 4 Minn. 119, 124.
[8] Cobb v. West, 4 Duer, 38.
[9] Page 292 of this vol.
[10] Appleby v. Johnson, L. R. 9 C. P. 158.
[11] Hagan v. Domestic Sewing Mach. Co. 9 Hun, 73, and see paragraph 15.
[12] Reuss v. Pickley, L. R. 1 Ex. 342; 4 H. & C. 588.
[13] Russell v. Slade, 12 Conn. 455.

for a year commencing at a future day, it is void if not in writing, and evidence of performance by plaintiff until discharge is not evidence of a new contract for the same term, but only entitles him to recover for actual service.[1]

If services are rendered under a contract, which is wholly void by the statute of frauds, no action can be maintained to recover their value, except upon evidence of the default of the other party, or his refusal to go on with the contract.[2]

Evidence that the employee refused to go on, on the credit of the original employer, and thereupon at the request of defendant, and on his oral promise to pay, went on with the work, is sufficient to go to the jury to sustain an inference of a new and original undertaking[3] by defendant, on which he is liable for work thereafter done.[4]

14. *Oral evidence to vary writing.*]—In application of the general principles already stated as to oral evidence in connection with written,[5] it is to be observed that evidence of the surrounding circumstances, the previous negotiations and the usage of the business or vocation, are freely admitted to explain ambiguous terms; but not to contradict unambiguous terms, except within the limits already stated, of evidence to show usages of language.[6] A stipulation on a point which the writing either expressly or impliedly controls cannot be added by parol.[7] But usage may be proved to show what amounts to complete performance of the express contract under the presumed understanding of the parties.[8] If the time for performance is not specified, subsequent conversations of the parties are competent evidence to show what they regarded as a reasonable time.[9]

Such papers as a circular of instructions accepted by an agent on entering employment,[10] further instructions in writing received by him during his employment, and acted on by him continuously

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[1] Oddy v. James, 48 N. Y. 685.

[2] Galvin v. Pentice, 45 N. Y. 162, per RAPALLO, J.; and see William Butcher Steel Works v. Atkinson, 68 Ill. 421.

[3] Lakeman v. Mountstephen, L. R. 7 H. of L. 17, s. c. 9 Moak's Eng. 5.

[4] Rand v. Mather, 11 Cush. 1.

[5] Page 294 of this vol.

[6] Compare Partridge v. Ins. Co. 15 Wall. 573; 1 Dill. 139; Stoops v. Smith, 100 Mass. 63, s. c. 1 Am. R. 85; Sweet v. Lee, 3 Mann. & G. 452, 460; Myers v. Sarl, 3 E. & E. 306; Zerrahn v. Ditson, 117 Mass. 553; and pp. 294, &c. and 132 of this vol. Whether contradictory clauses, which may be reconciled by construing one as an exception from the other, can be otherwise explained by parol evidence,—see Porter v. Spence, 38 N. Y. 119.

[7] Thorp v. Ross, 4 Abb. Ct. App. Dec 416. Whether a verbal limit of cost, on a written order, is competent,—see Hooper v. Taylor, 4 E. D. Smith, 486; Carll v. Spofford, 45 N. Y. 61.

[8] Cooper v. Kane, 19 Wend. 386, NELSON, Ch. J.

[9] Davis v. Talcott, 14 Barb. 611, rev'd, on other points, in 12 N. Y. 184. Thus under a contract to build such a drawbridge as specified in the contract, it is competent to prove that it is the common understanding that it should be so constructed as to be easily turned in two or three minutes, by one man. R. R. Co. v. Smith, 21 Wall. 262.

[10] Stagg v. Ins. Co. 10 Wall. 589.

thereafter, are contracts within the rule.[1] So is a stipulation in a receipt for a payment in advance, stating how it is to be applied or forfeited.[2]

15. *Kind of Service.*]—Where the writing is silent as to the kind of service agreed for, it may be shown by oral evidence of the surrounding circumstances,[3] and for this purpose the nature of the employer's business, and the kind of occupation to which the employee was known to be accustomed, are competent,[4] and the general usage in such business.[5] If the writing designates the service in the language of trade, oral evidence to show what business was properly included in the phrase used, is competent.[6]

16. *Measurement.*]—In application of the principle as to usage already stated,[7] evidence of usage in the locality, or in the trade, is competent to show in what manner measurements provided for by the contract are to be taken;[8] and the usage need not be pleaded.[9]

17. *Term of Service; Holidays, "Day's work," &c.*—If the allegation is of service between specified dates, prior or later services are not strictly provable,[10] except on the principles on which variance may be disregarded; but if the allegation is of indebtedness on a day named, or service before a day named, a term of service or various services before that day may be proved.[11]

If there is a written contract specifying the term of service,[12] or which, by specifying no term and stipulating for wages by the

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[1] Ib. Letter written by employer in answer to his remonstrances asking what his status was; or the employer's letter to his employee, written in answer as to the latter's inquiry as to the terms on which he was to be understood as serving, and put in evidence by him as proving his employment, are contracts within the rule that the writing cannot be contradicted by oral evidence. Partridge v. Insurance Co. 15 Wall. 579.

[2] Townsend v. Fisher, 2 Hilt. 47.

[3] Price v. Mouat, 11 C. B. N. S. 508; Mumford v. Gething, 7 C. B. N. S. 305; L. J. 29 C. P. 105.

[4] Hagan v. Domestic Sewing Machine Co. 9 Hun, 73.

[5] Eldredge v. Smith, 13 Allen, 140, 143.

[6] Stroud v. Frith, 11 Barb. 300.

[7] Page 296 of this vol.

[8] As, for instance, under a contract calling for bricks and laying them in a wall at so much "per thousand," that the number is ascertainable by measurement and estimate; Lowe v. Lehman, 15 Ohio St. 179; or how a wall with angles is to be measured when it is to be paid for "by the foot." Ford v. Tirrell, 9 Gray, 401; whether an agreement to pay for plastering "per square yard," includes or excludes measurement of spaces of base-boards, doors, &c. Walls v. Bailey, 49 N. Y. 467; and how wall more than nine inches thick is to be measured under a clause for payment "per superficial yard of work nine inches thick." Symonds v. Floyd, 6 C. B. N. S. 691.

[9] Lowe v. Lehman (above). As to proving the meaning of such terms as "hard pan,"—see Dubois v. Delaware, &c. Co. 12 Wend. 334, 15 Id. 87; Dickinson v. Water Comm'rs of Poughkeepsie, 2 Hun, 615; Currier v. Boston, &c. R. R. Co. 34 N. H. 498, 508.

[10] Manch. & Law. R. R. v. Fisk, 33 N. H. 297, 305.

[11] Beekman v. Platner, 15 Barb. 550.

[12] Sweet v. Lee, 3 Mann. & G. 452, 466.

week, month, or other period, implies that the term is for that period,[1] oral evidence is not competent to contradict the language; but it is competent to show what length of actual service is by usage designated by such language. Thus in a contract for the services of an actor for three years, a party may show that "year" means annual season,[2] but not that four years or seasons were agreed for.[3] "Month" means calendar month, unless otherwise expressed.[4] Parol evidence of a usage in the trade or business to allow holidays is competent;[5] and so is a usage not to pay the stipulated weekly salary during vacation.[6]

A general usage of the trade[7] is competent to show that an agreement for a day's work is satisfied by a certain number of hours, so as to entitle the employee to work for himself the rest of the time. So a usage to pay proportionably more than the day's wages for more hours than the usual day's work, is competent.[8] Where a statute fixes the number of hours in a day's work, unless otherwise expressly agreed, if the parties render and accept less or more, without any express agreement, an agreement may be inferred that the work actually done in a day shall be reckoned a day's work.[9] If such a statute does not require an express agreement to manifest a different intention, the rendering of more hours' service in a day than it calls for does not prove an intent that more than a day's wages shall be paid.[10]

18. *Rate of compensation.*]—Usually if, after the expiration of an hiring for an agreed compensation, the employee continues in the same service, the law implies, in the absence of other evidence, a promise to continue to pay at the same rate;[11] but such a promise is not implied after the expiration of service under an agreement to pay at a specified rate for a limited period, without evidence of actual engagement for that period.[12] Nor is an agreement to accept the same rate implied, if the employee commenced in ignorance of the business, and during a part of the period of the original contract was a learner.[13]

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[1] Evans v. Roe, L. R. 7 Com. Pl. 138, s. c. 2 Moak's Eng. R. 116.

[2] Grant v. Maddox, 15 Mees. & W. 737.

[3] Sweet v. Lee (above). It has been held that evidence of a usage of the trade to allow termination on certain notice, before the end of the periodical hiring, is competent. Parker v. Ibbetson, 4 C. B. (N. S.) 348, s. c. L. J. 27 C. P. 286.

[4] 1 N. Y. R. S. 606, § 4. *Contra*, at common law, Simpson v. Margitson, 11 Q. B. 23, 32.

[5] Reg. v. Stoke upon Trent, 5 Q. B. (Ad. & El. N. S.) 303; and see Hosley v. Black, 28 N. Y. 438, s. c. 26 How. Pr. 97.

[6] Grant v. Maddox, 15 Mees. & W. 737.

[7] Perhaps also a general usage of other kindred vocations in the same place. Barnes v. Ingalls, 39 Ala. 393.

[8] Hinton v. Locke, 5 Hill, 437.

[9] Brooks v. Cotton, 48 N. H. 50, s. c. 1 Am. R. 172.

[10] Luske v. Hotchkiss, 37 Conn. 219, s. c. 9 Am. R. 314.

[11] Smith v. Velie, 60 N. Y. 106; Vail v. Jersey Little Falls Manuf. Co. 32 Barb. 564. Compare Miller v. Hooper, 7 Hun, 200; Nutt v. Minor, 14 How. U. S. 464.

[12] Smith v. Velie (above).

[13] Galvin v. Prentice, 45 N. Y. 162.

A hiring at so much per week or month usually implies a promise to pay at the end of the periods thus specified.[1]

If complete performance of a special contract is prevented by sickness or death,[2] or by act of the law,[3] or other legal excuse exonerating the employee, the contract is competent evidence on the question of the rate of compensation for services actually performed; and contract rates cannot be reduced by proving that the portion unfinished would be more expensive in its nature than the portion completed.[4] So where the contract is absolutely void by the statute of frauds, it may still be put in evidence to fix the rate of compensation,[5] if any be recoverable.[6] If the void contract calls for compensation not by a pecuniary standard,[7] but in a specific thing the value of which is not fixed, such as a tract of land, the value of the services must be shown, and evidence of the value of the land is incompetent.[8]

19. *Fixed price, or quantum meruit.*]—Under an allegation of a contract to pay a specified rate of compensation, plaintiff may prove a promise to pay what the services were reasonably worth,[9] or an implied promise to pay usual compensation.[10] The variance is immaterial, if the defendant is not misled;[11] especially where there are sufficient averments to enable him to recover without reference to the allegation of an agreed compensation.[12] But if he rests his case on a contract fixing the price to be recovered, it is not competent for him to give evidence of value as a basis of recovery beyond the contract;[13] nor for the defendant, without denying the making of the contract, to give evidence that the value of the services was less.[14] Even where the complaint is on a *quantum meruit*, a contract at a specified sum, if proved, controls.[15] But if evidence of value is received from either side without objection, the other may be allowed to give evidence of the same kind.[16] And in a conflict of evidence as to whether a specified rate was agreed on or not, evidence of its reasonableness or

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[1] Heim v. Wolf, 1 E. D. Smith, 70.

[2] Clark v. Gilbert, 26 N. Y. 279, rev'g 32 Barb. 576.

[3] Jones v. Judd, 4 N. Y. 441.

[4] Id. Where a contract of yearly service is determined by consent in the middle of a quarter, there is no necessarily implied contract to pay *pro rata*; but a jury may infer such an agreement from circumstances. Rose. N. P. 492, citing Lamburn v. Cruden, 2 M. & Gr. 253; Thomas v. Williams, 1 Ad. & E. 685.

[5] Nones v. Homer, 2 Hilt. 116.

[6] Galvin v. Prentice, 45 N. Y. 162.

[7] Lisk v. Sherman, 25 Barb. 433.

[8] Erben v. Lorillard, 19 N. Y. 299, rev'g 23 Barb. 82.

[9] Scott v. Lilienthal, 9 Bosw. 224; s. p. Harrington v. Baker, 15 Gray, 588. *Contra*, Seale v. Emerson, 25 Cal. 293.

[10] Morgan v. Mason, 4 E. D. Smith, 636.

[11] Scott v. Lilienthal (above).

[12] Sussdorf v. Schmidt, 55 N. Y. 319.

[13] Trimble v. Stilwell, 4 E. D. Smith, 512.

[14] Marsh v. Holbrook, 3 Abb. Ct. App. Dec. 176.

[15] Ludlow v. Dole, 62 N. Y. 617, aff'g 1 Hun, 715, s. c. 4 Supm. Ct. (T. & C.) 655.

[16] Morgan v. Mason, 4 E. D. Smith, 636.

unreasonableness, and particularly of the usual price, is competent, as bearing on the probable truth of the allegation of rate agreed.[1] But evidence of the profitableness or unprofitableness to the employer of an engagement at such a rate is not competent.[2] Where the claim is for commissions, a variance as to the amount on which they are computable, may be disregarded.[3]

20. *Value of service.*]—On the question of the value of services of a workman, evidence of his skill is competent in his favor, in connection with evidence of the usual wages;[4] and evidence of his unskillfulness or his intemperate habits is competent against him.[5] Evidence of the recommendations of third persons on which he was engaged is not competent.[6]

To prove value of work and materials it is not competent to show the cost of constructing a different structure, for it leads to a collateral issue involving comparison between the structures;[7] and on the same principle to show the value of a service—for instance, negotiating the sale of a lease—it is not competent to prove the relative labor involved in negotiating that and the sale of the fee.[8] An agreed price being proved, evidence by comparison of plaintiff's services with those of his fellows, is not competent.[9]

21. *Bill rendered not a limit.*]—The presentment by a party to his debtor of a bill in which he charges a gross sum for services, for which he is entitled to claim *quantum meruit*, where the subject of the demand is one which would naturally consist of many items, there being no payment nor settlement of the account, does not preclude the creditor from showing what the services were reasonably worth, and recovering more than he had so charged.[10]

22. *Opinions of witnesses.*]—In applying the general rule admitting opinions of witnesses as to value,[11] it is held that the

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[1] Harrington v. Baker, 15 Gray, 538, 540; Darling v. Westmoreland, 52 N. H. 401, s. c. 13 Am. R. 55; s. p. Moore v. Davis, 49 N. H. 45, s. c. 6 Am. R. 460.

[2] Harrington v. Baker (above).

[3] Morgan v. Mason, 4 E. D. Smith, 636; Durkee v. Vermont, &c. R. R Co. 29 Vt. 127. It must be objected to, if at all, at the trial, so as to allow amendment. Divoll v. Henken, 48 N. Y. 672.

[4] Cummings v. Nichols, 13 N. H. 420; Barnes v. Ingalls, 39 Ala. 193; Major v. Spies, 66 Barb. 576.

[5] Cummings v. Nichols (above); and see Harmer v. Cornelius, 5 C. B. N. S. 236.

[6] Wolstenholme v. Wolstenholme Tile Manuf. Co. 3 Lans. 457. Evidence of what the employee had received from other employers has been held inadmissible. Stevens v. Benton, 2 Lans. 156, s. c. 39 How. Pr. 13; and see Collins v. Fowler, 4 Ala. 647. But compare Kingsbury v. Moses, 45 N. H. 222.

[7] Gouge v. Roberts, 53 N. Y. 619; s. p. 59 Id. 300; 37 Super. Ct. (J. & S.) 433. And see Chapter on SALES, paragraphs 20, 21.

[8] Siegel v. Lewis, 54 N. Y. 651; s. p. Gouge v. Roberts, 53 Id. 619.

[9] Green v. Washburn, 7 Allen, 390.

[10] Williams v. Glenny, 16 N. Y. 389; and see Romeyn v. Campan, 17 Mich. 327; 3 Am. Law Rev. 381.

[11] See pp. 310-312 and 347 of this vol. But compare Pullman v. Corning, 9 N. Y.

witness must be shown to have some special conversance with the subject.[1] The question of competency to express an opinion is for the court; and if facts appear showing a reasonable degree of conversance, it is not material that the witness says he does not profess to be an expert.[2] It is not a matter of right to cross-examine an expert as to his own professional income, by way of testing his qualifications.[3] It is not essential that the witness should have been employed in the vocation concerned;[4] and if he has been so employed, it is not a disqualification that he has abandoned it and engaged in other business.[5] If otherwise competent, it is no objection that the witness is the party examined in his own behalf.[6]

The testimony of a qualified witness, who has heard the services described by the other witnesses, or read their testimony, may be asked as to what would be the value of such services, if rendered as stated.[7] The value may be called for by a general

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93, aff'g 14 Barb. 174, where it was held that a witness who has examined buildings may, though neither a mason nor an expert, testify that, in his opinion, one was built more compactly than the other; or that a wall was not worth covering; that the materials were worth more than the wall.

[1] Lamoure v. Caryl, 4 Den. 370; Elfelt v. Smith, 1 Minn. 125. Thus one who has owned and managed mills for years, and employed millwrights, is competent to testify whether a millwright he has often employed is a good workman. Doster v. Brown, 25 Geo. 24. But the mere fact of being a miller does not qualify to express an opinion of the skillfulness of such work. Walker v. Fields, 28 Geo. 237. So one who is somewhat familiar with book-keeping and accounting, and shows a somewhat intimate familiarity with a book-keeper's services, is competent to testify to their value. Scott v. Lilienthal, 9 Bosw. 224. But one who is a farmer and does not know the usual compensation of clerks, is not. Lamoure v. Caryl, 4 Den. (N. Y.) 370, 373. So testimony of master builders as to value of a house, and of the work and materials, is competent. Tebbetts v. Haskins, 16 Me. 283, 289. But members of a committee are not rendered competent to express an opinion of the value or cost of fitting up a stage, by the fact that, after consultation with stage carpenters and artists, they had once fitted up a theatre. Forbes v. Howard, 4 R. I. 364.

A brick and tile maker of some years' experience is qualified to give an opinion on the proper mode of burning tiles, and what would be the effect of burning in one way or another. Wiggins v. Wallace, 19 Barb. 338. A carpenter of experience in the place is competent to testify to the value of carpenter work done, at the time and place of performance. Major v. Spies, 66 Barb. 576. So witnesses who were not ship-carpenters, but who had been in and about ships as masters and workmen, are competent to show the difference between the value of a vessel as repaired, and its value had it been repaired according to contract. Sikes v. Paine, 10 Ired. (N. C.) 280. So a physician is competent as to value of a nurse's services. Woodward v. Bugsbee, 2 Hun, 128. A mason may be asked how long, in his opinion, it would take to dry the walls of a house so as to render it fit and safe for human habitation. Sedgw. on Dam. 591; Smith v. Gugerty, 4 Barb. 515.

[2] Mercer v. Vose, 40 Super. Ct. (J. & S.) 218.

[3] Harland v. Lilienthal, 53 N. Y. 438.

[4] Pullman v. Corning, 14 Barb. 174, 9 N. Y. 93; Carroll v. Welch, 26 Tex. 147; Barnes v. Ingalls, 39 Ala. 193.

[5] Bearss v. Copley, 10 N. Y. 93; Robertson v. Knapp, 35 Id. 91, s. c. 33 How. Pr. 309.

[6] Nourry v. Lord, 3 Abb. Ct. App. Dec. 392.

[7] McCollum v. Seward, 62 N. Y. 316; Beckman v. Platner, 15 Barb. 550; Reynolds v. Robinson, 64 N. Y. 589. As to the proper form of the question, see pp. 311 and 314 of

question, leaving the details to cross-examination.[1] The witness may be asked to describe the peculiarities, the excellencies, or the defects, which enter into his estimate of value;[2] and it is not error to allow him to be asked, on cross-examination, what he would have undertaken the work for.[3]

23. *Modification of contract.*]—Oral evidence is admissible to prove a new and distinct agreement made upon a good and valid consideration, although the previous written agreement had been partly performed, and rescision is not shown by writing;[4] and the rule is the same though the previous agreement was sealed.[5]

Where the statute of frauds requires a writing, an oral modification does not satisfy the statute.[6]

24. *Performance.*]—On a special contract, substantial performance, notwithstanding slight defects caused by inadvertence or unintentional omissions, may be proved, unless full performance be an express condition: then it must be strictly proved,[7] or defendant's assent to deviation,[8] or his prevention of performance, be shown

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this vol. And compare Lewis v. Trickey, 20 Barb. 387, with Stevens v. Benton, 2 Lans. 156, 164, s. c. 39 How. Pr. 13, 34; Scott v. Lillienthal, 9 Bosw. 224, 226.

[1] Parker v. Parker, 33 Ala. 459, 462; Garfield v. Kirk, 65 Barb. 464.

And where a witness has testified to value of services, on the theory that the case was a difficult one, the defendant has a right to ask him, on cross-examination, whether assuming the nature of the case were such as defendant claims it was, he would not estimate the value lower. Garfield v. Kirk (above). But see Siegel v. Lewis, 54 N. Y. 651.

In the absence of market value of a structure, cost is relevant, in connection with opinions as to value. Patterson v. Kingsland, 8 Blatchf. 278.

A competent expert who has seen the engine and heard the testimony as to the repairs upon it, the value of which are sued for, may be asked if it be possible that such an engine could be so damaged as testified to, that a reasonable charge for its repair could amount to the sum claimed. Tyng v. Fields, 3 Hun, 75.

[2] Jackson v. N. Y. Central, &c. R. R. Co. 2 Supm. Ct. (T. & C.) 653. But it is not error to exclude a question as to how he arrived at his opinion, as too general. Booker v. Adkins, 48 Ala. N. S. 529.

[3] Gilman v. Gard, 29 Ind. 291, 293.

[4] Piatt's Adm'r v. U. S. 22 Wall. 506, and cases cited. There it was held competent to prove by parol that a contractor with the government refused to continue performance of his written contract, because he was unpaid, and thereupon orally agreed to continue at higher prices and wait for payment. s. p. Stewart v. Keteltas, 36 N. Y. 388, affi'g 9 Bosw. 261.

[5] Munroe v. Perkins, 9 Pick. 298, and cases cited. Compare Tinker v. Geraghty, 1 E. D. Smith, 687, and 2 Abb. N. Y. Dig. new ed. tit. CONTRACTS, *modif.* Oral evidence is competent to show that the time of performance of the work was extended or waived; and this need not be established by positive testimony; it may be inferred from circumstances. Meehan v. Williams, 2 Daly, 367, s. c. 36 How. Pr. 73. The request of the employer to make a change in the mode of construction, of a nature which both parties know to require more time, implies consent to a reasonable extension of time. Manuf. Co. v. U. S. 17 Wall. 595. Where the defense to a builder's suit for the money due on the contract is a claim for damages stipulated for his delay in completing a small part of the work, and it is shown that the contract was changed by introducing extra work, the burden of proof is on the party claiming the damages, to show either that the delay was but slightly produced by the change in the contract, or that it was caused by the builder's negligence or fault. Bridges v. Hyatt, 2 Abb. Pr. 449.

[6] Swain v. Seamens, 9 Wall. 254.

[7] Phillip v. Gallant, 62 N. Y. 264, and cas. cit.

[8] Rosc. N. P. 558; Hayden v. Hayward, 1 Camp. 180. Part performance followed by his voluntary and u excused cessation of performance is not enough. Jennings v. Camp, 13 Johns. 94; Lantry v. Parks, 8 Cow. 63. In an action on an agreement

by the act of the other party;[1] or other excuse exonerating him.[2] If the employer refuses to perform on his part, and actually prevents performance by the contractor, it is unnecessary for the latter to prove readiness and ability to perform.[3]

In a contract to perform work as soon as possible, or within a reasonable time, evidence of the surrounding circumstances is competent to show what was understood as a reasonable time.[4]

When the thing to be performed is expressed in terms of art, or technical terms, it is competent to ask a qualified witness as to whether the stipulation calls for a particular thing,[5] and as to the manner of performance.[6]

The mere fact that defendant took possession of his property, whether real[7] or personal,[8] does not necessarily amount to an admission that a contract to do work thereupon had been so performed as to impose any liability on him. The fact that defendant clandestinely removed the thing,[9] or refused to allow its inspection,[10] so as to preclude plaintiff having testimony to its quality, is relevant.

25. *Certificates of performance.*]—Certificates of performance, given by a third person, although he superintended the work, are not competent,[11] unless made so by agreement, or unless coupled with evidence that the person was the authorized agent of defendant to give such certificate.[12] If the promise to pay is conditioned on the work being done to the satisfaction of a third person, evidence of performance is not enough, without showing the satisfaction of that person.[13] But a stipulation to pay according

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to pay a certain portion of the profits of a joint adventure, upon condition that information furnished by the plaintiff should be true, the burden is on plaintiff to show that the information was true. Strong v. Place, 4 Robt. 385, s. c. 33 How. Pr. 114. Although if there was no such expressed condition the burden would be upon defendant to prove falsity, if he relied upon that. Id.; but compare Townsend v. Neale, 2 Camp. 191.

[1] Henderden v. Cook, 66 Barb. 23.

[2] Wolfe v. Howes, 20 N. Y. 197, affi'g 24 Barb. 174, 666. The objection that the contract was entire, so that full performance must be shown, if not taken at the trial, is not available to defendant on appeal. Jenkins v. Wheeler, 2 Abb. Ct. App. Dec. 442.

[3] Howell v. Gould, 2 Abb. Ct. App. Dec. 418.

[4] See Hydraulic Engineering Co. v. McHaffie, 27 Weekly R. 222.

[5] Colwell v. Lawrence, 38 N. Y. 71, s. c. 36 How. Pr. 306, affi'g 38 Barb. 643; 24 How. Pr. 324.

[6] Reed v. Hobbs, 3 Ill. (2 Scam.) 297; Conrad v. Trustees of Ithaca, 16 N. Y. 158. The testimony of the architect should be regarded as controlling, in a conflict of evidence, whether a building is erected in conformity with the contract. Tucker v. Williams, 2 Hilt. 562. As to production of plans on the trial, see Stuart v. Binsse, 10 Bosw. 436, and p. 321 of this vol.

[7] Reed v. Board of Education of Brooklyn, 4 Abb. Ct. App. Dec. 24.

[8] The Isaac Newton, 1 Abb. Adm. 11, 19.

[9] Kidd v. Belden, 19 Barb. 266.

[10] Bryant v. Stillwell, 24 Penn. St. 314, 317.

[11] Reed v. Scituate, 7 Allen, 141, 144.

[12] Smith v. Kahill, 17 Ill. 67; Sutherland v. Kittredge, 19 Me. 424.

[13] Butler v. Tucker, 24 Wend. 447, and cases cited; Barton v. Hermann, 11 Abb. Pr. N. S. 378. Compare Hart v. Lauman, 29 Barb. 410; Sharpe v. San Paulo Railw. Co. L. R. 8 Ch. App. 597, s. c. 6 Moak's Eng. 516.

to estimates of a third person,[1] or that any matter of difference shall be determined by a third person,[2] without making his act a condition or conclusive, does not exclude other evidence of performance, or non-performance.[3] If the contract contemplates a conclusive certificate, plaintiff must prove one,[4] substantially complying with the stipulation.[5] A general certificate, to a conclusion implying all the particulars, is enough,[6] but an evasive one is not.[7] On a question arising whether the certificate is sufficient within this rule, evidence that defendant made payments to plaintiff under the same contract, on similar certificates, without objection to their form, at the time of presentation, is relevant and conclusive.[8] Under these rules a certificate is conclusive in plaintiff's favor, unless defendant can show that it was procured by fraud.[9] Plaintiff may dispense with the requirement of a certificate by showing that the third person had unreasonably, and in bad faith, refused the certificate,[10] and thereupon proving performance of the work; or by showing that defendant had waived the matters to which the certificate was required.[11]

If the stipulation makes the third person an arbitrator, notice of his examination is material.[12]

26. *Excuse.*]—Evidence of an excuse for partial non-performance is objectionable under an allegation of performance, but should be admitted by amendment if defendant is not misled.[13]

27. *Shop-books and other accounts of a party offered in his own favor.*]—The rules already stated on this point[14] admit the account of mechanics and tradesmen;[15] and, upon the same principle, those of physicians.[16]

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[1] Sherman v. Mayor, &c. of N. Y. 1 N. Y. 316.

[2] Hurst v. Litchfield, 39 N. Y. 377, and cases cited. Compare Morris Canal & B. Co. v. Nathan, 2 Hall, 239.

[3] Bigler v. Mayor, &c. of New York, 253.

[4] Smith v. Brady, 17 N. Y. 173, s. P. 1859, McMahon v. N. Y. & Erie R. R. Co. 20 N. Y. 463.

[5] Adams v. Mayor, &c. of N. Y. 4 Duer, 295; Morgan v. Birnie, 9 Bing. 672. The certificate need not be given in writing, unless expressly required by the contract. Roberts v. Watkins, 14 C. B. N. S. 592, s. c. L. J. 32 C. P. 291.

[6] Stewart v. Ketcltas, 36 N. Y. 388, affi'g 9 Bosw. 261; Wyckoff v. Myers, 44 Id. 143.

[7] Smith v. Briggs, 3 Den. 73.

[8] Bloodgood v. Ingoldsby, 1 Hilt. 388.

[9] Wyckoff v. Meyers, 44 N. Y. 143. Unless the contract requires proof of performance *and* certificate. Glacius v. Black, 50 N Y. 151.

[10] Thomas v. Fleury, 26 N. Y. 26; Bowery Nat. Bank v. Mayor, &c. of N. Y. 63 N. Y. 336, rev'g 8 Hun, 639. *Contra*, Milner v. Field, 5 Exch. 829. Or that the defendant had such secret relations with the third person as to make the latter interested. Kimberley v. Dick, L. R. 13 Eq. 1.

[11] Smith v. Gugerty, 4 Barb. 614; compare Barton v. Hermann, 11 Abb. Pr. N. S. 378. See further as to the subject of certificates. 1 Moak's Eng. 532, n.; 6 Id. 528, 871; 1 Redf. on Rw. 435; Schencke v. Rowell, 1 Abb. N. C. 295.

[12] McMahon v. N. Y. & Erie. R. R. Co. 20 N. Y. 463; Collins v. Vanderbilt, 8 Bosw. 313.

[13] Hosley v. Black, 28 N. Y. 438, s. c. 26 How. Pr. 97.

[14] Page 322 of this vol.

[15] Linnell v. Sutherland, 11 Wend. 568; The Potomac, 2 Black, 581.

[16] Foster v. Coleman, 1 E. D. Smith 85; Knight v. Cunnington, 6 Hun, 100.

Charges made as each part of an entire work was completed are not incompetent;[1] but charges for anything done under a supposed special contract, but which, by reason of a rescission of the contract, afterwards became matter of account by operation of law, cannot be proved by the party's book. There must be a right to make an efficacious charge when the service is done.[2] Pay-rolls or check-rolls between a contractor and his laborers, though such as would be admissible as accounts between him and them, are not admissible in evidence against the contractor's employer, to enable the contractor to establish a *quantum meruit*, on the rescission of the contract, unless upon the ground that they were original entries.[3]

28. *Defenses—What Admissible under Denial.*]—Under a general denial, defendant may prove any circumstances tending to show that he was never indebted at all, or that he never owed so much as was claimed; for example, that he never incurred the debt; or that the services, either in whole or in part, were rendered as a gratuity; or that plaintiff had himself fixed a less price for them than he claimed to recover; or that they were rendered upon the credit of some other person than the defendant.[4] If the complaint is a mere allegation of indebtedness the rule is still more liberal.[5] But a general denial does not admit evidence that plaintiff has converted the thing, in respect of which the services were alleged to have been rendered.[6] If the complaint is on a *quantum meruit*, not for an agreed price, a general denial admits evidence in reduction of the value, such as, that the work was unskillfully done, or that defendant had discharged plaintiff, or given him notice to stop.[7] If the answer admits the employment and service alleged, and only denies the value, the quantity of work is not in issue, but only the value;[8] otherwise if it only admits employment and some service, not indicating the amount, and denies all other allegations.[9]

If the complaint is for an agreed price, a general denial does not admit evidence of unworkman-like manner,[10] nor of negligence or affirmative misconduct;[11] unless the contract as pleaded requires plaintiff to show performance of its stipulations, in which

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Contra, as to necessity of preliminary services, proof that physician kept correct books, &c., Clarke v. Smith, 46 Barb. 80.

[1] Kaughley v. Brewer, 12 Sergt. & R. 133.

[2] Cowen, J., Merrill v. Ithaca & Oswego R. R. Co. 16 Wend. 585, and cases cited.

[3] Merrill v. Ithaca & Oswego R. R. Co. 16 Wend. 586. For the rule as to original entries see pp. 320–322 of this vol.

[4] Schermerhorn v. Van Allen, 18 Barb. 29.

[5] Brown v. Colie, 1 E. D. Smith, 265.

[6] Wood v. Belden, 54 N. Y. 658, rev'g 59 Barb. 549. This is a counter-claim. Wadley v. Davis, 63 Barb. 500.

[7] Raymond v. Richardson, 4 E. D. Smith, 171; s. p. Bridges v. Paige, 13 Cal. 640.

[8] Van Dyke v. Maguire, 57 N. Y. 429.

[9] Albro v. Figuera, 60 Id. 630.

[10] Kendall v. Vallejo, 1 Cal. 371.

[11] Stoddard v. Treadwell, 26 Cal. 294, 305.

case a general denial allows evidence to disprove performance.[1] If the answer alleges generally that plaintiff had failed to fulfill the contract, and also sets forth particular defaults, he is not confined to proving the particular defaults stated, but may prove any defaults under his general allegation.[2] If there is no general allegation, defendant may be confined to proof of the default alleged.[3] If the contract is special, a general denial admits evidence that it was different from that alleged, for instance, a qualifying contract of the same date,[4] or a usage which in contemplation of law formed an integral part of the agreement;[5] but a denial of the contract only, does not admit evidence of a mutual abandonment of it.[6]

If there is a special contract, which the result of the work corresponds to, evidence that the thing will not answer its purpose is irrelevant.[7] On the other hand, if defendant shows that the contract was not faithfully performed, plaintiff cannot prove that the work would have been worth more than the contract price had it been performed.[8] An excess in the performance, if not shown to be detrimental, is not relevant.[9] But a departure may be, though not shown to be detrimental.[10]

If the complaint is general, defendant must aver a special contract, if he relies on it to show that by its terms nothing is due.[11] But under a general denial he may prove an agreement fixing a less price than that sued for.[12]

If the complaint is general for indebtedness, and does not allege a contract, the statute of frauds is available under a general denial.[13] Where the complaint sets forth a contract and the answer admits it, the statute is not available unless the facts to invoke the statute of frauds are pleaded.[14]

29. *Disproof of employment.*]—In a conflict of evidence as to who was the real employer, it is competent for defendant to show that he employed another person to do the whole work,[15] and paid him.[16] Evidence that plaintiff received payments from a third per-

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[1] Sisson v. Willard, 25 Ward. 572.
[2] Trimble v. Stilwell, 4 E. D. Smith, 512.
[3] Brown v. Colie, 1 Smith, 265.
[4] See Marsh v. Dodge, 66 N. Y. 533, rev'g 4 Hun, 278.
[5] Miller v. Ins. Co. of North Am. 1 Abb. New Cas. 470.
[6] Laraway v. Perkins, 10 N. Y. 371.
[7] Kendall v. Vallejo, 1 Cal. 371, 378.
[8] Williams v. Keech, 4 Hill, 168.
[9] Turner v. Haight, 16 N. Y. 465.
[10] See Swain v. Seamens, 9 Wall. 254.
[11] Reed v. Scituate, 7 Allen, 141; Hagan v. Burch, 8 Iowa, 309, 312. Where a plaintiff closes his case without its appearing that there is any written contract relating to the subject-matter of the action, the defendant, if he means to set up that there is such a contract, must produce it. Magnay v. Knight, 1 M. & Gr. 944, 950.
[12] Eudreaux v. Tucker, 10 La. Ann. 80.
[13] Alger v. Johnson, 6 Supm. Ct. (T. & C.) 632.
[14] Id.
[15] Pomeroy v. Pierce, 5 Hun, 119; s. p. Pelanne v. Coudreau, 16 La. Ann. 127.
[16] Gerish v. Chartier, 1 C. B. 13; Steph. Ev. 18.

son is competent, as tending to show that it was to him that plaintiff looked as employer.[1] The declarations of defendant, a part of the *res gestæ* of the circumstances under which the request was made, are competent in his own behalf.[2] Where the defence is that by agreement the business was carried on for joint account evidence of the acts, doings and declarations of the parties, the mode of transacting business and keeping the accounts, the dealings with others, and a memorandum in the handwriting of one and held by the other, though unsigned, tending to show such an agreement, are competent.[3] In disproof of the allegation of employment, evidence of plaintiff's conduct during the period, inconsistent with the relation, is relevant.[4]

30. *Payment.*]—In the case of weekly wages, systematically paid to a number of workmen or servants, evidence that plaintiff had been seen waiting with the others to receive his wages is competent to go to the jury, in connection with lapse of time beforesuit, from which to infer payment.[5] But the mere fact that fellow laborers were paid does not raise a presumption that plaintiff was.[6] Nor does mere lapse of time raise such a presumption, in the case of an ordinary domestic servant.[7]

31. *Former adjudication.*]—A former recovery for a part of a running account for continuous service, such as that of a physician, bars a new action for another part, even though the items be separate and distinct.[8] Otherwise, if the former recovery was on a distinct and separate contract.[9]

32. *Limitations.*]—In applying the statute of limitations to a claim for services rendered continuously during a long series of years, it may be presumed that the contract contemplated yearly or monthly payments,[10] and if the employer is deceased, the statutes is deemed to run from the completion of such periods of service, unless there is sufficient evidence of the decedent's agreement to make provision for compensation by a disposition of his property at death.[11]

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[1] Gilmore v. Atlantic & Pacific R. R. Co. 35 Barb. 279.
[2] Smi h v. Smith, 1 Sand. S. C. 206.
[3] Dickinson v. Robbins, 12 Pick. 74.
[4] See Daylon v. Hall, 8 Blackf. Ind. 556; Weber v. Kingsland, 8 Bosw. 415.
[5] Lucas v. Novosilicski, 1 Esp. 296; and see Seller v. Norman, 4 C. & P. 80.
[6] Filer v. Peebles, 8 N. H. 226, 231.
[7] Snediker v. Everingham, 27 N. J. L. (3 Dutch.) 143; and see Holmes v. The Lodemia, Crabbe, 434.
[8] Oliver v. Holt, 11 Ala. 574; compare O'Beirne v. Lloyd, 43 N. Y. 248.
[9] Phillips v. Berick, 16 Johns. 139. As to judgments for wages or price and judgments for discharge or breach, compare L. R. 10 C. P. 29, s. c 11 Moak's Eng. 232; Routledge v. Hislop, 2 E. & E. 549; De Wolf v. Crandall, 34 Super. Ct. (J. & S.) 14; Davenport v. Hubbard, 46 Vt. 200, s. c. 14 Am. R. 620; and cases cited in note 1 on p. 358 of this vol.
[10] Davis v. Gorton, 16 N. Y. 255.
[11] Nicholl v. Larkin, 2 Redf. Surr. R. 236.

II. Rules peculiarly applicable to Particular kinds of Service.

33. *Advertising.*]—Evidence of sending in an advertisement, not in itself implying a limitation—such as is implied by an advertisement of a sale on a day named, and other transitory announcements—and without any direction as to number of insertions, implies a direction to continue till stopped.[1] Where a limitation is expressed or implied, evidence that the advertiser took the paper, and that the advertisement was brought to his knowledge, is not enough to sustain a finding that he authorized the continuation of it.[2] For advertising after valid notice to discontinue, the price is not recoverable; the claim, if any, must be for damages.[3]

It is better to be prepared to produce the file as the best evidence of actual publication;[4] but an advertising agent suing on a contract to insert in papers of a certain description, must at least prove the papers to have been such, and continuance for the time stipulated.[5] The rule as to shop-books[6] applies to the books of a newspaper printer to show his authority and prices, in connection with such evidence of performance.[7] A witness who wrote out a notice to be advertised, and gave it to another person to be inserted, but has no personal knowledge of the publication, cannot be examined, in the absence of all other proof, as to the contents published.[8]

Where the advertising was agreed to be done in some special form,—such as a chart,—not particularly described in the written contract, oral evidence is admissible to show that, at the time the contract was made, the plaintiff agreed to make the chart of a certain material, and to publish it in a certain manner.[9]

On the question of value, a qualified witness may be asked what is a fair price for advertising such a card in the manner published by the plaintiff.[10]

34. *Artists; Architects; Authors.*]—In an *artist's* action for price of a portrait, evidence that defendant admitted that the portrait was good and accepted a delivery, is enough to go to the jury, though there be conflicting evidence on the question whether

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[1] Ahern v. Standard Life Ins. Co. 2 Sweeny, 441.

[2] Dake v. Patterson, 5 Hun, 558. One who publishes an advertisement by direction of a sheriff, marshal or other officer, cannot recover against the party without showing that the latter authorized the publication. Raney v. Weed, 3 Sandf. 577, s. c. 8 N. Y. Leg. Obs. 182.

[3] Stephens v. Howe, 34 Super. Ct. (2 J. & S.) 133.

[4] This was held necessary in Richards v. Howard, 2 Nott & M'C. 474. *Contra*, Enloe v. Hall, 1 Humph. (Tenn.) 303, 310. Compare next paragraph.

[5] Holloway v. Stephens, 2 Supm. Ct. (T. & C.) 562.

[6] Pages 322 and 372 of this vol.

[7] Richards v. Howard (above); Thomas v. Dyott, 1 Nott & M'C. 186.

[8] City Bank of Brooklyn v Dearborn, 20 N. Y. 244.

[9] Stoops v. Smith, 100 Mass. 63, s. c. 1 Am. R. 85.

[10] Palmer v. White, 10 Cush. 321, 323.

it was really a good likeness.[1] It is not necessary that a witness be an artist, in order to be competent to express an opinion on the question of likeness.[2]

On the question whether an *architect's* employment was conditioned on the adoption of his plans, the fact that he took the plans away does not raise a legal presumption against him.[3] If it appear that the plans were left with the employer, the nature of the action is sufficient notice to produce them.[4] In the absence of express agreement, it is a question for the jury whether the commission charged is, under the circumstances, reasonable or unreasonable.[5]

In an action by an *author* or writer, for compensation, it is not necessary to produce the work written.[6] The authorship being in question, it is not competent to ask the opinion of a witness (founded merely on his having read the articles, and professing a knowledge of the plaintiff's style of writing), as to whether they were written by plaintiff.[7] On the question of value, the opinion of the writer, formed with reference to the time and labor employed in its preparation, is competent,[8] and, if uncontradicted, is sufficient.[9]

35. *Attorney and Counsel.*]—An attorney must prove an employment, either original, or by recognition during the progress of the suit;[10] or a promise to pay, made with knowledge of service rendered. Evidence of services rendered merely is not enough.[11] If retainer is proved, the fact that the service was for a third person does not defeat the recovery.[12] A paper in the

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[1] Francois v. Ocks, 2 E. D. Smith, 417.

[2] Barnes v. Ingalls, 39 Ala. 193.

[3] Nourry v. Lord, 3 Abb. Ct. App. Dec. 397.

[4] Hooker v. Eagle Bank of Rochester 80 N. Y. 83.

[5] Rose. N. P. 558, citing Chapman v. De Tastet, 2 Stark. 294; Upsdell v. Stewart, Peake, 193. The schedule of the American Institute of Architects in New York is held not a proper rule of value of services elsewhere. Mason v. United States, 4 Ct. of Cl. 495. As to defects in the work, see Peterson v. Rawson, 34 N. Y. 370; 2 Bosw. 234.

[6] Houghton v. Paine, 29 Vt. 57.

[7] Lee v. Bennett, How. App. Cas. 187, 202.

[8] Babcock v. Raymond, 2 Hilt. 61.

[9] Id.; s. p. Dickenson v. Fitchburgh, 13 Gray, 546, 555

[10] Hotchkiss v. Le Roy, 9 Johns. 142; Burghart v. Gardner, 3 Barb. 64. (For other earlier cases see 2 Greenl. Ev. 120, § 139, &c.)

[11] Id. Attorneys transacting business as brokers, and entitled to compensation as such, must prove express contract, to recover a counsel fee for conversations with their employers about the business. Walker v. Am. Nat. Bank, 49 N. Y. 659.

[12] Wilson v. Burr, 25 Wend. 386. As to proving ratification of employment of counsel,—see Harnett v. Garvey, 36 Super. Ct. (4 J. & S.) 326. Retainer by one partner, Merchant v. Belding, 49 How. Pr. 344. As to combined employment, see Smith v. Duchardt, 45 N. Y. 597; Van Rensselaer v. Aikin, 44 N. Y. 126, rev'g 44 Barb. 547. For rules applicable to contingent agreements, see Ogden v. Des Arts, 4 Duer, 275; Ely v. Spofford, 22 Barb. 231; Wood v. Young, 5 Wend. 620; Wadsworth v. Green, 1 Sand. 78; Satterlee v. Jones, 3 Duer, 102; Marsh v. Holbrook, 3 Abb. Ct. App. Dec. 176; Coughlin v. N. Y. Cent. R. R. 71 N. Y. 443, rev'g 8 Hun, 136; Whitehead v. Kennedy, 69 N. Y. 462, 467, rev'g 7 Hun, 230.

cause, signed by the client, is better than oral evidence;[1] but there must be proof of the signature.[2]

For services, under the Code of Procedure,[3] an attorney or counsellor must prove, in the absence of an express agreement as to amount, the value of the services actually rendered.[4] Taxable costs are not the measure; and production of the judgment roll showing the costs taxed is not alone enough;[5] but the amount of taxable costs is competent as bearing on the value of the services.[6] Where the amount of compensation to be paid was not fixed, evidence of what is ordinarily charged by attorneys or counsel in cases of the same character, is admissible.[7] The importance and incidental effects of the controversy,[8] and the value of the property involved in litigation,[9] are competent for the same purpose, and as bearing on the care and labor involved. Evidence of how often the plaintiff appeared as attorney or counsel in the court where the services were rendered, is competent as showing skill and experience.[10] Retainer and service in a cause being proved, at an agreed rate, the question whether there were merits is irrelevant.[11]

Upon principles already stated,[12] the opinion of an attorney or counsellor as to the value of the services[13] (but not as to legal effect or right),[14] is competent; but that of a non-professional witness is not.[15]

Uselessness of the service, through error in advice, is not a defense, unless negligence or want of skill be shown to have contributed thereto.[16] The burden of proof of negligence is on the client.[17] Failure of success is not *prima facie* evidence of negligence or want of proper skill.[18]

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[1] Harper v. Williamson, 1 McCord (So. Car.) 156; and see Hughes v. Christy, 26 Tex. 230, 232.

[2] Burghart v. Gardner (above). The presumption that the officer who allowed the document to be filed would not do so if it were not genuine, is not enough. Id.

[3] N. Y. Code, § 303; Code Civ. Pro. § 66.

[4] Garr v. Mairet, 1 Hilt. 498; s. p. Moore v. Westervelt, 3 Sandf. 762.

[5] Id.

[6] Foster v. Newbrough, 66 Barb. 645.

[7] Stanton v. Embrey, 93 U. S. (3 Otto), 548. An appellate court will not take judicial notice of value by looking at the reported briefs, &c. Pearson v. Darrington, 32 Ala. 227, 262.

[8] Harland v. Lilienthal, 53 N. Y. 438.

[9] Garfield v. Kirk, 65 Barb. 468.

[10] Harland v. Lilienthal (above).

[11] Case v. Hotchkiss, 1 Abb. Ct. App. Dec. 324, s. c. 3 Abb. Pr. N. S. 381; 3 Keyes, 334; 37 How. Pr. 283.

[12] Pages 323 and 368 of this vol.

[13] Beekman v. Platner, 15 Barb. 550; Hart v. Vidal, 6 Cal. 56.

[14] Clussman v. Merkel, 3 Bosw. 402. Other than foreign law.

[15] Smith v. Kobbe, 59 Barb. 289.

[16] Bowman v. Tallman, 3 Abb. Ct. App. Dec. 182, note. The right to compensation for services in one matter is not forfeited by his misconduct in another; Currie v. Cowles, 6 Bosw. 452; nor by acting adversely; Porter v. Ruckman, 38 N. Y. 210.

[17] Seymour v. Cagger, 13 Hun, 29.

[18] Id.

36. *Board and lodging.*]—An implied promise by a father to pay for board and lodging of a child may be inferred from knowledge and omission to dissent.[1] Declarations of the child, if part of the *res gestæ* of removal, may be competent on the question of *loco parentis*, or gratuitous support.[2] The implied promise of a guardian to continue to pay may be implied from previous payments.[3] Such agreements are not within the statute of frauds, unless expressly to continue beyond a year from the time when made.[4] But if for a year or more to commence at a future day they are.[5] An agreement for board, though with lodging, in a specified apartment, is not a tenancy of real estate within the statute requiring writing.[6]

One who has had long experience in the care of a person, *non compos*, is competent to express an opinion as to the value of his board and care.[7]

37. *Brokers.*]—In a conflict of evidence as to employment, evidence of acts and declarations by the plaintiff, made in the interest of the other party to the bargain, and in hostility to defendant within the period covered by the alleged employment, is competent.[8] A clause stating terms of employment, inserted in a contract with a third person to which plaintiff was not a party, does not exclude oral evidence.[9] The testimony of a broker, that in a hypothetical case stated, brokers would be entitled to commission, is inadmissible. This is a question of law.[10]

A real estate broker, acting as such (and not as middleman, with the knowledge of both parties that he acts for both),[11] cannot recover from either, if employed by and entitled to compensation from the other,[12] unless this double employment was disclosed to[13] and assented to, by both,[14] and evidence in his behalf to

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[1] Nichole v. Allen, 3 C. & P. 36. To recover for board and maintenance of defendant's illegitimate child, an express promise must be shown, or it must be shown that he admitted himself the father and adopted the child, in which case plaintiff may recover on the implied promise for maintenance during the adoption, but not for that after the adoption has been revoked. NELSON, CH. J. Moncrief v. Ely, 19 Wend. 406, and cases cited.

[2] Edy v. McCoy, 20 Ala. 403; and see p. 179 of this vol.

[3] Pegge v. Guardians of Lampeter Union, L. R. 7 C. P. 366, s. c. 2 Moak's Eng. 668.

[4] Knowlman v. Bluett, L. R. 9 Ex. 1, s. c. 7 Moak's Eng. 287.

[5] Wilson v. Martin, 1 Den. 602.

[6] Wilson v. Martin (above); Inman v. Stamp, 1 Stark. 12; Edge v. Strafford, 1 C. & J. 391. Nor is an agreement for lodgings only. White v. Maynard, 111 Mass. 250, s. c. 15 Am. R. 28. *Contra*, Wright v. Stavert, 2 E. & E. 721; L. J. 29 Q. B. 161.

[7] Kendall v. May, 10 Allen (Mass.) 59, 67. And see Reynolds v. Robinson, 64 N. Y. 589.

[8] Miller v. Irish, 63 N. Y. 652, aff'g 3 Hun, 352, s. c. 5 Supm. Ct. (T. & C.) 707.

[9] Weber v. Kingsland, 8 Bosw. 415.

[10] Main v. Eagle, 1 E. D. Smith, 619; Weber v. Kingsland, 8 Bosw. 415. Compare Allan v. Sundius, 1 H. & C. 123.

[11] Siegel v. Gould, 7 Lans. 177; Rupp v. Sampson, 16 Gray, 393.

[12] Watker v. Osgood, 98 Mass. 348.

[13] Redfield v. Tegg, 38 N. Y. 212; and see Coleman v. Garrigues, 18 Barb. 60; Glentworth v. Luthen, 21 Id. 145; Morrison v. New York & New Haven R. R. Co. 32 Id. 568.

[14] Rice v. Wood, 113 Mass. 133, s. c. 18 Am. R. 459.

show a custom among brokers to charge a commission to both parties in such cases is inadmissible.[1]

It is competent to ask the purchaser, as a witness, if he would have purchased had he not gone to the plaintiff and obtained information from him.[2] If the employment requires the broker to conclude a contract, he cannot prove a sale by a written instrument which on its face does not bind the purchaser, aided by parol evidence of mistake or other circumstances which would make it binding, for the seller (unless his acceptance of a purchaser is shown) is entitled to a valid contract under the statute.[3]

If there was a contract for compensation, plaintiff need not prove any usage of brokerage for like services;[4] and if it specified the conditions, evidence that, by the usage of brokers, commissions are allowable, although the conditions are not complied with, is not competent.[5] If plaintiff was not a broker by vocation, evidence of the usual commissions of a broker is not competent.[6] He must prove that he was a broker, to make evidence of their usual charge available as the measure of recovery.[7] General value of time, travel and expense may be proved by opinion.[8] Opinion is not competent on the value of brokage services for procuring a loan, for that is fixed by statute; nor the value of a loan of credit, for credit has no market value.[9] Evidence that defendant had previously paid plaintiff brokage on similar transactions is competent, as tending to show usage and knowledge of it.[10]

38. *Officers and promoters of corporations.*]—The law does not imply a promise on the part of corporations to pay their directors, as such; and it must appear that an express by-law or a resolution of the board[11] was adopted to compensate them, before a director can recover for services as director.[12] If the com-

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[1] Farnsworth v. Hemmer, 1 Allen, 494; Raisin v. Clark, 41 Md. 158, s. c. 20 Am. R. 66; and see Lynch v. Fallon, 11 R. I. 311, s. c. 23 Am. R. 458; and p. 298 of this vol.

[2] Mansell v. Clements, L. R. 9 Com. Pl. 139, s. c. 8 Moak's Eng. R. 449.

[3] Stitt v. Huidekopers, 17 Wall. 397. As to whether consummated purchase must be shown, compare Love v. Miller, 53 Ind. 294, s. c. 21 Am. R. 192; and Richards v. Jackson, 31 Md. 250, s. c. 1 Am. R. 49.

[4] Paulsen v. Dallett, 2 Daly, 40.

[5] Main v. Eagle, 1 E. D. Smith, 619.

[6] Lyon v. Valentine, 33 Barb. 271. Compare Erben v. Lorillard, 19 N. Y. 299; 2 Keyes, 567.

[7] Main v. Eagle (above).

[8] Perrine v. Hotchkiss, 58 Barb. 77.

[9] Perrine v. Hotchkiss, 58 Barb. 77.

[10] Weber v Kingsland, 8 Bosw. 415.

[11] Or of the corporators.

[12] Rockford, Rock Island & St. Louis R. R. Co. v. Sage, 65 Ill. 328, s. c. 16 Am. R. 587, and cases cited. The resolution cannot be sustained by the plaintiff's vote or presence to make quorum. Butts v. Wood, 37 N. Y. 317, aff'g 38 Barb. 181; and see Gridley v. Lafayette, &c. R. R. Co. 71 Ill. 200. The board cannot vote themselves extra pay for extra service. See Branch Bank v. Collins, 7 Ala. 95; Blatchford v. Ross, 5 Abb. Pr. N. S. 434; s. p. 37 How. Pr. 110; 54 Barb. 42.

pensation is fixed by statute, a director cannot be allowed extra compensation for extra services rendered while he was a director.[1] Otherwise, as to duties not imposed upon him as director by the charter or by-laws of the company, where he acted not as director but as agent, for instance, in soliciting subscriptions and procuring right of way.[2] If a director is appointed by the board agent of the corporation in such other matters, clearly beyond the range of his duty, there is an implied promise on the part of the corporation to compensate him for such services rendered;[3] but not for services in effecting the organization, unless they were unquestionably beyond the range of his official duties.[4] Where the charter provides that the president shall receive no pay for official services unless voted him by the board, any service performed by him will be presumed to have been rendered as president, unless from its nature it appears that it was outside the duties of his office.[5] The rule requiring an express contract to pay directors, made before service rendered, is applicable to the offices of president, treasurer, and the like, who hold as trustees.[6] If the evidence of promise is oral, the admissions of the officer that he was not to have compensation are competent against him.[7]

To enable a *promoter* to recover against the subsequently organized corporation, it is not enough that the corporation has accepted the result of his labors and enjoyed its benefits, unless it appear that the projectors, by whom the services were employed,

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[1] Branch Bank v. Collins, 7 Ala. N. S. 95; The same v. Scott, Id. 107. But he may be allowed compensation for services rendered before he became director. Ib.

[2] Cheeney v. Lafayette, Bloomington & Mississippi R. R. Co. 68 Ill. 570, s. c. 18 Am. R. 585; Shackleford v. Orleans R. R. Co. 37 Miss. 202; Hall v. Vt. & Mass. R. R. Co. 28 Vt. 401.

[3] Shackelford v. New Orleans R. R. Co. 37 Miss. 202. *Contra*, New York & New Haven R. R. Co. v. Ketchum, 27 Conn. 170, 181; and compare Stacy v. State Bank of Illinois, 4 Scam. 91.

[4] New York & New Haven R. R. Co. v. Ketchum, 27 Conn. 170. But compare as to services in organization, Hall v. Vermont, &c. R. R. Co. 28 Vt. (2 Ams.) 401; Low v. Connecticut, &c. R. R. Co. 45 N. H. 370.

[5] Olney v. Chadsey, 7 R. I. 224. A director elected to serve without compensation cannot recover against the company for services rendered in that capacity, or for such as were incidental to his office as director. Loan Association v. Stonemetz, 29 Pa. St. 534. Even a resolution passed by the corporation after the services were rendered, that they be paid for, is without consideration and cannot be enforced by action. Ib. And to similar effect is Dunstan v. Imperial Gas Co. 3 Barn. & Ad. 125. See also on the general subject of officers' implied contract for compensation, (besides the cases cited in following notes): Jackson v. N. Y. Cent. R. Co. 2 Supreme Ct. (T. & C.) 653; Henry v. Rutland & Burlington R. Co. 27 Vt. 435; Rockford, Rock Island, &c. R. Co. v. Sage, 65 Ill. 328; Balstow v. City R. Co. 42 Cal. 465; Godbold v. Bank of Mobile, 11 Ala. 191; Belfast & County Downs R. Co. v. Belfast, Holywood, &c. R. Co., Ir. R. 3 Eq. 581. A vote of the directors during the incumbency of one president, fixing the salary of the president, does not amount to a written agreement to pay the same to a president subsequently elected, and any presumption arising from it may be rebutted by evidence of the situation or cessation of business, etc. Commonwealth Ins. Co. v. Crane, 6 Metc. 64.

[6] Holder v. Lafayette, &c. R. R. Co. 71 Ill. 106, s. c. 22 Am. R. 29; Kilpatrick v. Penrose Ferry Co. 49 Penn. St. 118; and see Cheeney v. Lafayette, &c. R. R. Co. 68 Ill. 570, s. c. 18 Am. R. 584.

[7] Commonwealth Ins. Co. v. Crane, 6 Metc. 64.

on an understanding they should be paid for, were a majority of the promoters, or that the charter had already been obtained, so that there was an inchoate corporation.[1] If no corporation was formed, evidence that defendant took part in the preliminary proceedings is competent as tending to show his authority to incur the necessary expenses.[2]

39. *Parent and child.*]—To sustain the father's action for the child's services, general evidence that plaintiff is the father, is *prima facie* enough. He is not to be required to prove legitimacy in the first instance.[3] If a parent sends the child to engage himself, he may recover on the terms the child made, without proof that they were known to the father.[4]

To entitle the child to sue, evidence that the child contracted on his own account, with the knowledge and tacit assent of the father;[5] or that the father has been continuously absent, without providing for the child,[6] or that the father made the contract, stipulating that the wages should be paid to the child,[7] is enough. So is evidence of express emancipation. Payment to the child may be a defense, unless the parent gave notice.[8]

40. *Physicians, &c.*]—A diploma from a medical college is sufficiently proved by a witness who identifies the corporate seal, and testifies to the genuineness of the signatures of the officers, though his knowledge of their writing was not acquired by seeing them write, but by familiarity with diplomas under their signatures, including one granted to himself.[9] Recovery for a beneficial operation is not prevented by showing that it was not performed with the highest skill.[10] Even if the patient is deceased,

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[1] Bell's Gap R. R. Co. v. Christy, 79 Penn. St. 54, s. c. 21 Am. R. 39. But compare Rockford, Rock Island, &c. R. R. Co. v. Sage, 65 Ill. 328, s. c. 16 Am. R. 587, and cases cited.

[2] Lake v. Duke of Argyll, 6 Q. B. 479; and see Ebbinghousen v. Worth, 4 Abb. New Cas. note.

[3] Haight v. Wright, 20 How. Pr. 91. *Contra*, Armstrong v. McDonald, 10 Barb. 300, clearly unsound.

[4] Herderhen v. Cook, 66 Barb. 21. As to whether the declarations of the son in such case are competent in evidence to prove the terms of the contract, compare Corbin v. Adams, 6 Cush. 93, and p. 177, of this vol.

[5] Armstrong v. McDonald, 10 Barb. 300.

[6] Canovar v. Cooper, 3 Barb. 115.

[7] Snedeker v. Everingham, 27 N. J. L. (3 Dutch.) 143, 148. Compare Brown v. Town of Canton, 49 N. Y. 632, rev'g 4 Lans. 409; Atwood v. Holcomb, 39 Conn. 270, s. c. 12 Am. Rep. 386. As to service under void indentures, compare Letts v. Brooks, Hill & D. Supp. 36, and Lewis v. Trickey, 20 Barb. 387.

[8] Herrick v. Fritcher, 47 Barb. 589; N. Y. L. 1850, c. 266; Clinton v. Rowland, 24 Barb. 634.

[9] Finch v. Gridley, 25 Wend. 469. For other rules, as to corporate acts, see p. 46, &c., of this vol., and compare Hunter v. Blount, 27 Geo. 76. As to evidence of employment, see Crane v. Baudoine, 55 N. Y. 256, rev'g 65 Barb. 260; Cooper v. N. Y. Central & Hudson River R. R. Co. 6 Hun, 276; Mundorf v. Wickersham, 63 Penn. St. 87, s. c. 3 Am. R. 531; M'Bride's Ex'x v. Watts, 1 M'Cord, 384.

[10] Alder v. Buckley, 1 Swan (Tenn.) 69; and see 3 Abb. New Cas. 229. General professional character not in issue. Jeffries v. Harris, 3 Hawks (No. Cas.) 105. As

the burden of proof is on his executor or administrator, to show that services proved to have been rendered, were gratuitous, if that be relied on.[1]

41. *Rewards.*]—The printed advertisement is competent upon adducing evidence tending to show that it was published by authority of defendant, or his agent.[2] Oral evidence is admissible to show that an ambiguous offer of reward relating to a class of crimes, was not retrospective.[3] Plaintiff must show that performance, on his part, was in consideration of the offer.[4] He cannot recover if he acted in ignorance of it.[5] But notice to defendant that he was acting on the offer, is not necessary.[6] If the reward was offered for two results, such as apprehension and conviction,[7] or apprehension and recovery of stolen property,[8] both, must be shown. On a reward for a detection or conviction, &c., the record of a conviction of an offender is competent,[9] but not conclusive,[10] evidence of his guilt, as against the offerer. If conviction was prevented by dismissal of the charge procured by the offerer, plaintiff may still recover, as if he proved conviction; and if the dismissal was procured by the attorney of the offerer, for the purpose of using the testimony of the accused, it may be inferred, in the absence of evidence, that the attorney acted within his authority.[11]

Evidence that the offer was publicly withdrawn before plaintiff acted on it, is competent, and is a defense, although plaintiff acted in ignorance of the withdrawal.[12]

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to declining to answer respecting secret processes, compare Naumon v. Zoerklaut, 21 Wisc. 466; Richards v. Judd, 15 Abb. Pr. N. S. 184.

[1] Scott's Case, 1 Redf. Surr. R. 234, 237.

[2] Lee v. Flemingsburg, 7 Dana (Ky.) 28; see, also, p. 96, of this vol.

[3] Salbadore v. Crescent Mut. Ins. Co. 22 La. Ann. 338.

[4] Lee v. Flemingsburgh (above), and see Marvin v. Treat, 37 Conn. 96, s. c. 9 Am. R. 307.

[5] Howland v. Lounds, 51 N. Y. 604. And if the offer is for apprehension and conviction of the offender, one who procured apprehension before he knew of the offer, cannot recover on proof of a subsequent conviction, even though after he became aware of the offer he aided the conviction; for both apprehension and conviction must be aided, *in consequence of such a reward*, to entitle the party to claim it. Fitch v. Snedaker, 38 N. Y. 248. Compare Gregg v. Pierce, 53 Barb. 387. As to apportionment of reward, see Janvrin v. Town of Exeter, 48 N. H. 83, s. c. 2 Am. R. 185; City Bank v. Bangs, 2 Edw. 95; Fargo v. Arthur, 43 How. Pr. 193; Prentiss v. Farnham, 22 Barb. 519.

[6] Baker v. Hoag, 7 Barb. 113; Hayden v. Songer, Ind. May, 1877.

[7] Fitch v. Snedaker (above).

[8] Jones v. Phœnix Bank, 8 N. Y. 228.

[9] Borough of York v. Forscht, 23 Penn. St 391.

[10] Mead v. City of Boston, 3 Cush. 404. It has been held that on an offer for detection of a thief, evidence that defendant, on plaintiff's information, caused a person to be arrested on the charge, may be *prima facie* sufficient. Brennan v. Haff, 1 Hilt. 511.

[11] Louisville & Nashville R. R. Co. v. Goodnight, 10 Bush, 552, s. c. 19 Am. R. 80.

[12] Shuey v. United States, 92 U. S. (2 Otto), 73.

III. Actions for Wrongful Dismissal, or Refusal to Receive.

42. *Dismissal or refusal.*]—On the question whether an employe was discharged, the declarations of a party, made in continuation of the transaction, may be competent as part of the *res gestæ*;[1] but evidence of subsequent instructions never communicated to the employe, is not.[2] Under a contract for future employment, evidence that on the arrival of the time for commencing service the employe was ready and willing (and offered, if necessary), to perform, and that the employer absolutely repudiated the contract, is sufficient without proof that the plaintiff thereafter tendered service, or kept himself in readiness to perform;[3] and the damages are *prima facie* the wages for the entire term.[4] In showing the probable compensation for a voyage, where the amount was contingent, testimony of experts to the average results of similar voyages, is competent; and the accounts of such voyages need not be produced.[5]

43. *Defenses.*]—Misconduct known at the time of discharge may be proven, though committed some time before the discharge, and though no cause was assigned for the discharge.[6] Evidence of total incapacity for service (if pleaded), is competent in defense of an action for discharging plaintiff without the length of notice to terminate the contract provided for by its terms.[7]

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[1] Thus, where the owner went on board the ship and took away the ship's papers, evidence that, on immediately depositing them with a third person, he indicated dismissal to be the reason, brings the words within the rule of the *res gestæ*. Russell v. Frisbie, 19 Conn. 205.

[2] Carrig v. Oaks, 110 Mass. 145.

[3] Howard v. Daly, 61 N. Y. 362; and see Dugan v. Anderson, 36 Md. 567, s. c. 11 Am. R. 509. Compare Colburn v. Woodworth, 31 Barb. 381. It is the better opinion that a repudiation of the contract before the time for commencing will be a breach, if the employer also put it out of his power to perform; or if the avowal was intended to and did influence the conduct of the employe to his damage; see, also, Gray v. Green, 9 Hun, 334.

[4] Howard v. Daly (above). Whether plaintiff must prove that he sought employment elsewhere, compare Id. and Polk v. Daly, 14 Abb. Pr. N. S. 156; Moody v. Leverich, Id. 145; Farrell v. French, Blatchf & H. 275; Id. 366.

[5] Eldredge v. Smith, 13 Allen, 140.

[6] Harrington v. First Nat. Bank of Chittenango, 1 Supm. Ct. (T. & C.) 361. Compare Spotswood v. Barron, 5 Exch. 110. If the contract reserved absolute right to dismiss, assigning a false reason is not material. Smith v. Douglass, 4 Daly, 191.

[7] Lyon v. Pollard, 20 Wall. 403. Inability resulting from sickness, while it may not render the employe liable, may prevent him from sustaining an action for dismissal. Poussard v. Spiers, 1 Queen's Bench Div. 410, s. c. 17 Moak's Eng. 93.

CHAPTER XX.

ACTIONS ON VARIOUS EXPRESS PROMISES TO PAY MONEY.

1. General principles.
2. Promise to pay purchase-money.
3. — incumbrance.
4. Promise to third person to pay plaintiff.
5. Promise to plaintiff to pay third person.

1. *General principles.*]—The rules applicable to oral contracts generally are illustrated in chapters XIII to XX; those applicable to unsealed writings in chapters XVI to XXVI; and those applicable to sealed and witnessed instruments in chapter XXVII.

2. *Promise to pay purchase-money.*]—The original contract, and delivery and acceptance of deed having been proved, evidence of express promise to pay balance is not necessary.[1] Conversely if an express and unconditional obligation to pay is proved,—as, for instance, notes given for purchase-money,—plaintiff need not prove the conveyance.[2] Parol evidence is admissible to show the amount agreed to be paid,[3] and the time,[4] and its non-payment,[5] notwithstanding an acknowledgment in the deed of the payment of a different or less[6] consideration in full.

A covenant purporting to bind the grantee will sustain an action against him, although he did not sign, if there be evidence of his acceptance of the deed.[7]

Declarations of the grantor that a specified sum was due, are competent against him to show that no more was due;[8] but are not competent in his own favor, even though made at execution, unless brought home to the grantee or plaintiff.[9]

3. — *incumbrance.*]—Plaintiff may show that, as a condition of delivery or acceptance of a deed without covenants, defendant orally promised to pay an incumbrance.[10] Otherwise if the promise was only for the consideration mentioned in the deed and the deed contains special covenants, and the incumbrance was not created by the party.[11]

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[1] Vernol v. Vernol, 63 N. Y. 45. Compare Huffman v. Ackley, 34 Mo. 277.
[2] Lyman v. United States Bank, 12 How. (U. S.) 225.
[3] Bowen v. Bell, 20 Johns. 338; McCrea v. Purmort, 16 Wend. 460, aff'g 5 Paige, 620, and see 16 N. Y. 538.
[4] Shepard v. Little, 14 Johns. 210.
[5] Same cases.
[6] Murray v. Smith, 1 Duer, 412; Strawbridge v. Cartledge, 7 Watts & S. 394.
[7] Atlantic Dock Co. v. Leavitt, 54 N. Y. 35.
[8] Reed v. Reed, 12 Penn. St. 117.
[9] Trimmer v. Trimmer, 13 Hun, 182.
[10] Remington v. Palmer, 62 N. Y. 31, rev'g 1 Hun, 619, s. c. 4 Supm. Ct. (T. & C.) 696. And see 12 Moak's Eng. 243, n.
[11] Howe v. Walker, 4 Gray, 318; 1 Greenl. Ev. 13 ed. 327, n.; 2 Whart. Ev. § 1014.

4. *Promise to third person to pay plaintiff.*]—A promise on a valid consideration, to pay a third person,[1] will sustain an action by the latter in his own name, though he was not privy to the consideration.[2] The promise may be implied from the acceptance of a conveyance expressed to be subject to the payment of a specified incumbrance,[3] or a specified sum.[4] If in writing, the instrument must be produced, or accounted for.[5] If the language of the promise is indefinite or ambiguous,—as, for instance, to pay "your account with A.,"—it may be explained by parol evidence, to show whether a past or future account was intended.[6]

Proof of the statement of the third person, at the time of incurring the debt, is sufficient evidence of his indebtedness to the plaintiff.[7] A judgment upon the merits recovered against the third person, even after the promise, in an action fully litigated and deliberately and intelligently decided by a competent court, is *prima facie*, and usually conclusive, evidence, against the promissor, of the amount of the debt, unless fraud or collusion is shown.[8] If the precise obligation incurred is identified by the promise,—as in case of a covenant to pay a designated mortgage,—the defendant cannot question the existence and validity of the obligation, but may show that it has been paid.[9] It is not necessary to prove the concurrence or assent of other beneficiaries,[10] unless the contract requires it. But revocation by the promisee, before assent by the plaintiff, will bar the action.[11] Oral evidence that the promisor was agent for the creditor is not competent as between them, to exonerate the promisor from liability, unless the face of the instrument bears some indication of the agency.[12]

5. *Promise to plaintiff to pay third person.*]—Upon a promise to plaintiff to pay a third person, plaintiff need not show that he has paid the debt.[13]

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[1] As distinguished from a bond conditioned for such payment. Turk v. Ridge, 41 N. Y. 201.

[2] Lawrence v. Fox, 20 N. Y. 268; Hutchings v. Miner, 46 Id. 456; Hall v. Robbins, 61 Barb. 33, s. c. 4 Lans. 463; Barlow v. Myers, 64 N. Y. 41, rev'g 3 Hun, 270; Hendrick v. Lindsay, 93 U. S. (3 Otto), 143; and cases collected in 2 Abb. N. Y. Dig. New ed. 170. 174; 5 Id. 289. *Contra*, except in cases of trust, agency, &c., Exch. Bk. of St. Louis v. Rice, 107 Mass. 37, s. c. 9 Am. R. 1.

[3] Collins v. Rowe, 1 Abb. New Cas. 97, and cases cited. For the theories sustaining this implication, see note in Binsse v. Paige, 1 Abb. Ct. App. Dec. 138.

[4] Dingeldein v. Third Ave. R. R. Co. 37 N. Y. 575, rev'g 9 Bosw. 79.

[5] Hatch v. Pryor, 2 Abb. Ct. App. Dec. 343.

[6] Wallrath v. Thompson, 4 Hill, 200.

[7] Lawrence v. Fox, 20 N. Y. 268. And see Draper v. Austin, 46 Vt. 215; and page 260 of this vol.

[8] See Luddington's Petition, 5 Abb. New Cas. 307, and cases cited.

[9] Hartley v. Tatham, 2 Abb. Ct. App. Dec. 339; and see Ritter v. Phillips, 53 N. Y. 586, affi'g 34 Super. Ct. (J. & S.) 289; 35 Id. 388.

[10] Seaman v. Hasbrouck, 35 Barb. 151.

[11] Kelly v. Roberts, 40 N. Y. 432; 16 Alb. L. J. 378; and see Devlin v. Murphy, 5 Abb. New Cas. 242.

[12] Auburn City Bank v. Leonard, 40 Barb. 119.

[13] Stout v. Folger, 34 Iowa, 71, s. c. 11 Am. R. 138; Furnas v. Durgin, 119 Mass. 500, s. c. 20 Am. R. 341; 15 Alb. L. J. 424. Otherwise if the promise was only to indemnify.

CHAPTER XXI.

ACTIONS ON NEGOTIABLE PAPER.

I. Rules applicable to negotiable paper generally.
1. General order of proof.
2. Production.
3. Lost or destroyed paper.
4. Proof of execution.
5. Admissions.
6. Testimony of the supposed writer.
7. Direct testimony to signature.
8. Witness who knows the handwriting generally.
9. Means of knowledge.
10. Opinion or belief.
11. Refreshing memory.
12. Testing the witness.
13. Comparison of hands.
14. Opinions of witnesses.
15. Matters of description.
16. Qualifications of witness.
17. Photographs.
18. Mark.
19. Identity of names.
20. Fictitious person.
21. Joint makers, &c.
22. Married woman.
23. Agent's signature.
24. Partnership signature.
25. Corporation paper.
26. Oral evidence to show real party.
27. Evidences of title.
28. Delivery.
29. Consideration.
30. Accommodation paper.
31. Alterations.
32. — how pleaded.
33. — mode of proof.
34. Blanks.
35. Marks of cancellation.
36. General rule as to oral evidence to vary.
37. Date.
38. Time of payment.
39. Amount.
40. Medium.
41. Interest.
42. Place of payment.
43. Defeasance.

I. Rules applicable to, generally—*continued.*
44. Particular fund; agreement to set-off; to renew.
45. Subsequent modification.
46. Indorsement.
47. Oral evidence to vary an indorsement.
48. Indorsement as a transfer of title.
49. Demand.
50. Non-payment.
51. Indorsements of payment, &c.
52. Competency of a party to the instrument to impeach it. The New York rule.
53. — the United States Court rule.
54. Admissions and declarations.
55. Foreign law.

II. Action by payee (or original "bearer") against maker.
56. Plaintiff's case.

III. Action against acceptor.
57. Acceptance.
58. Other facts.
59. Promise to accept.
60. Several parts, or duplicates.

IV. Action against drawer; on non-acceptance.
61. Refusal to accept.
62. Excuse for non-presentment.

V. Action against drawer, &c.; on non-payment.
63. Acceptance and presentment.

VI. Action against indorsers, &c.
64. Execution of the instrument.
65. Pleading facts to charge indorser.
66. Cogency of the evidence.
67. Time of demand.
68. Place.
69. Authority.
70. Identity of maker or drawee, and authority of agent or servant.
71. Production of the instrument.

VI. Action against indorsers—*continued.*
72. Due diligence in demand.
73. Official protest as evidence.
74. Sealed certificate.
75. Unsealed certificate.
76. Copy.
77. Secondary evidence.
78. Memoranda to refresh memory.
79. Memoranda of deceased person.
80. Legal notice to charge indorser.
81. Identity of person served.
82. Executors and administrators.
83. Time of service.
84. Actual notice.
85. Due diligence by the holder.
86. Place of directing notice.
87. Due diligence in inquiry.
88. Evidence of the contents of the notice.
89. Extrinsic evidence as to imperfect notice.
90. Mailing.
91. Inference of delivery or mailing from ordinary course of business.
92. Admissions of demand made and notice received.
93. Indirect evidence of notice.
94. Waiver of demand or notice.
95. Want of funds as an excuse.

VII. Irregular indorsement (by third person before payee).
96. Payee against irregular indorser. New York doctrine.
97. Defenses.
98. Subsequent transferee against irregular indorsee.
99. The United States Court doctrine.
100. Oral evidence to vary the ascertained contract.

VIII. Defenses generally.
101. Defenses available against all holders, whether *bona fide* or otherwise.
102. Failure or want of consideration.
103. Accommodation paper.
104. Fraud.
105. Duress.
106. Impeaching plaintiff's title.
107. Collateral security.
108. Transfer after maturity.

VIII. Defenses generally—*continued.*
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110. Payment.
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IX. Defendant's evidence to require plaintiff to prove title as a bona fide holder for value before maturity.
112. The general rule.
113. Failure or want of consideration.

X. Plaintiff's evidence of title as holder for value before maturity.
114. Burden of proof.
115. Evidence that transfer was before maturity.
116. — and before notice.
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118. Evidence of good faith.
119. "Taking up."

XI. Defendant's evidence that plaintiff is not a holder in good faith.
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121. Notice.
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XII. Action on municipal and other coupon bonds.
123. Title.
124. Evidence of regularity and power.
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XIII. Bank Checks.
126. Stamp.
127. Title.
128. Oral evidence to vary.
129. Laches.
130. Action against drawer.
131. Action against the bank.

XIV. Action on stock and premium notes given to insurance companies.
132. Stock notes.
133. Premium notes.
134. Losses and assessments.
135. Defenses.

I. Rules Applicable to Negotiable Paper Generally.

1. *General order of proof.*]—In all classes of cases the usual order of proof[1] is, for plaintiff;

1. To produce the paper sued on;

2. If execution be not admitted, to prove the signatures, and the necessary indorsements, if any;

3. To give such extrinsic evidence, if any, as may be necessary to explain the paper. If the action is against an indorser, or against a drawer of a bill, plaintiff will go on;

4. To prove presentment, and demand and dishonor (and, if necessary, protest), or circumstances to excuse these; and

5. Notice of dishonor, &c., to the indorser, or circumstances to excuse it.

The possession and proof of execution, &c., raise a legal presumption of consideration, and of title in plaintiff by a transfer before maturity in good faith and for value.[2] If plaintiff was not an original party to the paper, evidence of certain infirmities (below stated), will throw on him the burden of affirmative proof of title before maturity and for value; and this having been given, defendant may then prove that, nevertheless, plaintiff had notice of the infirmity. Though defendant be not able to prove such infirmity in the inception of the paper as will cast this burden on plaintiff, he may show that plaintiff was not a *bona fide* holder for value, before maturity; and *prima facie* evidence to negative either of these elements in plaintiff's title will let in evidence of any equity in favor of defendant that would be available against the original payee, if properly pleaded. As the mode of proof of some of the facts thus involved is common to actions of a great variety of classes, the most useful method will be to state first those rules applicable in actions of several classes, and afterward those peculiar to actions by Payee against Maker, Indorsee against Indorser, and the like.

2. *Production.*]—If the making or contents of the paper are in issue, the paper must be produced,[3] or its absence accounted for.[4] It is not an excuse to show that the paper is without the jurisdiction, and in the possession of an adverse claimant by defective title.[5] Defendant does not waive non-production of a negotiable note by going into evidence on the merits.[6] Production at the trial is enough, although the paper had been previously

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[1] See paragraphs 112 and 113, below, and Michigan Bank v. Eldred, 9 Wall. 548; and paragraphs 114–118, below.

[2] See paragraphs 27, 46, 97, 103, 112, 123 and 127, below, and Chambers County v. Clews, 21 Wall. 317.

[3] Potter v. Earnst, 51 Ind. 384.

[4] By the English rule, even when not in issue, interest is not recoverable without production. Hutton v. Ward, 15 Q. B. 26; L. J. 19 Q. B. 293; Rosc. N. P. 350.

[5] Van Alstyne v. Commercial Bank, 4 Abb. Ct. App. Dec. 452.

[6] Kirby v. Sisson, 2 Wend. 550.

lost, if no objection was made to, and no prejudice suffered by, demand and notice while lost.[1]

If the paper was intentionally destroyed by plaintiff himself, he must give a satisfactory explanation preliminary to secondary evidence.[2] If plaintiff's pleading and evidence trace the note into defendant's possession, the action itself is sufficient notice to produce it, to allow secondary evidence of its contents,[3] and of its indorsements of whatever kind,[4] if he does not produce it.

A statute excusing proof of *execution* unless there is a sworn denial of signature, does not dispense with production of the note.[5] A rule of court excusing plaintiff from proving execution, if defendant omits to file an affidavit denying it, means only actual making and delivery of the paper, not its validity, and only enables plaintiff to make out a *prima facie* case, not a conclusive one.[6] If execution is admitted, the existence of the instrument is proved by its production and evidence of identity.

3. *Lost or destroyed paper.*]—The loss or destruction need not be alleged in the complaint.[7] The question whether the evidence of loss or destruction is sufficient to admit secondary evidence is for the court, not the jury.[8] Positive and unequivocal evidence is not essential.[9] Parol evidence of the contents of a lost note or bill is admissible;[10] but the court are to require indemnity, if it was negotiable.[11] To entitle to indemnity, there must be some evidence that the paper was negotiable;[12] but there need not now be evidence that it was indorsed or payable to bearer. The statute[13] requires indemnity, though unindorsed.[14] It is not necessary to prove tender of indemnity before trial,[15] except for the purpose of recovering interest where the party was not in default with-

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[1] Smith v. Rockwell, 2 Hill, 482.

[2] Blade v. Noland, 12 Wend. 173; and see Steele v. Lord, 70 N. Y. 283. Compare Vanauken v. Hornbeck, 2 Green (N. J.) 178.

[3] Hammond v. Hopping, 13 Wend. 505.

[4] Howell v. Huyck, 2 Abb. Ct. App. Dec. 425. It may be proved by a witness testifying that he has seen the note in defendant's possession, and that he knows the signature to be genuine. Prescott v. Ward, 10 Allen, 203.

[5] Sebree v. Dorr, 9 Wheat. 681.

[6] Freeman v. Ellison, 37 Mich. 459, s. c. 18 Alb. L. J. 210.

[7] Ronner v. Bank of Columbia, 9 Wheat. 581.

[8] Page v. Page, 15 Pick. 374. Whether the loss was by destruction, so that indemnity is dispensed with, may be a question for the jury. Swift v. Stevens, 8 Conn. 436.

[9] Swift v. Stevens (above); see, also, 3 Abb. N. Y. Dig. new ed. 64–67.

[10] 2 N. Y. R. S. 406, § 75. Even though lost since the commencement of the suit. Jacks v. Darrin, 1 Abb. Pr. 148, s. c. 3 E. D. Smith, 548. For the conflicting rules, where no such statute exists, see 2 Pars. on Pr. N. &c. 290, &c. Being beyond the jurisdiction, and adversely held, is not a loss. Van Alstyne v. Commercial Bank, 4 Abb. Ct. App. Dec. 449.

[11] Same statute.

[12] Blade v. Noland, 12 Wend. 173, and see Wright v. Wright, 54 N. Y. 441.

[13] 2 N. Y. R. S. 406, §§ 75, 76.

[14] Frank v. Wessels, 64 N. Y. 158. Compare 2 Pars. on Pr. N. &c. 290.

[15] Frank v. Wessels, 64 N. Y. 158, 159.

out it, and, in some cases, costs.[1] Proof of actual destruction, whether accidental[2] or explained, dispenses with indemnity.

Proving loss or destruction does not dispense with proof of the execution and identity of the original. A sworn copy, given in evidence, excludes parol evidence to vary the contract, as would the original.[3] But it is not necessary to prove the original consideration, nor non-payment, merely because of loss or destruction.

4. *Proof of execution.*]—The signature of the party to be charged, if execution is not admitted,[4] must be proved, before the note can be put in evidence.[5] The signer, though competent and available as a witness, need not be called.[6] Proof of signature is *prima facie* sufficient, without other proof of genuineness.[7]

But if there was a subscribing witness, he must be called,[8] or his absence accounted for by showing that he is not living,[9] or not competent to testify, or not within the jurisdiction of the court, or not to be found with due diligence; and where his absence is thus excused, his handwriting must be proved. If there are several subscribing witnesses, it is sufficient to produce either who can prove the note; but the absence of all must be accounted for before the note can be proved by the handwriting of either.[10] The fact that the execution was abroad raises a presumption that the subscribing witness is beyond jurisdiction.[11] Plaintiff may prove that a name written at the left hand, in the place usual for the signature of a subscribing witness (though without a prefix indicating that it was a witness's signature), was, in fact, the signature of a maker.[12] If the subscribing witness leaves the question of execution in doubt,[13] other evidence of execution becomes admissible. A note bearing a seal is admissible under a complaint not

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[1] 2 Para. on Pr. N. &c. 302.

[2] Des Arts v. Leggett, 16 N. Y. 586, 588.

[3] Reed v. United States Express Co. 48 N. Y. 462.

[4] Or, if execution is denied on oath, where that is required by the statute. Holmes v. Riley, 14 Kans. 131.

[5] Id.

[6] Smith v. Prescott, 17 Me. 277.

[7] St. John v. Am. Mut. Life Ins. Co. 2 Duer, 412; and see Irvine v. Lumberman's Bank, 2 Watts & S. 190. The fact that the handwriting in the body of a check was not that of the drawer, raises no presumption that the check was not genuine, especially where there is evidence that the usage of the drawer was to have his checks filled up by a clerk or book-keeper. Redington v. Woods, 45 Cal. 406, s. c. 13 Am. R. 190.

[8] 3 Abb. N. Y. Dig. new ed. 133; 2 Para. on Prom. N. & B. 474. The fact that the maker is non-competent does not dispense with the necessity.

[9] Or, unless plaintiff can prove an admission. See paragraph 5.

[10] 3 Abb. N. Y. Dig. new ed. 134, 135.

[11] Savage v. D'Wolf, 1 Blatchf. 343.

[12] Rape v. Westcott, 18 N. J. L. (3 Harr.) 245. So he might show that a signature appearing to be that of a witness was a fictitious one, or a subsequent memorandum for purposes of identification, or an unauthorized addition. Id. Per Hornblower, C. J.

[13] Either by imperfect recollection; Quimby v. Buzzell, 16 Me. 470; or by denying all knowledge of the matter. Talbot v. Hobson, 7 Taunt. 254.

alleging that it was sealed;[1] and if the words of the instrument refer to a seal, or make no reference to mode of authentication, the presumption is that the seal was duly affixed;[2] but, if the words of the note refer to signing only, as "witness my hand this," &c., a seal if affixed should be proved as well as the signature.[3]

5. *Admissions.*]—The admission of defendant,[4] or his attorney in the cause,[5] is competent proof of the genuineness of the signature. But the evidence must tend to identify the note admitted with that produced. If the note was shown when the admission was made, a very general admission that it is all right, is enough;[6] if not shown, an admission referring to it either by the amount alone,[7] or by the name of the payee alone,[8] is not enough. If only a copy was shown there must be other evidence that the note produced on the trial is the original and genuine one.[9]

If the note is not under seal, proof of an admission by the signer of its genuineness, dispenses with the necessity of calling a subscribing witness.[10] If under seal it does not.[11]

The admission alone is not conclusive;[12] but if made deliberately, and with knowledge that the signature was not genuine, it may be available as a ratification, even though the facts do not raise an estoppel.[13] Evidence that defendant accredited the paper by acknowledging it to be genuine, and that plaintiff acted,[14] or refrained from acting,[15] on the faith of such representation, estops defendant from denying the genuineness. Evidence that defendant had previously recognized the validity of similar unauthorized signatures, with knowledge that they were such, is competent, as tending to show authority in the one who assumed to sign.[16]

6. *Testimony of the supposed writer.*]—One cannot be required to testify whether a signature is his until he has been shown the

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[1] Parkison v. McKim, Burn. (Wis.) 53. *Contra*, Helfer v. Alden, 3 Minn. 332.
[2] Merritt v. Cornell, 1 E. D. Smith, 335; Muckleroy v. Bethany, 27 Tex. 551.
[3] Merritt v. Cornell (above).
[4] Though made pending negotiation for compromise. Waldridge v. Kennison, 1 Esp. 143.
[5] Giving notice to produce a bill describing it as signed by the party is an admission of signature. Steph. Ev. 26.
[6] Suydam v. Coombs, 3 Green (N. J. L.) 133.
[7] Palmer v. Manning, 4 Den. 131.
[8] Shaver v. Ehle, 16 Johns. 201. Compare Minard v. Mead, 7 Wend. 68.
[9] Pentz v. Winterbottom, 5 Den. 51.
[10] Hall v. Phelps, 2 Johns. 451.
[11] Hogland v. Sebring, 1 South (4 N. J. L.) 105. *Contra*, Stark. Ev. 506.
[12] Salem Bank v. Gloucester Bank, 17 Mass. 1, 27.
[13] Hefner v. Vandolah, 62 Ill. 483, s. c. 14 Am. R. 106.
[14] Rosc. N. P. 359, citing Leach v. Buchanan, 4 Esp. 226.
[15] Casco Bank v. Keene, 53 Me. 103.
[16] Hammond v. Varian, 54 N. Y. 398. Whether it is conclusive, without showing plaintiff's reliance on the recognition, compare Weed v. Carpenter, 4 Wend. 219, and Morris v. Bethel, L. R. 5 C. P. 47; 4 Id. 765.

body of the paper itself.[1] The party[2] or a witness[3] who has testified as to whether a signature is his own, is not entitled, and cannot be required to write in court as a test;[4] but it is not error to permit him to do so by consent.[5] He may be asked if the body of the note is in his handwriting.[6]

The testimony of the writer, though he be in court and competent, is not exclusively the primary evidence. Other modes of proof, below stated, may be resorted to without calling him.[7] The testimony of the party is not a substitute for calling a subscribing witness, if there be one.

7. *Direct testimony to Particular Signature.*]—A witness may testify positively, in the first instance, that he knows the signature shown him to be that of the defendant,[8] and without stating in the first instance his means of knowledge. It is for the opposite party to ascertain by cross-examination, how he acquired his knowledge.[9]

8. *Witness who knows the Handwriting generally.*]—If the witness cannot swear thus positively to the particular signature, he is incompetent to prove the signature without proof of having seen the person write, or of other circumstances to show knowledge of the handwriting which he is called to prove.[10] Such a witness therefore should be asked first if he "knows" the handwriting of the defendant, or if he is "acquainted" with it, or questions to that effect; and next should be asked to state his means of knowledge;[11] and then, whether the signature is that of the party; or whether he believes it to be. The opinion or belief of the witness should be excluded, unless foundation is

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[1] N. Am. Fire Ins. Co. v. Throop, 22 Mich. 161. But on cross-examination it is in the discretion of the Court to allow this. Hardy v. Norton, 66 Barb. 527.

[2] King v. Donahue, 110 Mass. 155, s. c. 14 Am. R. 589.

[3] Hutchin's Case, 4 City H. Rec. 119.

[4] Gilbert v. Simpson, 6 Daly, 29. Compare Chandler v. Le Baron, 45 Me. 534.

[5] Hayes v. Adams, 2 Supm. Ct. (T. & C.) 593.

[6] Haughey v. Wright, 12 Hun, 179. Especially if the terms of the note are in controversy. Id.

[7] Edw. Notes to 2 Cow. & H. 507, and auth. cit.; s. p. An indictment for forgery. Foulker's case, 2 Rob. (Va) 836.

[8] Whittier v. Gould, 8 Watts (Penn.) 485; Goodhue v. Bartlett, 5 McLean, 186; *contra*, Slaymaker v. Wilson, 1 Penr. & W. 216.

[9] Whittier v. Gould; Goodhue v. Bartlett (above).

[10] The rule in Slaymaker v. Wilson (above), to the effect that means of knowledge must be shown in the first instance, is a sound rule for cases where the witness testifies to his opinion from his knowledge of the party's handwriting as distinguished from testifying directly to the genuineness of the signature from his knowledge of the particular instrument; and this accords with the general principle as to opinion evidence. But Moody v. Rowell, 17 Pick 490, admits the testimony in both cases, leaving the means of opinion to cross-examination.

[11] Pate v. People, 8 Ill. 644, 660. Even though he have apparent means of knowledge, he is not competent if he can only say he rather thinks he could tell the handwriting. Burnham v. Ayer, 36 N. H. 182.

thus first laid.[1] The adverse party may interpose by cross-examination on this as a preliminary question;[2] and it is for the judge to pass on the competency of the witness to express an opinion or belief.

9. *Means of knowledge.*]—There is no precise standard fixing the degree of knowledge necessary.[3] The question of qualification depends rather on the source of knowledge than its degree.[4] It is sufficient for the purpose if it appear either:[5]

1. That the witness has seen defendant write at least once;[6] or,

2. That he has seen writings which defendant either directly,[7] or indirectly, acknowledged to be in his handwriting—as, for instance, a note which the defendant paid;[8] or,

3. That he has received letters, or other documents, purporting to be written or signed by the defendant, in answer to communications[9] written by himself, or under his authority, and addressed to defendant, and has acted on them as such;[10] or, if the

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[1] McCracken v. West, 17 Ohio, 16. The better opinion is, that if no objection is made to the qualification of the witness, the omission to show the source of his knowledge is waived.

[2] See Henderson v. Bank, 11 Ala. 855; Barnich v. Wood, 3 Jones (N. C.) L. 306, 310; Moody v. Rowell, 17 Pick. 490.

[3] Hartung v. People, 4 Park. Cr. 319, 324.

[4] Smith v. Walton, 8 Gill (Md.) 77.

[5] There is no good reason, says Davis, J., for excluding testimony founded on any other mode of getting knowledge of handwriting, if the court, on the preliminary examination, can see that the witness has that degree of knowledge which will enable him to judge. Rogers v. Ritter, 12 Wall. 317.

[6] Magee v. Osborn, 32 N. Y. 669, rev'g 1 Rob. 689; Hammond v. Varian, 54 N. Y. 398; Smith v. Walton, 8 Gill (Md.) 77; Edelen v. Gough, Id. 87; Rideout v. Newton, 17 N. H. 71. Having seen him sign by initials was held sufficient, where the belief in genuineness depended on their form. Jackson v. Van Dusen, 5 Johns. 144. The testimony is not incompetent because he only saw defendant write many years ago, R. v. Hornstooke, 25 St. Tr. 71, cited in Steph. Ev. 58; or since the date of the disputed signature, Keith v. Lathrop, 10 Cush. 453; but if only since the controversy arose it is insufficient, if not incompetent. Utica Ins. Co. v. Badget, 3 Wend. 102. But seeing defendant in the act of writing is not enough, if there was no inspection of what he wrote. See Brigham v. Peters, 1 Gray, 139. The fact that the witness is not absolutely positive of the identity of the defendant with the person whom he saw write, does not render his testimony incompetent. See Woodford v. McCluahan, 9 Ill 85; Warren v. Anderson, 8 Scott, 384.

[7] State v. Spence, 2 Harr. (Del.) 348.

[8] Johnson v. Daverne, 19 Johns. 134; Hammond v. Varian, 54 N. Y. 398; and see Hess v. State, 5 Ohio, 5; State v. Cheek, 13 Ired. L. (N. C.) 114, 120.

[9] Webb v. Mauro, 1 Morr. (Ia.) 329.

[10] Tilford v. Knott, 2 Johns. Cas. 211; Southern Express Co. v. Thornton, 41 Miss. 216. But it is not enough to show that the witness has had some business with defendant. Mapes v. Leal, 27 Tex. 345. Nor that he had seen letters purporting to come from him, or said, by other persons not produced, to have come from him. Philadelphia, &c. R. R. Co. v. Hickman, 28 Penn. St. 318, 329; Goldsmith v. Bane, 3 Halst. (8 N. J. L.) 87; even though the witness acted on them. Cunningham v. Hudson River Bank, 21 Wend. 557. Compare Steph. Ev. Art. 51. Or though he can testify that from their contents he knows they must have come from defendant. Philadelphia, &c. R. R. Co. v. Hickman (above).

acts of the witness done pursuant to the letters purporting to come from defendant have been ratified by defendant;[1] or,

4. That, in the ordinary course of business, writings or signatures purporting to be made by defendant, have been habitually passed through his hands, and acted on by him as such;[2] or,

5. That, as a public officer, he has been called upon to pass on what he believed to be the defendant's signature, and has done so.[3]

If it appear that the knowledge was acquired for the purpose of the present controversy, the witness is not qualified.[4]

10. *Opinion or belief.*]—After showing knowledge of the handwriting (or of the signature alone as distinguished from the handwriting generally),[5] founded on adequate means of knowledge, the witness may testify to his belief or his opinion,[6] as to genuineness; and this evidence is sufficient to go to the jury in proof of execution.[7] An expression of belief, though not positive, is competent; but if hesitating or qualified, it may not alone be sufficient.[8]

It is not competent for a witness who cannot swear to belief or opinion to testify that the writing is like defendant's.[9]

11. *Refreshing memory.*]—A witness who satisfies these rules may, before[10] or at the trial,[11] refer to papers in his possession which he knows to be in defendant's handwriting, to refresh his memory, before testifying; but if, after so doing, he is not able to speak to the genuineness of the signature in suit, except from comparing the two, his testimony on the point is not competent.[12]

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[1] Bronson, J. Cunningham v. Hudson River Bank, 21 Wend. 557. But, in all these cases, personal knowledge of the facts constituting the means of forming an opinion, must be in the witness who is to express the opinion. Knowledge in one, and belief of another, will not do. Power v. Frick, 2 Grant (Penn.) 306. The writings by which the witness acquired his conversance with the handwriting, need not be produced. Jackson v. Murray, Anth. N. P. 143.

[2] Bowman v. Sanborn, 25 N. H. 87. As in the case of a bank cashier passing the bills of a neighboring bank. So, also, of the case of a messenger carrying defendants letters to the post-office. See Doe & Mudd v. Suckermore, 5 Ad. & E. 703, 740; Hess v. State, 5 Ohio, 5.

[3] Bank of Commonwealth v. Mudgett, 44 N. Y. 514, aff'g 45 Barb. 663; U. S. v. Champagne, 1 Ben. 241, 243; Amherst Bank v. Root, 2 Metc. 522, 532.

[4] 1 Whart. Ev. § 707.

[5] McKonkey v. Gaylord, 1 Jones L. (N. C.) 94.

[6] Shitler v. Bremer, 23 Penn. St. 413; Clark v. Freeman, 25 Id. 133; Fash v. Blake, 38 Ill. 363.

[7] Hopkins v. Megquire, 35 Me. 78; Magee v. Osborn (above).

[8] Smith v. Walton (above); Warson v. Brewster, 1 Penn. St. 381. Compare Wiggin v. Palmer, 31 N. H. 251, 270.

[9] *Contra*, 1 Whart. Ev. § 709. The reason why it is not competent is that evidence that one handwriting is like another, or resembles another, is no evidence whatever that it is the same.

[10] Redford v. Peggy, 6 Rand. (Va.) 316; see page 321, of this vol.

[11] Smith v. Walton, 8 Gill (Md.) 77; McNair v. Commonwealth, 26 Penn. St. 388.

[12] Id.

12. *Testing witness.*]—To test or impeach the witness, he cannot be shown, and examined as to the genuineness of papers, neither in evidence, nor adduced for comparison.[1] A witness cannot be required to answer as to part of a signature before being permitted to see the whole;[2] but may express an opinion as to part, though unable to form one as to the rest.[3]

13. *Comparison of hands.*]—The statute[4] is,—"Comparison of a disputed writing with any writing[5] proved[6] to the satisfaction of the court to be genuine, shall be permitted to be made by witnesses in all trials and proceedings, and such writings and the evidence of witnesses respecting the same may be submitted to the court and jury, as evidence of the genuineness, or otherwise, of the writing in dispute." At common law, this comparison may be made with writings already in evidence;[7] but not with others,[8] except to prove an ancient document.[9]

A skilled witness may give opinion as to the identity or difference of the handwritings.[10] And the jury may compare them.[11]

14. *Opinions of witnesses.*]—In order to express an opinion directly upon the question, whether the writing shown

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[1] Van Wyck v. McIntosh, 14 N. Y. 439. *Contra*, 1 Whart. Ev. § 710. Nor can a party allowed to do this contradict the answers. Van Wyck v. McIntosh (above).

[2] See N. Am. Fire Ins. Co. v. Throop, 22 Mich. 161. Compare 41 Ala. 626, 634. Testing *party* by signature of concealed paper, allowed. 66 Barb. 527.

[3] Smith v. Walton, 8 Gill. (Md.) 77.

[4] N. Y. L. 1880, c. 36. Same Stat. 28 & 29 Vict. c. 18, § 8; Iowa Code, § 3,655. Same rule without statute, in *Connecticut*, Lyon v. Lyman, 9 Conn. 55, 61; *Maine*, Woodman v. Dana, 52 Me. 9; *Mississippi*, Wilson v. Beauchamp, 50 Miss. 24; *Mass.*, Moody v. Rowell, 17 Pick. 490; and *New Hamp.*, State v. Hastings, 53 N. H. 452.

[5] Unsigned writings may be used. Richardson v. Newcomb, 21 Pick. 315, 317. But not letter-press copies. Commonw. v. Eastman, 1 Cush. 189.

[6] Beyond doubt. Martin v. Maguire, 7 Gray (Mass.), 177, 178. For instance, by a witness who saw the person write the very paper (1 Iowa, 159); or by the admission of the writer, or of his counsel (2 Me. [2 Greenl.] 33), unless offered on his own behalf (1 Iowa, 159). The opinion of a witness is not enough (1 Cush. 189). Nor letters merely proved to have been received (108 Mass. 344). Nor a certificate of acknowledgment (7 Gray, 177; 1 Iowa, 159).

[7] Moore v. U. S. 91 U. S (1 Otto), 270; Henderson v. Hackney, 16 Geo. 521; Williams v. Drexel, 14 Md. 566. And, according to some authorities, any proceeding in the cause, incontestably signed by the party (Northern Bk. v. Buford, 1 Duv. [Ky.] 335; Dunlop v. Silver, 1 Cranch C. Ct. 27; Shannon v. Fox, Id. 133).

[8] Moore v. U. S. (above), (unless by consent, Kannon v. Galloway, 58 Tenn. 230). This rule has been applied also in *Alabama*, State v. Givens, 5 Ala. 747; *Illinois*, Bd. of Trustees v. Misenheimer, 78 Ill. 22; *Kentucky*, McAllister v. McAllister, 7 B. Mon. 269; *Maryland*, Tome v. Parkersburgh R. R. Co., 39 Md. 36, s. c. 17 Am. R. 540, 561; *Michigan*, Van Sickle v. People, 29 Mich. 61; *New Jersey*, West v. State, 22 N. J. L. (2 Zab.) 212; *North Carolina*, Otey v. Hoy, 3 Jones, 407; *Tennessee*, Clark v. Rhodes, 2 Heisk. 206; *Texas*, Hanley v. Gandy, 28 Tex. 211; *Virginia*, Rowt v. Kyle, 1 Leigh, 216; *West V.* Clay v. Alderson, 10 W. Va. 49; *Wisconsin*, Pierce v. Northey, 14 Wis. 9.

In *Indiana* (Burdick v. Hunt, 43 Ind. 281), writings, *admitted* to be genuine, are thus used. Writings proved or admitted are used for purposes of *corroboration* only, in *Indiana*, Clark v. Wygatt, 15 Ind. 271; but see 43 Id. 281; *Pennsylvania*, Haycock v. Greup, 57 Penn. St. 438; *South Car.*, Bennett v. Matthews, 5 S. C. 478.

[9] Strother v. Lucas, 6 Pet. 763; Woodard v. Spiller, 1 Dana. (Ky.) 179, 181.

[10] Moody v. Rowell, 17 Pick. (Mass.) 490, 496. *Contra*, Travis v. Brown, 43 Penn. St. 9.

[11] State v. Hastings, 53 N. H. 452. *Contra*, Huston v. Schindler, 46 Ind. 38.

the witness is that of the person to whom it is imputed, when this is the question for the jury, the witness must know the handwriting, by means of knowledge such as are indicated above.[1] But an expert properly qualified, although he does not know the handwriting, may express an opinion as to the characteristics of the writing in evidence—for instance, as to the age of the writing, and of the paper; as to whether the writing is simulated or constrained, or natural;[2] whether the whole was written at the same time,[3] by the same hand,[4] and with the same pen and ink;[5] whether it has been altered;[6] whether writing upon a crease in the paper was made before or after the crease;[7] and whether writing upon an erasure was made before or after the body of the document was written,[8] and in general as to all matters which require special skill and scientific research to discover and explain.[9]

The grounds and reason of his opinion may be called for on direct as well as on cross-examination.[10]

15. *Matters of description.*]—Beside the expression of opinion, a competent witness may describe the condition and appearance of the document, so far as material, for the purpose of having them stated in the record.[11] So one not an expert may, of course, testify to facts he observed, such as the apparent effect of a powder found on the alleged forger's person.[12]

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[1] Paragraphs 8 and 9. This I understand to be the common law rule still in force in New York and some other States. Goodyear v. Vosburgh, 63 Barb. 156; Frank v. Chemical Bank, 37 Super. Ct. (J. & S.) 31; People v. Spooner, 1 Den. 543; Tome v. Parkersburgh R. R. Co. 39 Md. 36, s. c. 17 Am. R. 540; although the rule is not uniformly applied in practice. The rule is a proper corollary of that which excludes comparison of hands; for otherwise an expert might testify to an opinion formed on a comparison of hands out of court, and exclude the comparison from the jury. *Contra*, Moody v. Rowell, 17 Pick. 490 (the leading case in favor of expert opinions as to genuineness); Hicks v. Person, 19 Ohio, 426, 441; Withee v. Rowe, 45 Me. 571, 589; Woodman v. Dana, 52 Id. 9; and see Lyon v. Lyman, 9 Conn. 55; Travis v. Brown, 43 Penn. St. 9; and 5 Am. L. Rev. 238.

[2] People v. Hewit, 2 Park Cr. 20. But the mere denial of a signature, without allegation or evidence that it is simulated, does not justify the admission of evidence that it is not simulated. Kowing v. Manly, 49 N. Y. 192, 203, s. c. 13 Abb. Pr. N. S. 276.

[3] Dubois v. Baker, 30 N. Y. 355, 363, 365, affi'g 40 Barb. 556; Quinsigamond Bank v. Hobbs, 11 Gray, 250, 257.

[4] State v. Ward, 39 Vt. 225, 236. But compare Lodge v. Phipher, 11 Serg. & R. 333; and Fulton v. Hood, 34 Penn. St. 365.

[5] Fulton v. Hood, 34 Penn. St. 365.

[6] Moye v. Herndon, 30 Miss. 110, 118.

[7] Bacon v. Williams, 13 Gray, 525. *Contra*, Sackett v. Spencer, 29 Barb. 187. Unsound.

[8] Dubois v. Baker, 30 N. Y. 355. But not whether erasures were made by a peculiar instrument found in the party's possession. Commonwealth v. Webster, 5 Cush. 295.

[9] Frank v. Chemical Nat. Bk. 37 Super. Ct. (J. & S.) 31.

[10] Keith v. Lathrop, 10 Cush. 453.

[11] Dubois v. Baker (above).

[12] People v. Brotherton, 47 Cal. 388.

16. *Qualifications of witness.*]—The qualifications of the expert must be such as are appropriate to the questions on which his opinion is sought. Special conversance with handwriting, whether acquired in teaching it as a writing-master,[1] or in scrutinizing it as a bank cashier,[2] or as a business man in commercial employments,[3] qualifies a witness to express some opinion as to handwriting; for the qualification does not depend on vocation, but on intelligence, means of knowledge and practical experience; and it is not necessary that the witness claim to be an expert;[4] although experience in the special duty of examining and detecting alterations, erasures and forgeries, enhances the qualification of the witness. But mere skill in judging handwriting does not necessarily qualify to express an opinion as to the age of writing;[5] or whether an erasure has been made.[6]

17. *Photographs.*]—In aid of evidence on the question of genuineness, magnified photographs of the writing in evidence are competent,[7] upon preliminary proof of their accuracy,[8] and the photographer may be examined as an expert.[9]

18. *Mark.*]—Signature by mark does not require any special allegation,[10] nor any different mode of proof.[11] An expert may testify that a mark, purporting to be the signature of a very old man, could not have been made by the unaided hand of such a man.[12]

19. *Identity of names.*]—A discrepancy in name between the pleading and the bill or note, or between the name of the payee and the indorser, should be explained by evidence of identity.[13] Where the names are identical, identity of person is presumed in support of the action, unless the name is too common to allow the reasonableness of a presumption of identity,[14] or there are circumstances in evidence negativing it,[15] or it appears that there are

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[1] Moody v. Rowell, 17 Pick. 490; Bacon v. Williams, 13 Gray, 525.
[2] Dubois v. Baker, 30 N. Y. 355.
[3] Hyde v. Woolfolk, 1 Iowa, 159, 165.
[4] Id.
[5] Clark v. Bruce, 12 Hun, 271.
[6] Swan v. O'Fallon, 7 Mo. 231, 237.
[7] Marcy v. Barnes, 16 Gray, 161. *Contra*, Tome v. Parkersburgh, &c. R. R. Co. 39 Md. 36, s. c. 17 Am. R. 540.
[8] Taylor Will Case, 10 Abb. Pr. N. S. 301.
[9] Marcy v. Barnes (above).
[10] Walbridge v. Arnold, 21 Conn. 424, 429.
[11] See Jackson v. Van Dusen, 5 Johns. 144; 1 Whart. Ev. § 696.
[12] Lansing v. Russell, 3 Barb. Ch. 325. But such testimony loses its force if the subscribing witness testify that the hand was guided by another.
[13] 2 Pars. on Pr. N. & B. 474, 479. Compare Hunt v. Stewart, 7 Ala. 525; where the omission of a middle initial was not held sufficient to require evidence of identity, and see 2 Dan. Neg. Inst. 221; and see Fletcher v. Conly, 2 Greene (Iowa), 88. But identity of holder with payee of the same name was not presumed in Curry v. Bank of Mobile, to defeat claim to be *bona fide* indorsee before maturity.
[14] 1 Whart. Ev. 665, § 701.
[15] See p. 101, of this vol.

two persons of similar name and residence, or similar name and vocation.[1] Parol evidence of identity is admissible, and a variance in the pleading amendable.

20. *Fictitious person.*]—The fact that a person to whose order the paper was payable was a fictitious person,[2] may be shown by parol; and as evidence of the party's knowledge of the fact, it is competent to show that he had executed other similar paper, under circumstances implying such knowledge.[3]

21. *Joint makers, &c.*]—Where a joint note is shown to have been given upon a joint liability, it will be presumed it was intended the note should be several as well as joint, except in the case of a mere surety.[4]

22. *Married women.*]—In an action on notes made by a married woman to the order of and indorsed by her husband, there must be extrinsic evidence that they were in fact made in her separate business, or for the benefit of her separate estate. The fact that she gave them to her husband to be discounted, raises no presumption for this purpose.[5]

23. *Agent's Signature.*]—If the signature or indorsement is by an agent, his handwriting and authority must be proved.[6] An allegation of agency is not necessary, and if it be alleged, a further allegation of authority is not needed.[7] If the allegation is that the defendant signed or indorsed, an admission of execution will usually include admission of the authority of the agent; but if the signature is that of an apparent agent, and the allegation is that the agent signed, an admission of the execution with a denial of all other allegations, will put in issue the authority of the agent.[8] But an admission of the agent's authority without qualification, admits that he acted within its scope.

The authority of an agent to sign or to indorse may be shown by oral communications or by implication.[9] Written evidence is not necessary. Authority may be inferred even where no express authority existed, from the usage of the agent to make such paper, with the knowledge and tacit assent of the principal;

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[1] 2 Whart. (above). For a collection of authorities on names, see 18 Alb. L. J. 126.

[2] 1 N. Y. R. S. 768, § 5.

[3] Gibson v. Hunter, 2 H. Bl. 288; Rosc. N. P. 93.

[4] Yorks v. Peck, 14 Barb. 644. For the rules of proof in case of joint admissions, see pp. 186, &c. of this vol.

[5] Second National Bank of Watkins v. Miller, 63 N. Y. 639, affi'g 2 Supm. Ct. (T. & C.) 104. For the rules of proof in actions on married women's notes, &c. see pp. 163, &c. of this vol.

[6] See Nixon v. Palmer, 8 N. Y. 398; Beach v. Vandewater, 1 Sandf. 265.

[7] Moore v. McClure, 8 Hun, 557.

[8] Chambers County v. Clews, 21 Wall. 322.

[9] 2 Greenl. on Ev. 49, § 61; Trull v. True, 33 Me. 367; Moore v. Bank of Metropolis, 13 Pet. 302. As to what amounts to evidence of authority, compare N. Y. Dig. new ed. Prin. & A. 76, 82, 95, 114.

and evidence of such a fact is competent even though it be not also shown that it was known to the plaintiff. Evidence that the plaintiff knew the fact and in good faith relied on it as showing authority, is competent, and may raise an equitable estoppel in his favor.

One who seeks to support a transaction with an agent in his own name, by a previous course of dealing implying authority, should show that the form of the previous transactions were such as to justify reliance on the agent's authority;[1] or, at least, to amount to a holding out of the agent as authorized. Authority to buy and sell does not imply authority to make negotiable paper even in buying.[2] Authority to sign as maker or surety cannot be inferred from a general usage to indorse.[3]

To charge one personally, who signs as agent in a form adequate to bind his principal, the burden is on plaintiff to show that defendant was not in fact authorized to sign.[4]

24. *Partnership Signature.*]—The partnership of the defendants having been proved, as stated elsewhere,[5] it is enough to prove the signature, unless by reason of the character of the business, etc., evidence of authority is necessary; and the signature may be proved by evidence of the handwriting of him who wrote it, or by admission of either partner. The partnership, and their signature being shown, plaintiff may rely on the presumption of law that the signature was given for partnership purposes, or by authority of the other partners (even though the partner be individually a party)[6] without showing that the firm was a commercial or trading firm, or that the act was ratified, unless some of these facts are alleged in his pleading.[7] If it appear, however, on the face of the paper[8] or otherwise, either that the firm was a non-trading firm, in which such authority is not implied,[9] or that

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[1] Thus an agent of a firm who took a draft from their debtor payable to "my order" instead of to "our order," is not presumed to have been authorized, from mere proof that he had previously taken drafts in the course of his agency, unle s the form of the previous drafts is shown. Hogarth v. Wherley, L. R. 10 Com. Pl. 630, s. c. 14 Moak's Eng. R. 474. Compare Exchange Bank v. Monteath, 26 N. Y. 505; Reed v. Carpenter, 10 Wend. 403; Llewellyn v. Winckworth, 13 M. & Tr. 598; Rose. N. P. 358.

[2] But an amendment so as to recover on the original consideration is allowable. Vibbard v. Roderick, 51 Barb. 616.

[3] Early v. Reed, 6 Hill, 12.

[4] Walker v. Bank of State of N. Y. 9 N. Y. 582, affi'g 13 Barb. 636; and see Sheffield v. Ladue, 16 Minn. 388, s. c. 10 Am. R. 145. According to the Massachusetts cases also, he must show that defendant intended to use the name to bind himself. Bartlett v. Tucker, 104 Mass. 336, s. c. 6 Am. R. 240; or actually received the consideration. Compare White v. Madison, 26 N. Y. 117, s. c. less fully, 26 How. Pr. 481.

[5] Pp. 206–210 of this vol.

[6] Bank of Commonwealth v. Mudgett, 44 N. Y. 514.

[7] Carrier v. Cameron, 31 Mich. 373, s. c. 18 Am. R. 192; Gansevoort v. Williams, 14 Wend. 134; 1 Wood's Coll. 678, n.

[8] As, for instance, where the firm sign as surety. Boyd v. Plumb, 7 Wend. 309.

[9] Smith v. Sloan, 37 Wis. 285, s. c. 19 Am. R. 757.

the paper was given by a member out of the firm business,[1] the burden is upon the plaintiff,[2] holder of the note, to prove the authority, necessity, usage or ratification which may sustain the act. The fact that paper indorsed was negotiated to plaintiff by the maker or payee, is *prima facie* evidence that it was accommodation.[3] If it was in terms payable to the firm, in whose name it is indorsed, the fair inference is that it was indorsed in usual course of business.[4] Evidence that it was accommodation paper is sufficient to throw on plaintiff the burden of giving further evidence to bind the other partners than the one who signed the firm name.[5]

As against one who has made negotiable paper payable to a firm name,[6] or indorsed negotiable paper drawn by a firm name,[7] the production of the paper is sufficient evidence of the existence of the firm; and the names of the third persons who constituted the firm need not be alleged.[8]

25. *Corporation Paper.*]—A business[9] corporation, in the absence of special provision of charter, has implied power to make negotiable paper in the usual course of its business,[10] but the authority of the officer or agent, and the fact that the note was given in the legitimate business of the company, must be proven. An allegation that the paper was made or indorsed by defendants implies a lawful making or indorsement; and the burden is on defendants to show that it was not lawfully done. It need not be averred in the complaint that the note was indorsed by defendants in the course of their legitimate business.[11]

The cashier of a bank is presumed to have authority to indorse and transfer paper belonging to it, in the ordinary course of business,[12] but not to indorse for his own accommodation.[13]

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[1] Gansevoort v. Williams (above); Hoskinson v. Eliot, 62 Penn. St. 393; Manning v. Hays, 6 Md. 5; Leverson v. Lane, 13 C. B. N. S. 278; Kendall v. Wood, L. R. 6. Exch. 243.

[2] As to *bona fide* transferees, see subsequent paragraphs.

[3] Hendric v. Berkowitz, 37 Cal. 113.

[4] Catskill Bank v. Stall, 15 Wend. 366; 18 Id. 466.

[5] Lemoine v. Bank of N. A. 3 Dill. C. Ct. 48. Otherwise, of a guaranty. Nat. Bank v. Carpenter, 34 Iowa, 433.

[6] Blodgett v. Jackson, 40 N. H. 21.

[7] Dalrymple v. Hillenbrand, 62 N. Y. 5, s. c. 20 Am. R. 438.

[8] Bacon v. Cook, 1 Sandf. 77.

[9] As to municipal corporations, see Mayor, &c. v. Ray, 19 Wall. 468.

[10] McCullough v. Moss, 5 Den. 567; Benedict v. Lansing, Id. 283; and see Moss v. McCullough, 7 Barb. 279. As to distinction between this and accommodation paper, see Olcott v. Tioga R. R. Co. 27 N. Y. 546, affi'g 40 Barb. 179; Morford v. Farmers' Bank of Saratoga Co. 26 Barb. 568; Bridgeport City Bank v. Empire Stone Dressing Co. 30 Barb. 421, s. c. 19 How. Pr. 51; Mech. Bank. Asso. v. N. Y. & Saugerties White Lead Co. 35 N. Y. 505, affi'g 23 How. Pr. 74, s. c. lessfully, 20 Id. 509.

[11] Mechanics' Banking Association v. Spring Valley Shot & Lead Co. 25 Barb. 419, rev'g 18 How. Pr. 227.

[12] Matthews v. Mass. Nat. Bk. 1 Holmes, 396, and see 3 Am. L. Rev. 612, and cas. cit.

[13] West. St. Louis Sav. Bk. v. Shawnee Co. Bk. 95 U. S. (5 Otto) 537, affi'g 3 Dill. 403. Compare Pope v. Bank of Albion, 57 N. Y. 126, rev'g 59 Barb. 226.

Authority in other officers is sufficiently shown by evidence of their constant usage to do so,[1] known to the corporation or board.[2]

26. *Oral evidence to show real party.*]—Persons dealing with negotiable instruments are presumed to take them on the credit of the parties whose names appear upon them; but if there are sufficient indications on the face of the paper to show that it might reasonably have been intended as a contract by[3] or with[4] another than the one named,—as for instance where a corporation note is signed by an officer, or where a note is expressed or indorsed as payable to a cashier,—oral evidence is admissible for the purpose of enabling the real party to recover; and equally to charge the real party;[5] but not usually for the purpose of exonerating the signer,[6] unless to show that he contracted as agent for a government.[7] For the purpose of thus showing the real party, the conversations of the parties to the transaction, at the time of making the paper, and at the time of creating the consideration for the bill or note, are admissible as part of the *res gestæ*.[8] When individuals subscribe their proper names to a promissory note, *prima facie* they are liable personally, though they add a description of the character in which the note is given; but such presumption of liability may be rebutted, as between the original parties, by proof that the note was in fact given by the makers as agents, with the payee's knowledge of that fact.[9] But even where the signature is with an addition

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[1] Marine Bank v. Clements, 31 N. Y. 33, affi'g 6 Bosw. 166.

[2] Lawrence v. Gebhard, 41 Barb. 575. Whether the bank is estopped by statement of cashier to surety, whom he knew to be such, that note was paid, compare Cocheco Nat. Bank v. Haskell, 51 N. H. 116, s. c. 12 Am. R. 67 and 75 note, and Bank v. Seward, 37 Me. 519.

[3] Mechanics Bank v. Bank of Columbia, 5 Wheat. 326, 337.

[4] Baldwin v. Bank of Newbury, 1 Wall. 234.

[5] Compare Baldwin v. Bank of Newbury, 1 Wall. 234; Briggs v. Partridge, 65 N. Y. 363, and cases cited; Eastern R. R. Co. v. Benedict, 5 Gray, 566, and see p. 572; Caldwell v. Mohawk Bank, 64 Barb 333, and cases cited; and see 9 Moak's Eng. 15, and cases cited. The Supreme Court of the United States sanctions the same rule where nothing appears on the face of the paper to indicate agency. A certificate of deposit signed with an individual name, may be shown by parol evidence in an action against one not named, to be the contract of the latter made by the signer as the clerk or agent of the latter. Coleman v. First Nat. Bank, 53 N. Y. 388; 64 Barb. 33. Evidence that the transaction was at defendant's counter, in the usual course of their business, in pursuance of inquiry for defendants and without mention of the agent's name, is sufficient to sustain a finding that the contract was by the defendants. Compare Shields v. Niagara Savings Bank, 3 Hun, 477; Rich v. Niagara Savings Bank, 3 Hun, 481; and Van Leuven v. First Nat. Bank, 54 N. Y. 671, affi'g 6 Lans. 373.

For the rule where there is no extrinsic evidence, see De Witt v. Walton, 9 N. Y. 571; Fisher v. Eldridge, 12 Gray, 472; and see 9 Am. R. 161.

[6] Compare Brown v. Porter, 7 Allen, 337; Barbour v. Litchfield, 4 Abb. Ct. App. Dec. 655.

[7] Goodwin v. Robarts, L. R. 10 Exch. 337, s. c. 14 Moak's Eng. 591.

[8] Bank v. Kennedy, 17 Wall. 24.

[9] Haile v. Pierce, 33 Md. 327; Hood v. Hallenbeck, 7 Hun, 362. *Contra*, Tucker Co. v. Fairbanks, 98 Mass. 101, and cases cited; Carpenter v. Farnsworth, 106 Id. 561, s. c. 8 Am. R. 360; Sturdevant v. Hall, 59 Me. 172, s. c. 8 Am. R. 409.

indicating agency or official character, it is not always enough to prove that the other contracting parties knew the facts, and that the consideration went to the principal or corporation: for the parties may have intended to pledge the personal credit of the apparent signers.[1]

As between principal and agent, an agent who signs or indorses in his own name, may prove by parol, that it was not the intention that he should be bound personally,[2] but the evidence should be clear and strong.[3]

27. *Evidences of title.*]—Plaintiff's possession[4] of negotiable paper, not expressed or indorsed to be payable to another person,[5] is *prima facie* (but not conclusive) evidence of his title, and if it be expressly payable to him, or, if not so expressed, if it be payable after its date, he holds it clothed with the presumption that it was negotiated for value in the usual course of business at the time of its execution, and without notice of any equities between the prior parties to the instrument.[6] Even if he once indorsed it away, his possession is presumptive evidence of his title, whether his and subsequent indorsements be cancelled[7] or not.[8] If the paper is restricted "to order," and title is not shown as above, plaintiff must give evidence of his title.[9] In an action by an indorsee against the drawer of a bill or acceptor or maker of a note payable to order, the payee's indorsement must be proved;[10] but when sufficient has been proved to show the instrument payable to bearer, subsequent indorsements need not be proved, in the first instance, although restrictive.[11] Against an indorser

[1] Powers v. Briggs, 79 Ill. 493, s. c. 22 Am. R. 175. Compare Houghton v. First Nat. Bank of Elkhorn, 26 Wisc. 663, s. c. 7 Am. R. 107.

[2] Lewis v. Breume, 33 Md. 412, s. c. 3 Am. R. 190, qualifying Story on Ag. § 157; Chitty on B. 46.

[3] Ib.

[4] Actual possession as distinguished from constructive possession, or symbolical delivery, essential. Muller v. Pondir, 55 N. Y. 325, affi'g 6 Lans. 472.

[5] Collins v. Gilbert, 94 U. S. (4 Otto), 753, and cases cited. The presumption is sufficient even where it appears that plaintiff, not being the original party, paid nothing for it. Brown v. Penfield, 36 N. Y. 473, affi'g 24 How. Pr. 64; May v. Richardson, 3 Gray, 142. If the plaintiff, with possession, has other lawful documents going with the instrument,—as a genuine letter of introduction from a correspondent—this presumption is strengthened. And in general this presumption is stronger in proportion as it would be easy to rebut it if erroneous. 2 Pars. on Pr. N. &c. 480.

Where the paper is to bearer or indorsed in blank, allegations in the complaint as to how the holder acquired title thereto from the payee, are unnecessary. Mechanics' Bank v. Straiton, 3 Abb. Ct. App. Dec. 269; and if made need not be proved. Bedell v. Carll, 33 N. Y. 581. If plaintiff, appearing on the record individually, be an executor or administrator, the objection that he holds as such, if material, must be raised at the trial in order that he may give further evidence as to his personal interest. See Barlow v. Myers, 64 N. Y. 41, 46.

[6] Collins v. Gilbert, 94 U. S. (4 Otto), 753.

[7] Dollfus v. Frosch, 1 Den. 367.

[8] Mottram v. Mills, 1 Sandf. 37.

[9] Dorn v. Parsons, 56 Mo. 601.

[10] 2 Pars. on Pr. N. &c. 485.

[11] Id.

proof of his indorsement is sufficient proof of all the previous indorsements through whom the holder chooses to deduce title.[1]

28. *Delivery.*]—Delivery is *prima facie* shown by production of the paper.[2] The time[3] and purpose[4] of delivery may be proved by parol. If delivered by letter the letter is competent, as part of the *res gestæ*;[5] if manually delivered, the conversation is competent.[6]

Unless the note be sealed, oral evidence is competent to show that it was delivered to the party in whose favor it was drawn,[7] upon a condition, such that without performance of the condition he acquired no right to enforce it.[8]

29. *Consideration.*]—The burden of proof of the existence of a consideration between the original parties, is on plaintiff, and in case of a conflict of evidence, remains on him to satisfy the jury by preponderance of evidence.[9]

But the production of negotiable paper, whether made by individuals or corporations,[10] is presumptive evidence of consideration[11] both in the original making,[12] and in the transfers by which plaintiff acquired it.[13] This presumption may be repelled by extrinsic evidence,[14] or by the terms of the note itself, as where it shows the value was received from a third person.[15] And where consideration must be proved, the words "value received" in the

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[1] 2 Pars. on Pr. N. &c. 484.

[2] Sawyer v. Warner, 15 Barb. 282. As to proof of actual delivery, see Kinne v. Ford, 43 N. Y. 587, affi'g 52 Barb. 194.

[3] Good v. Martin, 95 U. S. (5 Otto), 90, 96.

[4] Bank v. Kennedy, 17 Wall. 26. The person who delivered it may state for what purpose. Id. But the mere belief or impression of a witness of the transaction is not competent. Head v. Shaver, 9 Ala. 791; Crounse v. Fitch, 14 Abb. Pr. 346.

[5] See Bank of Monroe v. Culver, 2 Hill, 531; Darling v. Miller, 54 Barb. 149; but compare Bailey v. Wakeman, 2 Den. 220.

[6] Bank v. Kennedy (above).

[7] Or to a third person. Vallett v. Parker, 6 Wend. 615; Chapman v. Tucker, 38 Wisc. 43, s. c. 20 Am. R. 1.

[8] Seymour v. Cowing, 4 Abb. Ct. App. Dec. 200; and see Couch v. Meeker, 2 Conn. 302; Barton v. Martin, 52 N. Y. 570; Bookstaver v. Jayne, 60 N. Y. 146. The evidence, to be admissible, must qualify the delivery, as distinguished from the terms of the note. Compare Erwin v. Saunders, 1 Cow. 249, and cases cited.

[9] Small v. Clewley, 62 Me. 155, s. c. 16 Am. R. 410; Delano v. Bartlett, 6 Cush. 364; Story on Pr. N. § 181; 1 Dan. Neg. I. 129. But see Sawyer v. McLouth, 46 Barb. 350. Whether the rule is the same as to a failure of consideration, see Burnham v. Allen, 1 Gray, 496.

[10] See Willmarth v. Crawford, 10 Wend. 341.

[11] Whether the words for "value received" are in it, or not. Kinsman v. Birdsall, 2 E. D. Smith, 395. As to the recent statutes avoiding notes given for patent rights unless so expressed, see note in 22 American Reports, 67.

[12] Black River Savings Bank v. Edwards, 10 Gray, 387.

[13] Collins v. Gilbert, 94 U. S. (4 Otto), 753. From the issuing and delivery of negotiable drafts for money, though illegal, there is a legal presumption that the consideration was money. Oneida Bank v. Ontario Bank, 21 N. Y. 490.

[14] See Dodge v. Pond, 23 N. Y. 69.

[15] Tenyck v. Vanderpoel, 8 Johns. 120. To recover on a note given for no other consideration than payment of the debt of another, the payee must prove the privity or assent of the debtor. Williams v. Sims, 22 Ala. 512.

paper, set out in the pleading is a sufficient allegation, even as against indorsers;[1] and the consideration need not be an equivalent, even as between the original parties.[2] Inadequacy of consideration[3] is not a defense,[4] unless fraud be in issue, and then it may be a relevant circumstance.[5] A consideration consisting of a prior indebtedness on an account stated or the like, may be proved by parol without producing the document evidencing the consideration; but the document is competent.[6] Evidence that the paper was given in consideration of the surrender of a prior note made by the same party is *prima facie* sufficient, and raises a legal presumption that differences as to the validity of the former note were settled.[7] But this, even if expressed, is not conclusive as between the original parties,[8] and those limited to their rights. If a note is expressed to carry interest from a time prior to its date, the presumption is not that it is usurious, but that it was given for an antecedent consideration.[9]

In cases where the existence of a consideration between the original parties is open to inquiry, the writing does not exclude oral evidence. The purpose for which a note was made is admissible if entirely consistent with its terms and conditions;[10] and a witness who knows the purpose may testify directly to the fact,[11] but not whether it would or would not have been made in a supposed case.[12] A witness having knowledge of the transaction may be asked directly what was the consideration,—whether two notes were part of the same transaction—and the like, leaving details to be called for by cross examination.[13]

The declarations of a prior party[14] are not generally admissible against the right of a subsequent holder, except within the rules stated in Chapter I, or when part of the *res gestæ* of an act properly in evidence,[15] or unless some further connection between the two persons is shown.[16]

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[1] Meyer v. Hibsher, 47 N. Y. 265. Otherwise at common law. Saxton v. Johnson, 10 Johns. 418; see also Bourne v. Ward, 51 Me. 191.

[2] Worth v. Case, 42 N. Y. 362, affi'g 2 Lans. 264. If an executory consideration is indorsed on the note, it may be notice of equities to transferees, but does not prevent the note being admitted as a negotiable instrument; and plaintiff should prove performance, if required at the trial. Sanders v. Bacon, 8 Johns. 485.

[3] As distinguished from usury pleaded, and from grossly unconscionable bargain.

[4] Earl v. Peck, 64 N. Y. 598.

[5] Especially where incapacity or undue influence is alleged. Molson v. Hawley, 1 Blatchf. 409.

[6] Leland v. Manning, 4 Hun, 7; Priedman v. Johnson, 21 Minn. 12.

[7] Piper v. Wade, 57 Geo. 223; and see Davis v. Gray, 17 Ohio St. 330.

[8] McDougall v. Cooper, 31 N. Y. 498.

[9] Ewing v. Howard, 7 Wall. 505.

[10] Bell v. Shibley, 33 Barb. 610, and cases cited. Compare Mathews v. Crosby, 56 N. H. 21.

[11] Osborn v. Robbins, 36 N. Y. 365, a. c. 4 Abb. Pr. N. S. 15, rev'g 37 Barb. 481.

[12] Newell v. Doty, 33 N. Y. 83.

[13] Ayrault v. Chamberlain, 33 Barb. 229.

[14] Even though he be since deceased. Kent v. Walton, 7 Wend. 256.

[15] See Snyder v. Willey, 33 Mich. 483; First Nat. Bank v. McMaingle, 69 Penn. St. 156; Nutter v. Stover, 48 Me. 163.

[16] Phillips v. Cole, 10 Ad. & E. 106; Rosc. N. P. 384.

30. *Accommodation paper.*]—The presumption of consideration, even where the paper is expressed to be for value received, does not estop maker,[1] drawer, acceptor,[2] or indorser,[3] from proving that his act was done for accommodation; but such proof does not alone (except as between the original parties and those subject to their equities), throw the burden on plaintiff to give further evidence of consideration.[4]

31. *Alterations.*]—If any material alteration,[5] whether apparently advantageous to the holder or not,[6] appears on the face of the paper, or in the indorsements on which his action depends,[7] he should be prepared with at least some evidence tending to explain it. The question whether the alteration is such that the absence of an explanation excludes the paper, is one for the court.[8] If there is nothing suspicious about the alteration, it is not error to admit the paper without explanation. If there is anything suspicious, the court should require explanation; and the evidence offered for this purpose,—which may include all the circumstances of its history, its nature, the appearance of the alterations, the possible or probable motives for the alteration or against it, and its effect upon the parties respectively,—ought to be submitted to the jury with the paper itself.[9]

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[1] Corlies v. Howe, 11 Gray, 125.

[2] Clark v. Sisson, 22 N. Y. 312, affi'g 5 Duer, 468.

[3] Patten v. Pearson, 55 Me. 39.

[4] Ellicott v. Martin, 6 Md. 509; 1 Dan. Neg. In. 129; see also 2 Abb. N. C. 305.

[5] Or an immaterial one fraudulently made. 1 Greenl. Ev. 608, § 568.

[6] If the alteration was apparently disadvantageous to the holder, this goes to relieve the case from suspicion that it was made after execution and without consent; see Bailey v. Taylor, 11 Conn. 531; but even if shown to have been so made, does not prevent the alteration from defeating the action. See Heins v. Cargill, 67 Me. 554; Franklin Ins. Co. v. Courtney, 6 Rep. 712; Huntington v. Finch, 3 Ohio St. 445; 2 Dan. Neg. In. 376. For other cases on the different views that have prevailed on this question, see also 17 Am. R. 97; 14 Moak's Eng. 585; 16 Id. 585; 16 Alb. Law. J. 64, 80

[7] Otherwise of words written on the back, and thus not essential. See Bay v. Schrader, 30 Miss. 326; Kimball v. Lawson, 2 Vt. 138.

[8] Tillou v. Clinton, &c. Ins. Co. 7 Barb. 564.

[9] Maybee v. Sniffen, 2 E. D. Smith, 1, s. c. 10 N. Y. Leg. Obs. 18; Artisans' Bank v. Backus, 31 How. Pr. 242, 36 N. Y. 100, s. c. 3 Abb. Pr. N. S. 273.

Four different rules contend for control on this vexed question. 1. That an alteration apparent on the face of the paper raises no presumption either way, but the question is for the jury. (Hunt v. Gray, 35 N. J. L. 227; Hayden v. Goodnow, 39 39 Conn. 164, and see Davis v. Jenney, 1 Metc. 221.)

2. That it raises a presumption against the paper, and requires, therefore, some explanation to render the paper admissible. (Rosc. N. P. 351, 384; 2 Para. on Contr. 228; and see 2 Dan. Neg. In. 314, 374, &c.; Mills v. Barnes, 11 N. H. 395; Low v. Merrill, Burn. [Wisc.] 185.)

3. That it raises such a presumption when it is suspicious, otherwise not. (1 Whart. Ev. 601, § 629; 1 Greenl. 604, § 564; Welch v. Coulbord, 3 Houst. [Del.] 647. Compare Farnsworth v. Sharp, 4 Sneed [Tenn.] 55.)

4. That it is presumed, in the absence of explanation, to have been made before delivery, and, therefore, requires no explanation in the first instance. (White v. Hass, 32 Ala. 470; Paramour v. Lindsey, 63 Mo. 63.) The third rule, though somewhat vague, is the true one. It is impossible to sustain the unqualified assertion that every alteration must raise a presumption either way, or that there can be no

An interlineation or addition, in a hand different from the other writing in the body of the note and from the signature, is presumptively an alteration, within these rules. Otherwise of the mere use of a different ink for part of the writing.[1]

Alteration, though not appearing on inspection, may be shown by extrinsic evidence; and this throws the same burden on the party offering the instrument, to explain the alteration.[2]

32. *How pleaded.*]—If the action is on the instrument in its original form, a material alteration raises a question of variance or failure of proof, as well as admits the objection that the instrument has been made void.[3] If the action is on the instrument in its altered form, an answer admitting execution, without alleging the alteration, precludes evidence of alteration;[4] but under a denial of execution[5] or a general denial, evidence that an alteration was made after delivery is admissible.[6] Proof of the defendant's signature is *prima facie* evidence that the whole body of the note written over it is the act of the defendant (subject to the rules as to suspicious alterations above stated); but the burden of proof remains on the plaintiff to show, on the whole evidence, that the note declared on was the note of the defendant.[7]

33. *Mode of proof.*]—Alterations may be proved by a witness who saw the instrument prior to alteration, although not present when made;[8] and he may testify that he has no knowledge or recollection that the alteration existed when he inspected the instrument;[9] and, under the rules already stated, ex-

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alteration that will not raise a presumption against the note. Thus a cancellation of the printed word "bearer" and insertion of "order," in the same hand and ink as the other writing, could not ordinarily exclude the paper for want of explanation. On the other hand, an increase of the amount, written over an erasure, and exceeding the marginal figures would require explanation before the case could go to the jury. Between such extremes there is every variety of degree; and the only safe guide is that stated in the text. For recent cases, where the particular kinds of alteration are considered, see, as to altering Date, Low v. Merrill, Burn. (Wisc.) 185; Wood v. Steele, 6 Wall. 80; Time to run, Davis v. Jenney, 1 Metc. 221; Place of payment, White v. Hass, 32 Ala. 470; Corcoran v. Dall, 32 Cal. 82; Meikel v. State Savings Bank, 36 Ind. 355; Diminishing the amount, Heins v. Cargill, 67 Me. 554; Adding interest clause, Iron Mountain Bark v. Murdock, 62 Mo. 70; Precluding interest except after maturity, Franklin Ins. Co. v. Courtney (Ind. S. Ct. 1878), 6 Reporter, 712; compare Paramour v. Lindsey, 63 Mo. 63; Alteration in clause "without defalcation or discount," Hunt v. Gray, 35 N. J. L. 227; Inserting charge on separate estate, Taddiken v. Cantrell, 69 N. Y. 597; Erasure from printed form, Corcoran v. Dall, 32 Cal. 82; Paramour v. Lindsey, 63 Mo. 63.

For the rule as to sealed instruments, compare Little v. Herndon, 10 Wall. 31, and cases cited; Smith v. U. S. 2 Id. 231, and see 1 Id. 282, and Ch. XLVIII, paragraph 7.

[1] Wilson v. Harris, 35 Iowa, 507.

[2] Herrick v. Malin, 22 Wend. 388; Jackson v. Osborn, 2 Id. 555.

[3] *Contra*, Hirschman v. Budd, L. R. 8 Ex. 171, s. c. 5 Moak's Eng. 361.

[4] Smedbergh v. Whittlesey, 3 Sandf. Ch. 320.

[5] Rosc. N. P. 384.

[6] Boomer v. Koon, 6 Hun, 645; Lincoln v. Lincoln, 12 Gray, 47.

[7] Simpson v. Davis, 119 Mass. 269, s. c. 20 Am. R. 324; Willett v. Shepard, 34 Mich. 106.

[8] Ansley v. Peterson, 30 Wisc. 653.

[9] Abel v. Fitch, 20 Conn. 90, 97.

perts and those who are acquainted with the handwriting, may be examined.[1] Original memoranda or entries of the transaction are competent also, under rules already stated.[2]

The fact that the defendant was the maker or indorser of other paper having a similar clause to the one alleged to be an alteration, is not admissible in evidence, for the purpose of raising an inference that the clause was not an alteration.[3] The fact that the party to whom the alteration is imputed, was in embarrassed circumstances, when he negotiated the paper, is not competent as tending to show that it was altered by him so as to increase its amount before negotiation.[4] Evidence that defendant has paid interest on the altered paper, is relevant to show consent.[5] Evidence that plaintiff demanded payment, is not necessarily a ratification of an unauthorized alteration made by a third person.[6] A general consent or authority to add or alter may be proved; and it is not material that the maker was not informed what addition was made.[7]

34. *Blanks.*]—Evidence that a party to the instrument intrusted it to another, for use as such, with blanks not filled, is *prima facie* evidence of authority to complete it by filling them, but not to vary or alter its material terms by erasing what was written or printed as a part thereof, nor to pervert its scope or meaning by filling the blanks with stipulations repugnant to what was plainly and clearly expressed in the instrument;[8] and this authority enures to successive holders who take it with the blank unfilled;[9] and evidence of the blank and of the filling of it, is admissible under an allegation describing simply the completed paper.[10]

35. *Marks of cancellation.*]—Lines cancelling the whole instrument,[11] or the stamp "Paid,"[12] raise a presumption of discharge; but this may be rebutted.[13] The presumption of discharge

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[1] Paragraphs 8 to 17. If reliance is put on the fact that a part is in different ink from the rest, interrogate a witness as to the fact, so as to have it on the record. See Hardy v. Norton, 66 Barb. 528.

[2] Kennedy v. Crandell, 3 Lans. 1; and p. 322 of this vol.

[3] Iron Mountain Bank v. Murdock, 62 Mo. 70; Paramour v. Lindsey, 63 Id. 63. But he may be asked whether he ever made any such note whatever. First Nat. Bank of Plattsburgh v. Heaton, 6 Supm. Ct. (T. & C.) 37; Jourden v. Boyce, 33 Mich. 302.

[4] Agawam Bank v. Sears, 4 Gray, 95.

[5] Rosc. N. P. 383.

[6] Laugenberger v. Kroeger, 48 Cal. 147, s. c. 17 Am. R. 418.

[7] Taddiken v. Cantrell, 69 N. Y. 597. Compare Davidson v. Lanier, 4 Wall. 447.

[8] Angle v. North-western Mutual Life Insurance Co. 92 U. S. (2 Otto), 330; Abbott v. Rose, 62 Me. 194, s. c. 16 Am. R. 427; Redlich v. Doll, 54 N. Y. 234.

[9] Page v. Morrel, 3 Abb. Ct. App. Dec. 433; and see Spitler v. James, 32 Ind. 202, s. c. 1 Am. R. 334, and note; Michigan Bank v. Eldred, 9 Wall. 544; Davidson v. Lanier, 4 Wall. 447.

[10] Rosc. N. P. 352.

[11] Pitcher v. Patrick, 5 Ala. (1 Stew. & P.) 478.

[12] See Turner v. Bank of Fox Lake, 4 Abb. Ct. App. Dec. 434.

[13] Same cases.

arising from actual cancellation is not necessarily rebutted by evidence that the discharge was not by payment or set-off.[1]

36. *General rule as to oral evidence to vary.*]—Parol evidence of an oral agreement alleged to have been made at the time of the drawing, making or indorsing of a bill or note, cannot be permitted[2] to vary, qualify, or contradict, or to add to or subtract from the absolute terms of the written contract, there being no fraud, accident or mistake.[3] If a memorandum appears upon the paper in such a position as not to be authenticated by the signature, either party may show parol facts as to its being affixed, and if it be shown that it was affixed before delivery, as a part of the contract, it is part of the note within the above rule.[4]

37. *Date.*]—If no date is expressed, the date of delivery may be proved by parol. A date expressed[5] is *prima facie* evidence of the time of delivery;[6] unless the admissibility of the instrument depends on its date.[7] If the date is referred to in the body of the contract, as fixing the time of payment, it cannot be varied by parol,[8] unless fraud, accident or mistake is shown;[9] and even then evidence of error may not be competent for the purpose of showing, as against a *bona fide* holder, that the paper was illegal, as made on Sunday.[10]

38. *Time of payment.*]—If the time of payment is expressed,[11] or if not, and the note is therefore payable immediately,[12] parol evidence that another time of payment or presentment[13] was agreed upon between the parties at or before delivery, is not competent. The time and mode cannot be varied by parol. Hence if payment by installments is specified, a parol agreement that the whole

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[1] Gray v. Gray, 2 Lans. 178, but see 47 N. Y. 552.

[2] Unless performed and accepted. Bank of Lyons v. Demmon, Hill & D. Supp. 398.

[3] Forsythe v. Kimball, 91 U. S. (1 Otto), 291, 294. Compare 1 Greenl. Ev. 13 ed. 322, note. But a contemporaneous memorandum between the same parties, and not merely collateral (Webb v. Spicer, 13 Q. B. 894, affi'g 8 H. L. C. 510); if shown to be founded on good consideration (McManus v. Bark, L. R. 5 Ex. 65); is admissible for that purpose, whether on the same or a separate paper (Leeds v. Lancashire, 2 Camp. 205; Bowerbank v. Monteiro, 4 Taunt. 844); and though not alleged to be in writing (Young v. Austen, L. R. 4 C. P. 553; Corkling v. Massey, L. R. 8 C. P. 395); but the allegation will not be proved unless an agreement in writing is given in evidence in support of it at the trial. Young v. Austen, *supra;* Abrey v. Crux, L. R. 5 C. P. 37; Rosc. N. P. 389.

[4] Heywood v. Perrin, 10 Pick. 228.

[5] Even if only on the stamp, for its cancellation. Holbrook v. N. J. Zinc Co. 57 N. Y. 616.

[6] 1 Pars. on Pr. N. &c. 41.

[7] Smith v. Shoemaker, 17 Wall. 637.

[8] Joseph v. Bigelow, 4 Cush. 82, 84. SHAW, Ch. J. This case, so far as it excludes the evidence in connection with proof of mistake or fraud, goes too far.

[9] Breck v. Cole, 4 Sandf. 79; Germania Bank v. Distler, 4 Hun, 633.

[10] Knox v. Clifford, 38 Wisc. 651, s. c. 20 Am. R. 28.

[11] Walker v. Clay, 21 Ala. 797.

[12] Thompson v. Ketcham, 8 Johns. 190.

[13] Blakemore v. Wood, 3 Sneed (Tenn.) 470.

should be due, on default in one, cannot be proved.[1] But an error in date for payment, obvious on the face of the paper, may be corrected by parol.[2] A variance between the allegation and proof as to the time when payable, or the length of time to run, even if substantial, should be disregarded if defendant is not misled to his prejudice;[3] and amendment should be allowed, if necessary, to identify the instrument. If the law allows grace, evidence of a usage to the contrary is not competent.[4]

39. *Amount.*]—The sum stated in the body *prima facie* governs;[5] and if complete and unambiguous, cannot be varied by parol,[6] even if the marginal figures are different.[7] The figures in the margin serve to aid and explain apparent defects in statements of the amount in the body, but if there is no statement in the body, marginal figures do not supply the blank,[8] but only limit the holder in filling it.[9] Mistake in the amount written, when available as a defense, must be pleaded.[10]

40. *Medium.*]—For the purpose of showing the medium of payment, evidence of the place where the contract was made, and subject to the law of which it was to be performed, is competent; and if there are several currencies, oral evidence of which was intended is competent.[11] Otherwise, an unambiguous designation cannot be qualified by oral evidence that a different or depreciated medium was intended,[12] unless fraud or mistake is shown. Proof of the foreign law is not essential; but the value, unless established under the act of Congress,[13] may be shown, like the

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[1] Brown v. Wiley, 20 How. U. S. 442. But the writing does not exclude oral evidence that it was falsely read over at the time of signing, and that the true agreement was different. Farmers' & Manufacturers' Bank v. Whinfield, 24 Wend. 419. If there is an ambiguous character in the instrument, evidence of how it was read to the signer at the time of signing is competent (subject, however, to the rules as to *bona fide* holders stated below); for in such a case the reading of the note to the maker is part of the *res gestæ*. Arthur v. Roberts, 60 Barb. 580.

[2] Miller v. Crayton, 3 Supm. Ct. (T. & C.) 360; and see 13 Conn. 282, 285, n.

[3] Chapman v. Carolin, 3 Bosw. 456; Page v. Bank of Alexandria, 7 Wheat. 35; Sebree v. Dorr, 9 Wheat. 558. *Contra*, at common law, Trowbridge v. Didier, 4 Duer, 448.

[4] Woodruff v. Merchants' Bank, 25 Wend. 673; and see 16 N. Y. 395. But compare Renner v. Bank of Columbia, 9 Wheat. 581; Bank of Washington v. Triplett, 1 Pet. 32.

[5] Norwich Bank v. Hyde, 13 Conn. 282.

[6] Glazoway v. Moore, Harper (S. C.) 401; Hall v. Mott, Brayton (Vt.) 79.

[7] Rosc. N. P. 353, citing Saunderson v. Piper, 5 N. C. 425; Wolfolk v. Bank, &c. 10 Bush (Ky.), 504.

[8] Norwich Bank v. Hyde (above).

[9] Boyd v. Brotherson, 10 Wend. 93.

[10] See Seeley v. Engell, 13 N. Y. 542.

[11] Thus a contract made in the Confederate States, during the war of the rebellion, to pay "dollars," may be shown by parol evidence to mean Confederate currency. Thorington v. Smith, 8 Wall. 1; Donley v. Tindall, 32 Tex. 43, s. c. 5 Am. R. 234. But without such evidence the legal presumption is that lawful money of the United States was meant. Confederate Note Case, 19 Wall. 548. As to what kind of evidence of intention would suffice, see id. p. 559.

[12] Baugh v. Ramsey, 4 T. B. Monr. 156; Bradley v. Anderson, 5 Vt. 152.

[13] U. S. R. S. §§ 3564, 3565. Compare McButt v. Hoge, 2 Hilt. 81; Stranaghan v. Youmans, 65 Barb. 392.

value of chattels in a distant market, by the opinions of witnesses.[1] The court is not bound to take judicial notice of the value even of Canadian currency,[2] unless fixed by the act of Congress.[3]

41. *Interest.*]—If the instrument fixes the time for paying interest,—either by specifying it, or by naming no time, and thus in legal effect making it payable only at maturity,—oral evidence that it was to be paid previously or periodically is not competent,[4] unless fraud or mistake is shown.

The court is not bound to take judicial notice of the rate of interest, even in a neighboring country,[5] but may do so. The rate in another State or nation is not presumed to have the same limits as here; but the foreign statute should be proved by the party relying on it.[6]

42. *Place of payment.*]—In the absence of anything on the paper to indicate or restrict the place of payment, the presumption of law is that it is payable where dated, if dated at any place; otherwise, where made or delivered. The designation on the note cannot be varied by a contemporaneous parol agreement fixing a different place; nor by evidence of a different residence of the parties.[7] A variance in designating the particular place of payment specified in the body of the note is to be disregarded, unless defendant has been misled.[8] Parol evidence of an agreement contemporaneous with the making of negotiable paper, that it should be payable at a specified place not expressed in it, is not competent.[9]

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[1] Kermott v. Ayer, 11 Mich. 181; Comstock v. Smith, 20 Mich. 338; pages 307–311 of this vol.; Schmidt v. Herforth, 5 Robt. 124.

[2] Kermott v. Ayer (above).

[3] McButt v. Hoge, 2 Hilt. 81.

[4] Koehring v. Muemminghoff, 61 Mo. 403, s. c. 21 Am. R. 402. As to varying the *rate* of interest by parol, compare Rohan v. Hanson, 11 Cush. 44; Shoop v. Clark, 4 Abb. Ct. App. Dec. 235.

[5] Kermott v. Ayer, 11 Mich. 181.

[6] Kermott v. Ayer, 11 Mich. 181. As to the mode, see p. 22 of this vol.

[7] 2 Pars. on Pr. N. &c. 333, 338. Prof. Parson's six rules (2 Pars. on Pr. N. &c. 324) as to the law of place applicable to negotiable paper are:

I. If a bill or note be payable in a particular place, it is to be treated as if made there, without reference to the place at which it is written, or signed, or dated.

II. If by the express terms of a note or bill, or by legal construction of its terms, it is payable especially in any place, it is presumed that both parties know this fact.

III. It is presumed that both parties know the law of the place in which the paper is payable; and

IV. That both parties intend that this law shall govern the contract.

V. While this law governs the contract as to all the rights and obligations resting upon it, the law of the place in which such a note or bill is sued (the *lex fori*) governs the remedies upon the note or bill.

VI. The *lex loci contractus* depends not upon the place where the note or bill is made, drawn or dated, but upon the place where it is delivered from drawer to drawee, from promisor to payee, from indorser to indorsee. See 6 Abb. New Cas. 76.

[8] Rosc. N. P. 352; Comstock v. Savage, 27 Conn. 184.

[9] Specht v. Howard, 16 Wall. 565. *Contra*, Brent v. Bank of Metropolis, 1 Pet. 89, aff'g 2 Cranch C. Ct. 530.

43. *Defeasance.*]—Oral evidence that defendant delivered the instrument to plaintiff, on a present condition which he refused to perform, as distinguished from a future contingency, or the future performance of a condition, is competent;[1] and so it may be shown that he made it as part of an entire verbal contract, as, for example, that it was given for the price of property sold, on a contemporaneous agreement that if the property fell below a given measurement, an abatement from the note should be made; and that, on measurement, it did so fall short;[2] or that it was made and delivered as security only.[3] And a written agreement between the same parties, contemporaneous with the instrument, may be proved as part of the *res gestæ*, though it vary the legal effect of the instrument.[4] But, effectual delivery or indorsement[5] not being negatived, parol evidence of an agreement, contemporaneous with the instrument, that it should be void in a certain event, is inadmissible.[6] When, however, such an agreement has been executed by the return of the consideration to the payee, and his acceptance thereof, the evidence is competent as introductory to the latter facts.[7]

44. *Particular fund; Agreement to set-off—to renew.*]—Upon the same principle oral evidence is inadmissible to show that the paper was to be paid out of a particular fund only,[8] or only in the contingency of a fund being realized by the maker[9] or the payee;[10] or that before payment could be required certain collateral securities must be applied.[11] Nor is it competent to show a contemporaneous oral agreement, that a cross demand should be applied in reduction of the note,[12] as distinguished from

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[1] Shepard v. Hall, 1 Conn. 497; Calhoun v. Davis, 2 Ind. 532. Thus it may be proved that a note was delivered not as such, but as a mere memorandum of a cross note loaned to the maker (Seymour v. Cowing, 4 Abb. Ct. App. Dec. 200, 206); but not that it was given for anticipated services, on an agreement that it should not be payable if the services were not rendered; Dale v. Pope, 4 Litt. 166; West v. Kelly, 19 Ala. 353; or for the price of goods to be returned if not satisfactory. Allen v. Furbish, 4 Gray, 504. (*Contra*, Folger v. Donsman, 37 Wisc. 619.) Nor even that it was given for a disputed demand on an agreement to surrender it, in case a receipt could not be found; Brown v. Hull, 1 Den. 400; or for a release, by the payee, of his interest in an estate, with an agreement that, if the interests of the other heirs could not be obtained, both the note and release should be void. Ely v. Kilborn, 5 Den. 514

[2] Carter v. Hamilton, Seld. Notes, No. 6, 80, rev'g 11 Barb. 147; Lewis v. Gray, 1 Mass. 297, 1 Greenl. Ev. § 284a, and cases cited. *Contra*, Miller v. White, 7 Blackf. 491.

[3] Agawam Bank v. Strever, 18 N. Y. 502; Moses v. Murgatroid, 1 Johns. Ch. 119. *Contra*, Walker v. Crawford, 56 Ill. 444, s. c. 8 Am. R. 701.

[4] Rogers v. Broadnax, 27 Tex. 238.

[5] Skinner v. Church, 36 Iowa, 91.

[6] Payne v. Ladue, 1 Hill, 116.

[7] Bank of Lyons v. Demmon, Hill & D. Supp. 398, and cases cited.

[8] Gridley v. Dole, 4 N. Y. 486; Adams v. Wilson, 12 Metc. 138.

[9] Underwood v Simmons, 12 Metc. 275.

[10] Currier v. Hale, 8 Allen, 47. As to the rule when the note refers to the fund, see Sears v. Wright, 24 Me. 278.

[11] Abrey v. Crux, L. R. 5 C. P. 37.

[12] Eaves v. Henderson, 17 Wend. 190; St. Louis Ins. Co. v. Homer, 9 Metc. 39.

a reduction by a failure of consideration;[1] nor that the paper should be renewed, in whole[2] or in part,[3] at maturity.

45. *Subsequent modification.*]—A subsequent modification of the terms, founded on sufficient consideration, may be proved, as between the parties bound thereby, if alleged in pleading, otherwise not.[4] If in writing, parol evidence of qualifications of it is not competent.[5]

46. *Indorsement.*]—The mode of proving indorsement is the same as that of other signatures. The use of initials or other writing or characters, may be shown by parol to have been made as an indorsement.[6] Indorsement in the hand of the maker may be sustained by parol authority from the payee,[7] or by recognition or holding out.[8] Evidence that a lost note was acquired by purchase or in payment for property, raises no presumption that it was indorsed by the transferrer.[9] There is a legal but not conclusive presumption that an undated indorsement was made before the paper became due;[10] which is allowed for the sake of the negotiable character of paper; but if the time is material to plaintiff, in any other respect than this, the burden of proof is on him to show the time.[11] The presumption may be rebutted by any competent evidence that the paper remained the property of the payee after its maturity;[12] but the declarations and admissions of the payee, indorser, or other holder, are not competent for this purpose against the subsequent holder,[13] unless part of the *res gestæ* of an act properly in evidence. Even where it appears that the indorsement was for accommodation, the transferee may rely on the *prima facie* presumption that it was made before negotiation to him.[14]

A valuable consideration for an indorsement is presumed; and it is incumbent upon the other party to show the real consideration, if inadequate.[15] If the indorsement is relied on merely as a transfer of title, evidence that there was no consideration is not, by itself, relevant.[16]

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[1] Smith v. Carter, 25 Wisc. 283.

[2] Burge v. Dishman, 5 Blackf. 272; Ockington v. Law, 66 Me. 551; Anspach v. Bast, 52 Penn. St. 356.

[3] Barton v. Wilkins, 1 Miss. 75; Dawson v. Bank of Ill. 5 Ill. 56. But an agreement to renew, indorsed, though unsigned, may be valid. Flynn v. Mudd, 27 Ill. 323.

[4] Newell v. Salmons, 22 Barb. 647.

[5] Alston v. Wingfield, 53 Geo. 18.

[6] Merchants' Bank v. Spicer, 6 Wend. 443; Brown v. Butchers, &c. Bank, 6 Hill, 443.

[7] Turnbull v. Trout, 1 Hall. 336.

[8] Weed v. Carpenter, 10 Wend. 403.

[9] Woods v. Gassett, 11 N. H. 442.

[10] Rose. N. P. 381; 2 Pars. on Pr. N. &c. 10.

[11] Pars. on Pr. N. &c. 10; Solomon v. Holt, 3 E. D. Smith, 139.

[12] Id.

[13] Page 12 of this vol. *Contra*, 2 Pars. on Pr. N. &c. 10.

[14] See Michigan Bank v. Eldred, 9 Wall, 544, and cases cited.

[15] Riddle v. Mandeville, 5 Cranch, 322.

[16] See Chapter I. City Bank of N. H. v. Perkins, 29 N. Y. 554, aff'g 4 Bosw. 420.

47. *Oral evidence to vary an indorsement.*]—The law recognizes five principal objects for which indorsement may be made, which are distinct from, and often inconsistent with, each other. These objects (the first two of which are often conjoined in one indorsement) are: 1. To show that the indorser transfers the legal title; 2. To show that he acknowledges his liability, in case of dishonor and notice, according to the law merchant; 3. To show that one who may have not had nor transferred title, lends his credit to the paper on the like condition; 4. To show that the indorser constitutes the transferee his agent for collection; 5. To show payment received. In the absence of extrinsic evidence, there is a legal presumption that an indorsement was intended for the first two purposes and those only. He who relies on either purpose alone or on either of the other two, to characterize the act, must show that such was the object; and the question whether oral evidence is competent for this purpose is much contested. Two very different rules are invoked to exclude such evidence;—one that it is oral evidence to vary a writing,—the other that subsequent transferees in good faith, &c., have a right to rely on the legal presumptions of intent to transfer and become liable. The better opinion is that the rule against oral evidence to vary a writing, does not exclude such evidence for the purpose of showing what the object and consequent legal character of the contract was;[1] but when its legal character has been ascertained, evidence of a contemporaneous oral agreement is not competent to vary the legal consequences or measure of its effect. Yet the rule protecting transferees in good faith, &c., does exclude all extrinsic evidence, whether oral or written, when offered to deprive them of the effect of the legal presumptions above stated.

Hence, except as against a transferee in good faith, &c., oral evidence is admissible to show that the object was not to assume the liability of an indorser, but only to transfer title, on a sale of the note,[2] or upon a special trust, such as to enable the indorsee to collect it as agent for the indorser,[3] or to transfer it in payment of a debt,[4] or to show, as between successive indorsers, that they were sureties, and what was their relative liability to each other,[5]

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[1] The contract between indorser and indorsee does not consist exclusively of the writing popularly called an indorsement. The contract consists partly of the written indorsement, partly of the delivery of the bill to the indorsee, and may also consist partly of the mutual understanding and intention with which the delivery was made by the indorser and received by the indorsee. That intention may be collected from the words of the parties to the contract, either spoken or written, from the usage of the place, or of the trade from the course of dealing between the parties or from their relative situation. Bruce v. Wright, 5 Supm. Ct. (T. & C.) 81; Castrique v. Buttigieg, 10 Moore P. C. 94, and cases cited; Byles on B. 147; Ross v. Espy, 66 Penn. St. 481, s. c 5 Am. R. 394, and cases cited; Rey v. Simpson, 22 How. U. S. 341. *Contra*, 1 Dan. on Neg. Inst. 532.

[2] Bruce v. Wright (above); or as agent, Elwell v. Dodge, 33 Barb. 336.

[3] Sweeny v. Easter, 1 Wall. 166.

[4] Davis v. Brown, 94 U. S. (4 Otto), 423.

[5] Phillips v. Preston, 5 How. U. S. 278, and see p. 257 of this vol.

or whether the words "without recourse" qualify the preceding or following name,[1] or to show that the indorsement was made only to be used as evidence of payment of the instrument.[2]

But even between the immediate parties to the indorsement, parol evidence is not admissible to show a contemporaneous agreement that in consideration of the indorser's omitting to qualify his indorsement with the words "without recourse," the plaintiff would hold him harmless from all liability,[3] nor that the indorser would be liable without demand or notice.[4] The rule that to this extent an indorsement cannot be varied by parol, is a rule of evidence, and does not go to the validity of the contract. Hence the law of the forum applies.[5]

To establish joint liability of consecutive indorsers, there must be independent proof of contemporaneous execution,[6] unless, perhaps, where they are the partners in the firm to whose order the paper was payable.[7]

The qualifying agreement should be pleaded;[8] it may, however, be available under a denial of indorsing.[9]

48. *Indorsement as a transfer of title.*]—The object of the statute[10] is that before an indorsee can recover, in his own name, the contents of an instrument payable to order, he shall show that he has acquired a property in it, by a transfer from those who were the original payees.[11] The statute is satisfied by an indorsement by the real payees; and parol evidence is competent to show that an indorsement which, on its face does not appear to represent the payees, legally does so.[12]

The fact that two persons, not partners, are joint payees or indorsees, is no evidence of authority in one to indorse the name of the other.[13]

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[1] Fitchburg Bank v. Greenwood, 2 Allen, 434.

[2] Morris v. Faurot, 21 Ohio St. 155, s. c. 8 Am. R. 45.

[3] Dale v. Year, 38 Ct. 15, s. c. 9 Am. R. 353.

[4] Bank of Albion v. Smith, 27 Barb. 489; Tebbetts v. Pickering, 5 Cush. 83; Barry v. Morse, 3 N. H. 132. *Contra*, 1 Dan. § 717. But a subsequent waiver by parol may be shown. See paragraph 45; and perhaps an express authority to overwrite a guaranty might be shown. Cottrell v. Conklin, 4 Duer, 45.

[5] Downer v. Chesebrough, 36 Conn. 39, s. c. 4 Am. R. 29.

[6] Wetherwax v. Payne, 2 Mich. 555; Rothschild v. Grix, 31 Id. 150.

[7] Bell v. Massey, 14 La. Ann. 831.

[8] See Meador v. The Dollar Savings Bank, 56 Geo. 605.

[9] Marston v. Allen, 8 M. & W. 503; Rosc. N. P. 360; Denton v. Peters, L. R. 5 Q. B. 475.

[10] 1 N. Y. R. S. 768, § 4, same stat. 3 & 4 Anne, c. 9.

[11] Pease v. Dwight, 6 How. U. S. 198.

[12] Id. Thus parol evidence is admissible to show that the apparent payee is dead, and that the indorser is his administrator (see 2 Pars. on Pr. N. 5); that an individual name indorsed in place of a firm name of payees, was the name habitually used by the firm for their indorsements. South Carolina Bank v. Case, 8 Barnw. & C. 436. That a name of a payee, whose indorsement is apparently necessary and is lacking, was put or left in as payee by mistake, so as to entitle an indorsee of the true payee to recover as indorsee, actually, though not apparently, of the whole interest. Pease v. Dwight (above).

[13] Wood v. Wood, 1 Harr. (N. J.) 428; 3 Pars. on Pr. N. &c. 4, and see p. 189, of this vol. *Contra*, Snelling v. Boyd, 5 Monr. 173.

49. *Demand.*]—Though the instrument be payable on demand, it is not necessary, except as against drawer or indorser, to prove a demand,[1] even though alleged.[2]

50. *Non-payment.*]—Plaintiff's possession of the paper is sufficient *prima facie* evidence of breach by non-payment.[3]

51. *Indorsements of payment, &c.*]—The holder producing the instrument from his own custody, puts it in evidence subject to the disadvantage of whatever indorsements in reduction of it appear upon it.[4] As against him such indorsements need no further proof than their appearance. They are not evidence in his favor, against others, without some evidence of handwriting, signature, or other assent. They are evidence against him, unless explained. Such an indorsement, if dated, is presumed (as against the holder who puts it in evidence) to have been made at the time of its date, and, unless otherwise expressed, will be understood to indicate a transaction had at that time. If not dated, it is not presumed to have been made at or before delivery, without extrinsic evidence to that effect. Such indorsements are not, however, conclusive.[5]

52. *Competency of a party to the instrument to impeach it. The New York Rule.*]—The better opinion is that parties to negotiable paper are equally competent as any other witnesses to testify to any facts impeaching its validity.[6]

53. — *the United States' Court rule.*]—In the Supreme Court of the United States, and in some of the State courts, it is held, on the contrary, that a person who has placed his name on a nego-

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[1] Fairchild v. Ogdensburg, Clayton & Rome R. R. Co. 15 N. Y. 337.

[2] Burnham v. Allen, 1 Gray, 496.

[3] Howell v. Van Sicklen, 6 Hun, 115. It is often said that plaintiff need not prove non-payment; but this is because his possession raises a sufficient presumption of non-payment. In an action by the payee's administrator against the maker, the presumption of discharge arising from the maker's possession of the note is not rebutted by the mere fact of the payee's death. The question is for the jury. Larremore v. Wells, 29 Ohio St. 13. Compare Grey v. Grey, 47 N. Y. 552. In Powell v. Swan, 5 Dana, 1, it was held, in a peculiar case, that the fact that a note, with the signature of the promisor torn off, remains in the possession of the promisee, repels the presumption of payment.

[4] Morris v. Morris, 5 Mich. 171, 180; Thompson v. Blanchard, 2 Iowa, 44, 48; Greenough v. Taylor, 17 Ill. 602. (*Contra*, of full payment, Ray v. Bell, 24 Ill. 444, not well considered.) Even if the indorsements have been erased. Carson v. Duncan, 1 Greene (Iowa), 466; Graves v. Moore, 7 T. B. Monr. 341.

[5] Kingman v. Tirrell, 11 Allen, 97.

[6] This is the general rule administered now in *England*, Jordain v. Lashbrook, 7 T. R. 601; and in *Alabama*, Griffing v. Harris, 9 Port. 225; *Connecticut*, Jackson v. Packer, 13 Conn. 342; *Georgia*, Slack v. Moss, Dud. 161; *Kentucky*, Gorham v. Carroll, 3 Litt. 221; *Maine* (in a very qualified form), Abbott v. Rose, 62 Me. 194, s. c. 16 Am. R. 427; compare Deering v. Sawtel, 4 Greenl. 191; *Maryland*, Ringgold v. Tyson, 3 Harr. & J. 172; *Michigan*, Orr v. Lacey, 2 Doug. 230; *Missouri*, Bank of Mo. v. Hull, 7 Mo. 278; St. John v. McConnell, 19 Id. 38; *New Hampshire*, Haines v. Dennett, 11 N. H. 180; *New Jersey*, Freeman v. Britton, 2 Harr. 191; *New York*, Williams v. Walbridge, 3 Wend. 415; *North Carolina*, Guy v. Hull, 3 Murph. 150; *South Carolina*, Knight v. Packard, 3 McCord, 71; *Texas*, Parsons v. Phipps, 4 Tex. 341; *Vermont*, Pecker v. Sawyer, 24 Vt. 45; *Virginia*, Taylor v. Beck, 3 Rand. 316.

tiable paper, as a party to it, is not afterward, in a suit on such security, competent as a witness to prove any fact existing at the time of his accrediting the paper, which would tend to impeach or invalidate it.[1]

Where this rule is recognized, it is generally restricted so as not to apply except to negotiable paper indorsed and put into circulation in the usual course of business, before maturity or dishonor,[2] nor to apply between original parties or those affected with notice of their equities,[3] nor to exclude testimony to a fact subsequent to the act by which the witness gave credit to the paper,[4] or to a fact not impairing the validity of the paper, but consistent with its terms,[5] nor to apply to one who indorsed "without recourse."[6]

54. *Admissions and declarations.*]—The admissions and declarations of a party sought to be charged are, in general, competent against himself,[7] whether made to the plaintiff or a stranger; but not competent in his own favor, unless connected with the party against whom they are adduced, or part of the *res gestæ* of an act properly in evidence.[8]

The admissions and declarations of a former holder of the instrument are not competent against a subsequent holder if made after he parted with his title to the instrument.[9] If made before

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[1] Sweeny v. Easter, 1 Wall. 166. The reason assigned for this rule sufficiently indicates its unsoundness, viz., that it is against good morals and public policy to permit a person who has thus aided in giving currency and circulation to such paper to testify to facts which would render such paper void, after he has thus imposed it upon the public as valid, with all the sanction which his name will give it. This is a good reason for holding him, as a party to the action, estopped from alleging or proving such a fact; but it is not a reason for silencing him as a witness, if the law allows the fact to be alleged and proved, and it rests within his knowledge.

Nevertheless the rule has been recognized not only in earlier English cases now overruled, and in the *Supreme Court of the United States*, Sweeny v. Easter (above); but also in *Illinois*, Dewey v. Warriner, 71 Ill. 198, s. c. 22 Am. R. 91; *Iowa*, Strang v. Wilson, 1 Morris, 84; *Louisiana*, Shamburgh v. Commagere, 5 Martin (La.), 9; *Maine*, Deering v. Sawtel, 4 Greenl. 191; but compare Abbott v. Rose, 62 Me. 194, s. c. 16 Am. R. 427; *Massachusetts*, Thayer v. Crossman, 1 Metc. 416; *Mississippi*, Drake v. Henly, Walk. 541; *Pennsylvania*, Gaul v. Willis, 26 Penn. St. 259; Parke v. Smith, 4 Watts & S. 287; *Ohio*, Treon v. Brown, 14 Ohio, 482; *Tennessee*, Smithwick v. Anderson, 2 Swan. 573.

[2] Parke v. Smith, 4 Watts & S. 287; Rohrer v. Morningstar, 18 Ohio, 579; Smithwick v. Anderson, 2 Swan. 573; Thayer v. Crossman, 1 Metc. 416.

[3] Eastwood v. Creccy, 1 MacA. 232; Bubier v. Pulsifer, 4 Gray, 592. Thus the witness may testify to facts showing that the objector was not a *bona fide* holder. Id.

[4] Such as omission to give notice of dishonor to charge the indorser, Drake v. Henly, Walk. (Miss.) 541; or an alteration, Haines v. Dennett, 11 N. H. 180; Shamburgh v. Commagere, 5 Mart. (La.) 9.

[5] Sweeny v. Easter, 1 Wall. 174.

[6] 2 Pars. on Pr. N. & B. 470.

[7] As to admissions where there is a joint or a several liability, see p. 188 of this vol.

[8] As to what constitutes part of the *res gestæ*, compare Osborn v. Robbins, 37 Barb. 482, rev'd in 36 N. Y. 365; Dexter v. Clemens, 17 Pick. 175.

[9] City Bank of Brooklyn v. McChesney, 20 N. Y. 240. But they may be made competent by showing that he acted as agent for the subsequent holder, see Lancey v. Clark, 3 Hun, 575, affi'd in 64 N. Y. 209.

that, they are not competent against a transferee for value, even after dishonor,[1] unless his interest is legally identical with that of the declarant,[2] or he took with actual notice of the facts.[3] The fact that the declarant had possession of the instrument at the time of making declarations and admissions is not alone sufficient to render such statements competent against the one who was then the owner.[4]

55. *Foreign law.*]—Matters bearing upon the execution, the interpretation, and the validity of the contract, are generally to be determined by the law of the place where it was made;[5] matters connected with its performance by the law of the place for performance;[6] and matters respecting the remedy, including questions of the admissibility of evidence,[7] upon the law of the forum.[8]

The law merchant is presumed by the court, in the absence of evidence to the contrary, to be the same beyond as within its jurisdiction.[9] But that law cannot override the local laws and legalized commercial usages of any State which sees fit to alter it.[10] Such law of a foreign State, if different from our own, must be proved as any other fact, in the modes allowed by law.[11] The court need not notice the foreign local law judicially without such proof.[12]

II. Action by Payee (or original "bearer") against Maker.

56. *Plaintiff's case.*]—In addition to general rules already stated, it is only necessary to add that a due bill,[13] or a draft drawn by one officer or agent on another officer or agent of the same principal,[14] is admissible under an allegation of a promissory note.

The payee need not prove indorsements on the back of the instrument. His possession of the instrument is *prima facie* (but not conclusive) evidence of his title,[15] even though it have his

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[1] Jermain v. Worth, 5 Den. 342, rev'd on another point in 6 N. Y. 276. Otherwise of actual transactions as distinguished from loose oral declarations. Id.

[2] The rule stated in the text is the New York Rule. Paige v. Cagwin, 7 Hill, 361. For contrary rules, see p. 12 of this vol.

[3] Roe v. Jerome, 18 Conn. 138, 152.

[4] Scott v. Stevenson, 3 Hun, 352, s. c. 5 Supm. Ct. (T. & C.) 352.

[5] Scudder v. Union National Bank, 91 U. S. (1 Otto), 406 (and see Tilden v. Blair, 21 Wall. 241; Wayne Co. Bank v. Low, 6 Abb. New Cas. 76 and cases cited).

[6] Id.

[7] Downer v. Chesebrough, 36 Ct. 39.

[8] Scudder v. Union National Bank (above). See page 411, n. 7.

[9] See Leavenworth v. Brockway, 2 Hill, 201; compare Dollfus v. Frosch, 1 Den. 367.

[10] 2 Pars. on Pr. N. &c. 317.

[11] See pp. 22 and 23 of this vol.

[12] Donegan v. Wood, 49 Ala. 242, s. c. 20 Am. R. 276.

[13] Kimball v. Huntington, 10 Wend. 675.

[14] Fairchild v. Ogdensburgh, Clayton & Rome R. R. Co. 15 N. Y. 337.

[15] For the rule in cases of partnership, see p. 224; and for evidence of transfers among them before suit, Whitlock v. McKecknie, 1 Bosw. 427.

indorsement upon it.[1] But if there are suspicious circumstances, he may be put to further proof.[2] If it appear that he inserted his own name as payee, in a blank left in a note payable to order, he must adduce evidence that he was intended as payee, or authorized to insert his name.[3] If it appear that there are two persons of the payee's name, plaintiff's possession is some evidence that he is the one intended,[4] but it is best to be prepared with other evidence. Defendant's possession of the note,[5] even though it be canceled,[6] is not conclusive evidence against plaintiff's right to recover. If it appear that plaintiff had at one time transferred the note to a third person, evidence of a re-assignment,[7] or that the transfer was without consideration, and merely for a temporary purpose which had failed,—such as to enable him to bring an action, which has been discontinued,—is admissible.[8]

III. Action against Acceptor.

57. *Acceptance.*]—Against the acceptor, his acceptance must be proved, if in issue; which is done by producing the bill, with evidence of his handwriting. This raises a presumption of acceptance within due time and according to the course of business.[9] If the words do not necessarily import acceptance, although such as to be sufficient if unexplained, parol evidence is competent to show the circumstances under which they were written, and accompanying declarations which are not necessarily inconsistent with the writing.[10] At common law, a parol acceptance may be proved either by a promise to pay or to accept an existing bill,[11] or by a promise to accept a future bill coupled with evidence that the bill was taken on the faith of the promise.[12]

Under the statute, a writing, signed, or at least signature,[13] must be shown,[14] in the case of any bill accepted and to be paid in this State.[15]

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[1] Mottram v. Mills, 1 Sandf. 37.
[2] Grant v. Vaughan, 3 Burr. 1627.
[3] Crutchly v. Mann, 5 Taunt. 529. But see paragraph 34.
[4] Sweeting v. Fowler, 1 Stark. 106; Stebbing v. Spicer, 8 C. B. 827.
[5] Garlock v. Gaertner, 7 Wend. 198.
[6] Grey v. Grey, 47 N. Y. 552, rev'g 2 Lans. 173.
[7] Smith v. Childress, 27 Ark. 328; s. p. Washoe v. Hibernia Fire Ins. Co. 7 Hun, 75.
[8] Hatters' Bank v. Phillips, 38 N. Y. 128.
[9] Rosc. N. P. 356, citing Roberts v. Bethell, 12 C. B. 778.
[10] So held where the indorsement was: "I take notice of the above." Cook v. Baldwin, 120 Mass. 317, s. c. 21 Am. R. 517. When from the position of names in the paper it is uncertain which is drawer and which is acceptor, parol evidence may be given in an action by the payee, to show the intention of the parties. Walton v. Williams, 44 Ala. N. S. 348; and see Druiff v. Lord Parker, L. R. 5 Eq. 131.
[11] Edson v. Fuller, 22 N. H. (3 Fost.) 189; Bank of Michigan v. Ely, 17 Wend. 511, per Nelson, Ch. J.
[12] Ontario Bank v. Worthington, 12 Wend. 698.
[13] Spear v. Pratt, 2 Hill, 583. See Walker v. Bank of State of N. Y. 9 N. Y. 584.
[14] 1 N. Y. R. S. 768, § 6 (2 R. S. 6th ed. 1160); Blakiston v. Dudley, 5 Duer, 376. Otherwise of an order operating as an assignment. Morton v. Naylor, 1 Hill, 584; compare Luff v. Pope, 5 Id. 417.
[15] N. Y. &c. Bank v. Gibson, 5 Duer, 583.

One suing on a conditional acceptance must show performance of the condition.[1]

58. *Other facts.*]—Acceptance being proved, the drawer's signature is thereby admitted and need not be proved; but the genuineness of an indorsement made by the drawer of a bill payable to his own order, though made at the time of drawing and before acceptance, is not admitted,[2] but must be proved. An acceptance[3] precludes the acceptor from proving that the drawers were legally incapable of contracting,[4] or that they were not a firm as indicated by the bill itself,[5] but not from proving alteration of the body of the instrument.[6] Due presentment for acceptance is proved by proof of acceptance.[7]

59. *Promise to accept.*]—An agreement or promise to accept, if equivalent in law to acceptance, may be proved under an allegation of acceptance;[8] and no consideration need be shown.[9] Absolute written[10] authority to draw is equivalent to an unconditional promise to accept,[11] within the statute;[12] but authority to draw must point with certainty to the bills sued on.[13] A conditional authority or promise is not enough under the statute,[14] even if the condition be shown to have been performed.[15] In case of an acceptance on a separate paper, or a promise to accept a future bill, it is not essential to prove that the writing was shown to the person who took the bill; it is enough, if informed of it, he took the bill on the faith of it.[16] To recover as *bona fide* holder, against an acceptor who would not be bound otherwise, it is not enough to show parting with value before the acceptance, even in reliance that the bill would be accepted as other like bills had been before.[17]

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[1] Read v. Wilkinson, 2 Wash. C. Ct. 514; Ford v. Angelrodt, 37 Mo. 50. Whether a qualification imports a condition is a question of law for the judge. Sprout v. Matthews, 1 T. R. 182; Rosc. N. P. 355.

[2] 2 Pars. on Pr. N. &c. 483. And evidence of the genuineness of the latter having been given, the jury may compare the two. Id. A variance in stating the initial of first name of drawer will not sustain a general denial. Claflin v. Griffin, 8 Bosw. 689.

[3] Even if for honor. Rosc. N. P. 380.

[4] Rosc. N. P. 358.

[5] 2 Pars. on Pr. N. &c. 484.

[6] White v. Continental Bank, 64 N. Y. 316.

[7] Edson v. Fuller, 22 N. H. (2 Fost.) 183, 186.

[8] Ontario Bank v. Worthington, 12 Wend. 593. But it may be specially pleaded. Barney v. Worthington, 37 N. Y. 112; and should be if general. Boyce v. Edwards, 4 Pet. 111.

[9] Ontario Bank v. Worthington (above).

[10] So held of a telegram. Johnson v. Clark, 39 N. Y. 216.

[11] Ulster Co. Bank v. McFarlan, 5 Hill, 434.

[12] 1 N. Y. R. S. 1160, § 8.

[13] Boyce v. Edwards, 4 Pet. 121, and cases cited.

[14] Shaver v. Western Union Tel. Co. 57 N. Y. 459.

[15] N. Y. & Virginia, &c. Bank v. Gibson, 5 Duer, 584; *contra, per* DWIGHT, C., dissenting in Shaver v. Western Union Tel. Co. 57 N. Y. 467.

[16] Bank of Mich. v. Ely, 17 Wend. 508.

[17] Farmers', &c. Bank v. Empire Stone Dressing Co. 10 Abb. Pr. 47, s.c. 5 Bosw. 275.

60. *Several parts, or duplicates.*]—In an action against the drawer or indorser, of a bill of exchange drawn in parts, plaintiff must produce at the trial the identical bill or number of the set that was protested, or account for its absence.[1] Extrinsic evidence is competent for the purpose of showing that the word "duplicate" written across the instrument, was affixed because it was given merely as a substitute for a lost original.[2]

IV. Action against Drawer; on Non-acceptance.

61. *Refusal to accept.*]—In an action against drawer or indorser, for the drawee's refusal to accept, presentment for acceptance must be alleged and proved;[3] and it is sufficient for the plaintiff to show that the drawee refused to accept in the terms of the bill.[4] On the question what was a reasonable time for presentment, the distances, the means of communication, the usages of trade, the fluctuations of exchange, and illness or inevitable accident, are relevant.[5] If presented to an agent, plaintiff must give some evidence of authority to accept or refuse,—but this may be circumstantial, as, for instance, that the person was the drawee's clerk, known to be accustomed to do this kind of business for him.[6]

62. *Excuse for non-presentment.*]—Evidence that the drawer had no funds in the hands of the drawee from the time the bill was drawn till the time it became due, dispenses with the necessity of presentment,[7] unless the drawer shows he had a reasonable expectation that it would be paid.[8] As against the drawer, his oral request to delay presentment is competent.[9]

Without proof of agency to speak for the drawer, the drawee's declarations, though made at the time of presentment, that he had no funds of the drawer in his hands, are not admissible against the drawer.[10]

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[1] Wells v. Whitehead, 15 Wend. 527. As to effect of the words "second of exchange, first unpaid," see Bank of Pittsburgh v. Neal, 22 How. U. S. 96, and cases cited.

[2] Benton v. Martin, 40 N. Y. 345, qualifying result in 31 Id. 382.

[3] Mercer v. Southwell, 2 Show. 180; Rosc. N. P. 367.

[4] Boehm v. Garcias, 1 Camp. 425, n.; Rosc. N. P. 367.

[5] Para. on Pr. N. &c. 342.

[6] Para. on Pr. N. &c. 349.

[7] Kingsley v. Robinson, 21 Pick. 328. The presumption is that the drawee is in funds. Thurman v. Van Brunt, 19 Barb. 409; even though several places of payment are named. North Bank v. Abbot, 13 Pick. 465. Evidence of a refusal to pay the drawer's drafts a day or two before and after may be sufficient to rebut this presumption. Ransom v. Wheeler, 12 Abb. Pr. 139.

[8] Carle v. White, 9 Greenl. (Me.) 105. The allegation of no funds is disproved if it be shown that the drawer had effects on their way to the drawee, though they never reached him. Rosc. N. P. 378.

[9] Sheldon v. Chapman, 31 N. Y. 644.

[10] Carle v. White, 9 Greenl. (Me.) 104. And the notary's statement of such declarations inserted in his protest is not evidence. Dumont v. Pope, 7 Blackf. 367; Dakin v. Graves, 48 N. H. 45.

Although the acceptance was expressed to be payable at a particular place, the *acceptor* is *prima facie* liable without allegation or proof of demand for payment there. It is for him to show readiness to pay if he rely on that.[1]

V. Against Drawer, &c.; on Non-payment.

63. *Acceptance and presentment.*]—If the acceptance specifies a place other than the acceptor's residence as the place of payment, there must be evidence of the handwriting of the acceptor.[2] Evidence that the drawer, after the return of the bill to him for non-payment, and after inspection of the bill, promised to pay it, raises a presumption against him that the acceptance is genuine.[3] Evidence of presentment at the place specified is admissible, under a general allegation that the bill was duly presented.[4] And under an allegation that a bill drawn on one as of a specified address, and accepted generally, was presented to the drawee for payment, evidence that the holder went to the address, but found no one there, is admissible.[5]

Other rules as to dishonor are stated below, in connection with those as to charging indorsers.

VI. Actions against Indorsers, &c.

64. *Execution of the instrument.*]—It is not necessary, as against an indorser, to prove the signature of the maker,[6] drawer,[7] or of prior indorsers.[8] Nor can the indorser question their capacity;[9] nor the genuineness of the signatures.[10] Under a denial of indorsing, defendant may show that, without negligence on his part, his signature was fraudulently obtained, without any intention on his part to indorse.[11] The rules applicable to the mode of proving the defendant's indorsement,[12] and to oral evidence to vary it,[13] have been already stated.

As against an indorser, on non-payment of a bill by the drawee, evidence of a presentment for payment, at the place, if any, pointed out in the acceptance, is enough, without proving the acceptance itself.[14]

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[1] Green v. Goings, 7 Barb. 652; Terbell v. Downer, 28 Vt. (1 Will.) 511.
[2] Rosc. N. P. 369.
[3] Mottram v. Mills, 1 Sandf. 37.
[4] Rosc. N. P. 369.
[5] Id.
[6] Dalrymple v. Willenbrand, 62 N. Y. 5, affi'g 2 Hun, 488, s. c. 5 Supm. Ct. (T. & C.) 57.
[7] Rosc. N. P. 381, 399.
[8] Evidence of a misspelling of such a name is admissible to show that it was intended to make the paper payable to a fictitious person. Turnbull v. Bowyer, 40 N. Y. 456, affi'g 2 Robt. 406.
[9] Id.; Erwin v. Downs, 15 N. Y. 575.
[10] See Turner v. Keller, 66 N. Y. 66.
[11] Foster v. Mackinnon, L. R. 4 C. P. 704; Rosc. N. P. 380.
[12] Paragraphs 46 and 4 to 26.
[13] Paragraphs 47 and 48, and 26.
[14] Rosc. N. P. 381.

65. *Pleading facts to charge indorser.*]—An allegation of demand and notice of dishonor is essential; and its omission is not dispensed with by giving a copy of the instrument and alleging the sum due, and performance of conditions, &c., in the short form, allowed by Code of Procedure, for pleading instruments for the payment of money only.[1] Under an allegation of demand and notice, the fact must be proved, and an excuse for failing to demand,[2] or to give notice,[3] is not admissible[4] without amendment;[5] but indirect evidence, such as a subsequent promise to pay, or an actual part payment, or an admission of liability, is admissible;[6] and evidence of an informal demand, with reasons justifying it, as distinguished from excuse for non-demand, is admissible.[7]

66. *Cogency of the evidence.*]—The evidence of demand and notice must be sufficiently clear. Mere probability of proof is not enough;[8] but direct and positive evidence is not essential.[9]

67. *Time of demand.*]—The court may take judicial notice of the law merchant which allows grace,[10] and of the occurrence of Sundays,[11] and other universally known festivals, such as Christmas.[12] Evidence of usage is not competent, in opposition to the established principles of law, as to shorten the time fixed by law.[13] Evidence that demand was made, at the proper place and on the proper day, is *prima facie* evidence that the act was done at a proper time of the day.[14] According to high authority, those

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[1] Conkling v. Gandall, 1 Abb. Ct. App. Dec. 423.

[2] Garvey v. Fowler, 6 Duer, 587; Dolph v. Rice, 18 Wisc. 397; Shultz v. Depuy, 3 Abb. Pr. 252; Rosc. N. P. 377. The excuse is deemed one of the facts constituting the cause of action. Pier v. Heinnchoffen, 52 Mo. 333. *Contra*, at common law, Williams v. Matthews, 3 Cow. 252; 2 Greenl. on Ev. § 197, approved by Daniel, vol. 2, p. 90, &c. § 1048. The variance ought to be freely amendable if it has not misled. An express written acknowledgment of demand, &c., is competent under an allegation of the demand, &c., although it be proved as matter of fact that there was none; if the acknowledgment was made with full knowledge of the facts. Camp v. Bates, 11 Conn. 487.

[3] Curtis v. State Bank, 6 Blackf. 312; Rosc. N. P. 377.

[4] Leeson v. Pigott, Bayley on Bills, 9th ed. 409.

[5] Rosc. on P. 369, 377.

[6] Bank of United States v. Lyman, 1 Blatchf. 297, s. c. 20 Vt. 666, 679, affi'd 12 How. 225; Sherman v. Clark, 3 McLean, 91. Evidence that the drawees after maturity repeatedly promised to pay the bill, is sufficient to sustain a finding that it was duly presented at maturity, although the drawees testify it was not so presented. Patterson v. Stettauer, 40 Super. Ct. (J. & S.) 54.

[7] Rosc. N. P. 369, 379; Jones v. Fales, 4 Mass. 245; City Bank v. Cutter, 3 Pick. 414.

[8] Martinis v. Johnson, 1 Zabr. (N. J.) 239. But compare Kane v. Ins. Co. 20 Am. R. 409

[9] Commercial Bank v. Strong, 28 Vt. 316.

[10] Renner v. Bank of Columbia, 9 Wheat. 581.

[11] Mechanics & Farmers' Bank v. Gibson, 7 Wend. 460.

[12] Sasscer v. Farmers' Bank, 4 Md. 409, 420.

[13] Randall v. Smith, 63 Me. 105, s. c. 18 Am. R. 200. Compare City Bank v. Cutter, 3 Pick. 414.

[14] Wiseman v. Chiappella, 23 How. (U. S.) 368; DeWolf v. Murray, 2 Sandf. 166; Fleming v. Fulton, 7 Miss. (6 How.) 473.

who make paper payable at a bank are bound by the usage of the bank, whether they know it or not.[1] The court may take judicial notice of what are banking hours within their own local jurisdiction, but will not do so as to places beyond the State.[2]

68. *Place of demand.*]—If the paper specifies the place of payment, the evidence must show demand there;[3] if not, the place of date,[4] or, if undated, the place of making,[5] is presumptively the place for payment; but oral evidence not contradicting what is thus expressed, is competent.[6] If a specific address is not stated or shown by extrinsic evidence, the plaintiff, in order to rely on the fact that holder had the note at the place generally mentioned, on the day, ready to receive payment, must show that the maker had no ascertainable place of business or residence there.[7]

69. *Authority to demand.*]—The fact that the instrument was in the possession of the notary or other person making the demand, is *prima facie* evidence of his authority to demand payment.[8]

70. *Identity of maker or drawee; or authority of agent or servant.*]—To show that the demand was made on the proper person, indirect evidence is sufficient, and very slight evidence has often been accepted, in the absence of all evidence to the contrary. Answers made by a person applied to as the maker or drawee, on a demand of payment, admitting himself to be the person supposed, are admissible as part of the *res gestæ*, and are presumptive evidence that the person of whom the demand was made was the maker or drawee.[9] For this purpose, parol evidence is competent,[10] and very slight evidence may be enough. It is not sufficient to show that the bill was presented to some person on the premises of the maker or drawee without connecting them.[11]

A notarial certificate, competent to prove demand, is *prima facie* evidence of the identity of the person on whom the demand

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[1] 1 Dan. Neg. Inst. § 662.

[2] See 1 Dan. Neg. Inst. § 601.

[3] Meyer v. Hibsher, 47 N. Y. 270. But evidence of special agreement, or of usage equivalent thereto, is competent to show that notice to the maker what bank held the note was contemplated and was given, in lieu of literal demand. North Bank v. Abbot, 13 Pick. 464.

[4] Nailor v. Bowie, 3 Md. 251.

[5] Id.; Herrich v. Baldwin, 17 Minn. 209, s. c. 10 Am. R. 161.

[6] Meyer v. Hibsher, 47 N. Y. 271. And see King v. Crowell, 61 Me. 244, s. c. 14 Am. R. 560.

[7] Meyer v. Hibsher (above).

[8] Bank of Utica v. Smith, 18 Johns. 239; Burbank v. Beach, 15 Barb. 331.

[9] Hunt v. Maybee, 7 N. Y. 266; s. p. Howard v. Holbrook, 9 Bosw. 237, s. c. 23 How. Pr. 64.

[10] Staenbach v. Bank of Virginia, 11 Gratt. 260.

[11] Cheek v. Roper, 5 Esp. 175; Rosc. N. P. 367.

was made, or, equally, of the fact stated that he was a member of the firm[1] or agent for the maker or drawee.[2]

71. *Production of the instrument.*]—Visible production of the instrument need not be proved if the person making demand had it there in his possession, and there was an absolute refusal to pay.[3] The fact that the notary had the instrument with him, though not stated, may be presumed in aid of his certificate.[4] When the instrument is made payable at a bank, if the bill is the property of the bank, the presence of the instrument there need not be proved, as the presumption of law is, that the paper was in the bank, and the burden rests upon the defendant to show that the party liable called to pay it.[5] Even if not the property of the bank, plaintiff need not show that the instrument was in the hands of the officer of the bank whose duty it was to receive payment; and the contrary would not be material, if the note was in the bank ready for payment,[6] and remained unpaid. If shown to have been in the bank, the presumption is that the proper officer could have obtained it. Evidence that it belonged to the bank, raises a *prima facie* presumption that it was there.[7]

72. *Due diligence in demand.*]—On the question whether due diligence was used in making inquiry, the answers made by persons of whom inquiry was properly made, are competent as parts of the *res gestæ*, not as evidence of the facts stated, but as bearing on the question of diligence.[8] If the person making demand or inquiry is dead, his memoranda, made in the course of duty, of his acts in pursuance of inquiry are competent.[9] So where the law requires diligence to collect of maker and prior indorsers, the record of an action against them is competent.[10]

73. *Official protest as evidence.*]—By the law merchant, demand, presentment and dishonor of a *foreign* negotiable bill of exchange (that is, of one payable without the State)[11] can be proved for the purpose of charging a drawer or indorser, only by

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[1] Elliott v. White, 6 Jones (N. C.) 98. But compare Otsego Co. Bank v. Warren, 18 Barb. 290.

[2] Dickerson v. Turner, 12 Ind. 223; Phillips v. Poindexter, 18 Ala. 579. *Contra*, Drumm v. Bradfute, 18 La. Ann. 680. The evidence is aided by the presumption of official regularity. See Gardner v. Bank of Tennessee, 2 Swan, 420.

[3] King v. Crowell, 61 Me. 244, s. c. 14 Am. R. 560; Etheridge v. Ladd, 44 Barb. 69.

[4] Ross v. Bedell, 5 Duer, 462; Union Bank v. Foulkes, 2 Sneed 555.

[5] Chicopee Bank v. Philadelphia Bank, 8 Wall. 641, and cases cited.

[6] Otherwise if mislaid. Chicopee Bank v. Philadelphia Bank (above).

[7] 1 Pars. on Pr. N. &c. 437.

[8] Adams v. Leland, 30 N. Y. 309, affi'g 5 Bosw. 411.

[9] Halliday v. Martinet, 20 Johns. 168.

[10] Camden v. Doremus, 3 How. (U. S.) 515; 2 Whart. § 823.

[11] Whether protest is competent in case of a bill drawn without, and payable and protested within the State, see 2 Dan. Neg. Inst. § 969, and cases cited; Brain v. Preece, 11 Mees. & W. 775.

protest;[1] and no part of these facts can be proved by extrinsic evidence. If the demand and notice were made by the clerk or partner of the notary whose certificate of the act is relied on, evidence of a local usage for the notary's clerk to make the demand, is competent and necessary;[2] and the usage must be shown to relate to the class of paper in question, foreign or domestic.[3]

In the case of *promissory notes*[4] and *inland bills*,[5] the competency of the notarial certificate depends entirely upon statute.[6] Where proof by certificate is, by statute, substituted for common-law evidence, all the forms directed by the statute, whether pre-

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[1] By notary's certificate or by proof that it was made at a place where there was no resident notary, and by a substantial person of the place. Chanoine v. Fowler, 3 Wend. 173; and see Burke v. McKay, 2 How. (U. S.) 66.

[2] Commercial Bank of Ky. v. Varnum, 49 N. Y. 269, a. c. 11 Am. Law Reg. (N. S.) 307, rev'g 3 Lans. 86; Cribbs v. Adams, 13 Gray, 600.

[3] 1 Dan. Neg. Inst. § 587; 2 Dan. Neg. Inst. § 926.

[4] Bond v. Bragg, 17 Ill. 69. *Contra*, in some States, as to notes payable in one State and indorsed by a resident of another State. Williams v. Putnam, 14 N. H. 540. So, too, evidence of usage may avail in some jurisdictions. See Townley v. Sumrall, 2 Pet. 170.

[5] Union Bank v. Hyde, 6 Wheat. 572; Nicholls v. Webb, 8 Id. 326.

[6] See, for instance, Walker v. Turner, 2 Gratt. 534.

The New York Statutes, as to notarial certificates, are as follows:

"The certificate of a notary public of the State, under his hand and seal of office, of the presentment by him, for acceptance or payment, or of the protest, for non-acceptance or non-payment of a promissory note or bill of exchange, or of the service of notice thereof on a party to the note or bill; specifying the mode of giving the notice, the reputed place of residence of the party to whom it was given, and the post-office nearest thereto, is presumptive evidence of the facts certified, unless the party, against whom it is offered, has served upon the adverse party, with his pleading, or, within ten days after joinder of an issue of fact, an original affidavit, to the effect, that he has not received notice of non-acceptance, or of non-payment of the note or bill. A verified answer is not sufficient as an affidavit, within the meaning of this section." Code Civ. Pro. § 923, from L. 1833, c. 271, § 8 (3 R. S. 6th ed. 445, § 36); and see 3 R. S. 6th ed. 1163.

"In case of the death or insanity of a notary public of the State, or of his absence or removal, so that his personal attendance, or his testimony, cannot be procured, in any mode prescribed by law, his original protest, under his hand and official seal, the genuineness thereof being first duly proved, is presumptive evidence of a demand of acceptance, or of payment, therein stated; and a note or memorandum, personally made or signed by him, at the foot of a protest, or in a regular register of official acts, kept by him, is presumptive evidence that a notice of non-acceptance or non-payment was sent or delivered, at the time, and in the manner, stated in the note or memorandum." Code Civ. Pro. § 924, from 2 R. S. 283, 284, §§ 46, 47 (3 R. S. 6th ed. 444, 446).

"Proof of the presentment, for acceptance or payment, of a promissory note or bill of exchange, payable in another State, or in a Territory, or foreign country, or of a protest of the note or bill, for non-acceptance, or non-payment, or of the service of notice thereof, on a party to the note or bill, may be made, in any manner authorized by the laws of the State, Territory, or country, where it was payable." Code Civ. Pro. § 925, from L. 1865, c. 309 (2 R. S. 6th ed. 1164, § 32).

The act of 1833, above stated, has no application to the case of a certificate of a notary of this State to the presentment of a note drawn payable at a place in another State. Dutchess Co. Bank v. Ibbotson, 5 Den. 110; Kirtland v. Wanzer, 2 Duer, 278. Nor does it make a notary's certificate evidence of an excuse for not presenting —*e. g.*, that on due inquiry he had been unable to find the maker. Furniss v. Holland, 1 Edm. 470. Where the notarial certificate makes no mention of the service of notice of protest, a memorandum at the foot of the draft annexed to the certificate, is no evidence of such service. Bank of Vergennes v. Cameron, 7 Barb. 143.

liminary or substantial, must be strictly complied with.[1] A statute making the notarial certificate or record evidence on notes or inland bills, does not make it evidence in the courts of another State;[2] nor does a statute making it evidence of demand and dishonor, imply that it is to be received as evidence of notice in the courts of the same State.[3] If the statute declares the notarial certificate to be evidence, the certificate must not purport to be a mere copy of a record from the notary's books. But it need not be made out and signed at the time of making the protest.[4] The official certificate is not rendered incompetent by the fact that it was drawn up,[5] or a mistake in it was corrected by the notary[6] after suit brought.

If there is not annexed[7] to an answer denying notice of protest, an affidavit of denial of receipt of notice, as required by the act of 1833,[8] the notary's certificate is presumptive evidence; and this presumption is not destroyed by defendant's testimony on the trial, that he did not receive the notice sent through the post-office.[9]

In New York, a plaintiff relying on the act allowing protest in another State to be proved according to the law of that State,[10] should produce the foreign certificate duly authenticated according to the law of the place where made, with evidence of the law of that place, sufficient to show that the facts stated in the certificate do, by that law, charge the party.[11] If the certificate does not state the facts, there should be other proof, or at least evidence that by the same law such a general certificate is sufficient.[12]

Where protest is competent, but not the only competent evidence, extrinsic evidence of necessary facts not sufficiently stated in it,[13] and not inconsistent with it, is competent. A protest, when exclusively relied on to prove the necessary facts, must contain sufficient averments that everything requisite has been done to authorize the demand upon the indorser;[14] but the court will make all reasonable presumptions of detail in aid of the certificate which are justified by the language of its statements;[15] yet, should not, in general, presume a precedent act like demand, from a

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[1] Rogers v. Jackson, 19 Wend. 383.
[2] Kirtland v. Wanzer, 2 Duer, 278.
[3] Curtis v. Buckley, 14 Kans. 449. Compare 2 Dan. Neg. Inst. 18. *Contra*, 2 Pars. on Pr. N. &c. 498.
[4] Brandon v. Loftus, 4 How. 127.
[5] Cayuga Co. Bank v. Hunt, 2 Hill, 635.
[6] Estep v. Cecil, 6 Ohio St. 536, and cases cited.
[7] Gawtry v. Doane, 51 N. Y. 89.
[8] Note 6 p. 427 (above), § 923.
[9] Dunn v. Devlin, 2 Daly, 122.
[10] See note above, § 925.
[11] Lawson v. Pinckney, 40 Super. Ct. (J. & S.) 187.
[12] Id.
[13] Nailor v. Bowie, 3 Md. 251.
[14] People's Bank of Baltimore v. Brook, 31 Md. 7, s. c. 1 Am. R. 11.
[15] See 2 Dan. Neg. Inst. § 962, 964.

statement of a subsequent act like notice; nor matters of fact, like inquiries, from a mere legal conclusion, such as an allegation of due diligence. The protest, when admitted, is *prima facie* but not conclusive[1] evidence of the facts stated, and within the official power and duty of the notary. Any statement in it may be rebutted by any competent testimony.[2] If the certificate states what is necessary, the fact that the notary or clerk called as a witness has no recollection, does not impair its effect.

74. *Sealed Certificate.*]—The notary's official seal is sufficient *prima facie* evidence of the authenticity of the certificate. The courts take judicial notice of the seal, and it proves itself by its appearance[3] in any part of the certificate.[4] But it may be controverted as fictitious or improperly affixed.[5] A seal printed,[6] or scrawled,[7] is not enough at common law; but an impression in the paper is *prima facie* sufficient;[8] and it will be presumed to have been affixed according to the law of the country where the dishonor occurred, until there is something to impeach it.[9]

75. *Unsealed Certificate.*]—If the certificate is not under the notary's seal, or not made by the notary in person, it does not prove itself, and there must be extraneous evidence to show that it was duly made by the person officiating, and that by the law of the country where it was made, it is sufficient without a seal.[10]

76. *Copy.*]—A duly authenticated duplicate protest,[11] or a verified copy,[12] drawn up from the notary's book, is admissible secondary evidence in lieu of the original sent abroad. If the statute makes a certified copy of the record admissible evidence, it is not necessary to account for the non-production of the original.[13] Testimony as to the form of notice the notary was accustomed to use, and a copy of his blank, are competent secondary evidence in connection with evidence that he sent the usual notice.

77. *Secondary evidence of statutory certificate.*]—But where the competency of the certificate depends on the statute, the necessary facts cannot be proved by showing that a notary's certificate

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[1] Nelson v. Fotterall, 8 Leigh, 118.

[2] 2 Dan. Neg. Inst. § 959.

[3] United States v. Libby, 1 Woodb. & M. 221, and cases cited; 2 Dan. Neg. Inst. § 945. *Contra*, as to foreign notaries, 1 Whart. Ev. 286, § 320; not sound here.

[4] Olcott v. Tioga R. R. Co. 27 N. Y. 546, affi'g 40 Barb. 179.

[5] 2 Dan. Neg. Inst. § 945.

[6] Richard v. Boller, 6 Daly, 460, s. c. 51 How. Pr. 371.

[7] Ross v. Bedell, 5 Duer, 462, and cases cited.

[8] And is sufficient by statute in N. Y. 2 N. Y. R. S. 276, § 10; Id. 404, § 61.

[9] Id. § 947. As to defective seal, see Re Phillips, 14 Nat. Bkcy. Reg. 219, and cases cited; Donegan v. Wood, 49 Ala. 242, s. c. 20 Am. R. 280.

[10] 2 Dan. Neg. Inst. §§ 946, 948.

[11] Geralspulo v. Wieler, 10 C. B. 690, 715, s. c. 20 L. J. C. P. 105; Phillips v. Poindexter, 18 Ala. 579.

[12] Halliday v. McDougall, 20 Wend. 81; Mauri v. Heffernan, 13 Johns. 58.

[13] McAfee v. Doremus, 5 How. 53.

of those facts, once existed, and has been lost, and then proving its contents. The statute makes the certificate evidence; which is an innovation on the common law. If the certificate itself is not produced, the statute is not complied with, and common law evidence of the presentment, &c., must be given.[1]

78. *Memoranda to refresh memory.*]—Under the rule already stated,[2] the person who did any act to charge the indorser, may refresh his memory by reading his contemporaneous entry; but to render his testimony sufficient, either the fact must appear stated in the entry, or he must be able to remember it. His argumentative belief that a fact not stated must have existed, because he would not have entered other facts if it had not, is not enough.[3]

79. *Memoranda of deceased person.*]—In cases where production of protest is not essential, the entries and memoranda, whether in his book or on the instrument,[4] made by the notary or his clerk, or a bank officer,[5] or messenger,[6] since deceased, whose obligation it was to do the act, and who made the memorandum contemporaneously in the course of his duty, are competent as memoranda in the usual course of business,[7] or to refresh memory,[8] to prove facts so done. It is no objection that the person was a notary,[9] and *notarial* protest was unnecessary or not effectually accomplished.[10] Hence a protest of an inland bill or a note, even if not admissible by statute as primary evidence, is, after the notary's death, competent secondary evidence, as a memorandum made in the usual course of business.[11] If the person who made the entry is living his testimony must be adduced.[12] The entry can prove no more than what it states; and if it omits to state the residence of the indorser, the post-office to which notice was addressed, or any other material fact, it cannot be inferred.[13]

Experts may be called to decipher abbreviated and elliptical entries in the book of a notary who is deceased,[14] as distinguished from testifying what the construction is.[15]

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[1] Dutchess County Bank v. Ibbotson, 5 Den. 110.
[2] Page 320 of this vol. Sasscer v. Farmers' Bank, 4 Md. 409.
[3] Gaylor v. Stringer, 1 Hilt. 337. Compare Bank of Columbia v. McKenney, 3 Cranch C. Ct. 361.
[4] Hart v. Wilson, 2 Wend. 513.
[5] Nichols v. Goldsmith, 7 Wend. 160, and cases cited.
[6] Welsh v. Barrett, 15 Mass. 380.
[7] Nicholls v. Webb, 8 Wheat. 326; Halliday v. McDougall, 20 Wend. 85.
[8] Cole v. Jessup, 10 N. Y. 100. See the rules as to such mem. on pp. 331, 332, of this vol., and Lewis v. Kramer, 3 Md. 265.
[9] Gawtry v. Doane, 51 N. Y. 84, affi'g 48 Barb. 148.
[10] Cole v. Jessup (above).
[11] Porter v. Judson, 1 Gray, 175, Shaw, Ch. J.
[12] Wilbur v. Selden, 6 Cow. 162.
[13] 2 Dan. Neg. Inst. § 1057, and cases cited. Paragraphs 73 and 78 (above).
[14] Sheldon v. Benham, 4 Hill, 129.
[15] Compare Duncan v. Watson, 10 Miss. 121.

80. *Legal notice to charge indorser.*]—Notice may be shown, either directly, by evidence of actual notice seasonably received by defendant;[1] or by evidence of due diligence by the holder in sending notice;[2] or indirectly, by evidence that defendant has expressly or impliedly admitted that he had due notice.[3]

81. *Identity of person served.*]—The same rules as to the evidence of the identity of the person served apply as in case of the person on whom demand is made,[4] and, if anything, more freely, because the defendant charged can the better rebut the evidence.

82. *Executors and Administrators.*]—To charge the estate of a deceased person on his indorsement, matured after his death, the holder must show service of the notice at the last residence, or last place of business of the deceased, or on the executor named in the will, if any; or on one who actually at the time is administrator, or special administrator. Service on one who was named executor in the will, and who had been removed or renounced, is not sufficient, if it appear that, with reasonable diligence, the holder might have ascertained the existence of a special administrator, who was the proper person to receive the notice.[5]

83. *Time of service.*]—If plaintiff relies on direct evidence of notice, whether actual or constructive, he must distinctly show that it was given on the proper day.[6] It will not suffice to show that it was given on one of two days, if the latter would be too late.[7]

84. *Actual notice.*]—To show actual notice an oral communication may be proved;[8] but evidence of mere knowledge,[9] or of notice from a stranger,[10] is not enough.

If a number of parties were entitled to notice, it is sufficient to charge any one, to show that notice actually reached him in such a time as would be required for the intermediate parties to transmit it to him in the usual course of the mail, allowing each one his day.[11] But the courts need not take judicial cognizance of the course of the mails.[12] That should be shown by the party

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[1] Paragraph 84.
[2] Paragraphs 85—90.
[3] Hyde v Stone, 20 How. U. S. 170; 2 Dan. Neg. Inst. § 1050.
[4] See paragraph 70. Hunt v. Maybee, 7 N. Y. 266.
[5] Goodnow v. Warren, 122 Mass. 79, s. c. 23 Am. R. 289, and cases cited. Compare Maspero v. Pedesclaux, 22 La. Ann. 227, s. c. 2 Am. R. 727.
[6] Friend v. Wilkinson, 9 Gratt. 31.
[7] 2 Dan. Neg. Inst. § 1051.
[8] Woodin v. Foster, 16 Barb. 146; Cuyler v. Stevens, 4 Wend. 566.
[9] Rosc. N. P. 371.
[10] Walmsley v. Acton, 44 Barb. 312; 2 Dan. Neg. Inst. § 988.
[11] 2 Dan. Neg. Inst. § 1053. Compare Sheldon v. Benham, 1 Hill, 429, and Van Brunt v. Vaughn, 7 Reporter, 397, s. c. 47 Iowa.
[12] See Early v. Preston, 1 Patt. & H. (Va.) 228.

relying on it. It would be better for plaintiff to show also that he gave notice in due season to his immediate indorser. When he has shown that notice reached the remote party within the time which would regularly be consumed, it will be for the latter to show a defective link in the chain of notices, if any there be.[1]

A denial of receiving notice may be sustained by testimony of a clerk or cashier, leaving it to cross-examination to inquire into his means of knowledge.[2]

85. *Due diligence by the holder.*]—If it be shown that due and legal diligence was used by the holder in sending notice, a conclusive legal presumption of notice attaches, or, in other words, the fact that the notice was never received becomes immaterial.[3]

86. *Place of directing notice.*]—The place of date of the instrument is *prima facie* but not conclusive evidence, for the purpose of notice, that the maker or drawer resides there.[4] And coupled with other circumstances, it may be evidence of the residence of the indorser. Such circumstances should, however, be strong and persuasive, for there is no *prima facie* presumption that an indorser resides at the place of date, or at the place of payment.[5] A certificate of service, specifying the reputed residence to which the notice was sent, is *prima facie* evidence of the reputed place of residence of the party notified.[6] But the place of residence or business is not sufficiently shown by the notary's certificate, merely that he mailed the notice addressed to the indorser at, &c.[7]

The better opinion is, that in all cases, no matter how long the paper had to run, notice addressed to the indorser at the place where he resided when he made the indorsement is sufficient to charge him, although he may have changed his residence, unless it be shown that the holder had received information of the change of residence.[8]

An erroneous address may be sustained by evidence that the party held himself out as resident there,[9] or directly caused the mistake by the manner of his own writing,[10] so as to be estopped from objecting.

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[1] 2 Dan. Neg. Inst. § 1053.
[2] Union National Bank v. Sixth National Bank, 1 Lans. 13; 43 N. Y. 452.
[3] Dickens v. Beal, 10 Pet. 572, 582.
[4] 2 Dan. Neg. Inst. § 1030. It is a slight presumption. Lowery v. Scott, 24 Wend. 358.
[5] Id. § 1031.
[6] Bell v. Lent, 24 Wend. 230, Nelson, Ch. J.
[7] Bradshaw v. Hedge, 10 Iowa, 402; Raine v. Rice, 2 Patt. & H. (Va.) 529; Turner v. Rogers, 8 Ind. 139; U. S. Bank v. Smith, 11 Wheat. 171. But a certificate that he notified the indorser by mailing a notice *to him* addressed at, &c., has been held sufficient, within the rule stated in the text. Wamsley v. Rivers, 34 Iowa, 463.
[8] Requa v. Collins, 51 N. Y. 144, 148, approved in 2 Dan. Neg. Inst. § 1032.
[9] 2 Dan. Neg. Inst. § 1029.
[10] Manuf. &c. Bank v. Hazard, 30 N. Y. 226.

87. *Due diligence in inquiry.*]—The parties through whose hands negotiable paper has passed, are presumed to know the residence of the parties from whom they received it, and of the prior parties; and therefore evidence that they were properly applied to for information, and assumed to know, justifies acts done upon information given by them.[1] Diligence is not shown by merely consulting the directory, when other sources of accurate information may be within the convenient reach of the person whose duty it may be to secure it, through which it can be obtained.[2] The notary's testimony that he made diligent inquiry and ascertained the reputed residence, &c., is sufficient to go to the jury, if not objected to as too general.[3] Details may be called out on cross-examination.

88. *Evidence of the contents of the notice.*]—The fact that notice was given in writing does not preclude oral or other evidence of the giving of due notice (either by direct testimony[4] or by putting in evidence a duplicate);[5] and producing or giving notice to produce the original is not necessary. But there should be sufficient evidence of the contents of the written notice relied on to show that it was due notice.[6] But it is not essential to prove in detail the exact contents of the notice; general testimony, especially from the notary, may be enough.[7]

89. *Extrinsic evidence as to imperfect notice.*]—Where the notice served is erroneous in some particulars, rendering it ambiguous on its face, evidence is admissible to show that there was only one note or bill to which it could possibly have applied.[8] Evidence of defendant's knowledge of the circumstances, is competent, for the purpose of showing that he could not have been misled.[9] Even when the notice is defective, it may be shown by extrinsic evidence that the indorser was not misled as to the identity of the dishonored note;[10] and if the notice be correct and sufficient in view of the note or bill which it describes, it cannot be rendered invalid by showing *aliunde* that notes, similar in parties, date, amount, and time and place of payment, were outstanding, and were only distinguishable from each other by their numbering.[11]

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[1] Beale v. Parrish, 20 N. Y. 407, rev'g 24 Barb. 243; Lawrence v. Miller, 16 N. Y. 235.

[2] Greenwich Bank v. DeGroot, 7 Hun, 213.

[3] Carroll v. Upton, 3 N. Y. (3 Comst.) 272.

[4] Lindenberger v. Beall, 6 Wheat. 104; Rosc. N. P. 376; Johnson v. Haight, 13 Johns. 470. This is so whether the notice is given by a notary public or a private person. Scott v. Betts, Hill & D. Supp. 363.

[5] 2 Dan. Neg. Inst. § 1051.

[6] Id. Smith v. Hill, 6 Wis. 154.

[7] Dickens v. Beal, 10 Pet. 572; and see Lindenberger v. Beall, 6 Wheat. 104.

[8] Cayuga County Bank v. Warden, 6 N. Y. 19, reaffi'g 1 Id. 413. Compare 1 Pars. on Pr. N. 474.

[9] Cook v. Litchfield, 9 N. Y. 279.

[10] Hodges v. Shuler, 22 N. Y. 114, affi'g 24 Barb. 68.

[11] Id.

90. *Mailing.*]—Where the holder[1] and the party to be charged by the notice, reside in different places, or the party entitled to notice resides at a place other than the particular place at which the bill or note is payable, or, after diligent inquiry was supposed, though erroneously, to so reside,[2] it is in general, sufficient to prove notice of dishonor duly addressed, and mailed within the proper time. This done, the fact that the notice was not received, is irrelevant.[3] The usage of a bank, if relied on to sustain service by mail on persons residing in the same place should be proved by clear and satisfactory evidence, so that it may be presumed that the parties had reference to it in contracting.[4]

In addition to rules already stated as to communications by mail,[5] it may be observed that when one relies on mailing he must show the mailing to have been in time to be timely received according to the ordinary course.[6] The court is not bound to take judicial notice of the course of the mails, nor of the time required for a letter to go from one post-office to another.[7] In support of mailing, as due diligence, plaintiff may give evidence of the usual course of the mails, and the knowledge of the post-office authorities and other circumstances throwing light on the question whether the notice, as addressed and mailed, was reasonably diligent, within the rule,[8] or even for the purpose of raising a presumption that the notice was actually received, although due diligence was not used.[9]

A notary's certificate that notice was mailed, if competent, raises a presumption that the postage was paid.[10] Such a certificate that it was "mailed for" the indorser raises a presumption that it was directed to him.[11]

91. *Inference of delivery or mailing, from ordinary course of business.*]—It is not necessary to show, by direct evidence, that the particular letter containing the notice was put into the mail. It may be inferred from indirect evidence, such as that it was put with letters for the post-office by one clerk, and that the letters of that day were deposited by another clerk; or that it was put with letters customarily made up in the usual course

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[1] See Bowling v. Harrison, 6 How. (U. S.) 259.
[2] Saco Nat. Bank v. Sanborn, 63 Me. 340, s. c. 18 Am. R. 224.
[3] Bussard v. Levering, 6 Wheat. 102; Rosc. N. P. 374.
[4] Bowling v. Harrison, 6 How. (U. S.) 259; 2 Dan. Neg. Inst. § 1013.
[5] Page 291 of this vol.
[6] The presumption that notice of protest, &c., sent by mail, reached the person addressed, ends when the mode of conveyance is irregular and illegal, and the mail may not be carried at all, and when it is known that the regular mail has been indefinitely suspended. Donegan v. Wood, 49 Ala. 242, s. c. 20 Am. R. 279, and cases cited.
[7] Early v. Preston, 1 Patt. & H. (Va.) 228.
[8] Dickens v. Beal, 10 Pet. 572.
[9] Id.
[10] Brooks v. Day, 11 Iowa, 46.
[11] Smith v. Janes, 20 Wend. 192; and see Dunn v. Devlin, 2 Daly, 122.

of business for the postman, and that he invariably carried all the letters found upon the table.[1] Where service is thus proved by presumption from the ordinary course of business, the testimony of each person through whose hands in ordinary course the letter would have passed to the mail or to the custody of the postman, should be adduced,[2] but it is not essential that each remember the particular letter, and be able to negative its loss, &c.[3]

92. *Admissions of demand made and notice received.*]—The protest may be proved by the express admission of the party sought to be charged, without producing the notary or his certificate.[4] Such an admission, though strong evidence, is not conclusive, even if written, but he may show that the paper was signed under mistake,[5] unless another person has been induced to alter his condition thereby.[6]

An admission of liability, whether express[7] or implied,[8] or by a promise, made to the holder, or to a third person,[9] if shown to have been made subsequent to the dishonor, is competent evidence from which to infer due demand, presentment and notice.[10] Part payment after maturity, by the drawer or indorser, is an acknowledgment of liability; and if unexplained is presumptive evidence against him of demand and notice. And if it be shown that such part payment was made with knowledge of laches of the holder, it constitutes a waiver.[11]

The burden of proof is upon the plaintiff to show clearly and distinctly the acknowledgment of liability or promise to pay; but it matters not what particular phrase was used, if it amounted to such acknowledgment or promise. If the promise was qualified by a condition, evidence of its acceptance, or of performance of the condition, is necessary to make it available as a waiver;[12] but without such evidence, it is competent in connection with other circumstances, as tending to show that due demand was made and notice given.[13]

When the admission or promise is adduced as evidence that

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[1] 2 Dan. Neg. Inst. § 1054.
[2] See Hawkes v. Salter, 4 Bing. 715.
[3] Commercial Bank v. Strong, 28 Vt. 316; Hetherington v. Kemp, 4 Campb. 193. Compare Bradley v. Davis, 25 Me. 49.
[4] Derrickson v. Whitney, 6 Gray, 248.
[5] Commercial Bank of Albany v. Clark, 28 Vt. 325.
[6] Heane v. Rogers, 9 Barn. & Cress. 577.
[7] Rosc. N. P. 374.
[8] As, for instance, by including the bill in the indorser's schedule of debts in insolvency, Hyde v. Stone, 20 How. U. S. 170; or in an account stated, Bank of U. S. v. Lyman, 20 Vt. 666; or allowing judgment to go by default in an action brought by a former holder of the same bill. Rabey v. Gilbert, 6 H. & N. 536; L. J. 30 Ex. 170; cited in Rosc. N. P. 382.
[9] Potter v. Rayworth, 13 East, 417; Rosc. N. P. 382.
[10] Lewis v. Brehme, 33 Md. 412, s. c. 3 Am. R. 190.
[11] 2 Dan. Neg. Inst. § 1165.
[12] Id. § 1162.
[13] Id. § 1164.

notice was received, and not as evidence of a contract or waiver, dispensing with the right to notice,[1] the burden is on the party whose admission or promise is adduced, to show that he made it without knowledge of the facts, and that the facts were not sufficient to charge him.[2]

93. *Indirect evidence of notice.*]—Evidence of any acts and declarations of the party sought to be charged, which tend to show that he had received notice is competent in aid of direct evidence of actual notice or due diligence, such, for instance, as the fact that he has taken back the original consideration of the dishonored note;[3] or has taken indemnity;[4] or has objected to paying solely on other grounds,[5] and the like.

94. *Waiver of demand or notice.*]—If the holder has any legal excuse for not having actually made demand and given notice, it lies on him to prove it.[6] But such evidence is not strictly admissible under an allegation of demand or notice.[7]

The waiver may be proved by, 1, an express previous assent to omission; or 2, by subsequent promise with full knowledge; or 3, by evidence that defendant gave the holder notice that the paper would not be paid, and promised to make it good, even though such notice did not reach the holder so as to influence his action as to demand, &c.[8]

Evidence that the indorser, with full knowledge of the laches, unequivocally assented to continue his liability, or to be responsible as though protest had been made, establishes a waiver of omission to demand and give notice.[9] The assent must be clearly established, and will not be inferred from doubtful or equivocal acts or language.[10] An express promise to pay, made after discharge, and with full knowledge, is enough. But it is not necessary to prove an express promise. Any transaction between him and the holder is enough, which clearly indicates this intention.[11]

Where a subsequent admission or promise is adduced as evidence of a waiver of omission, as distinguished from using it as evidence, that there was no omission, plaintiff must show that it

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[1] See Rose. N. P. 374.
[2] Lewis v. Brehme (above); Tebbetts v. Dowd, 23 Wend. 379.
[3] Andrews v. Boyd, 3 Metc. 434.
[4] Ross v. Planters' Bank, 5 Humph. 335.
[5] Curlewis v. Corfield, 1 Q. B. 814, s. c. 6 Jur. 259; 1 G. & D. 489.
[6] United States v. Barker, 4 Wash. C. Ct. 464.
[7] Paragraph 65. *Contra*, in some States. Harrison v. Bailey, 99 Mass. 620, and approved by 2 Dan. Neg. Inst. § 1049; and see 14 Wall. 374.
[8] Yeager v. Farwell, 13 Wall. 13.
[9] Ross v. Hurd, 71 N. Y. 18.
[10] Ross v. Hurd (above).
[11] Ross v. Hurd (above); such as saying, "I will waive protest." Id. Or agreeing to consider the demand and notice as made in due time, and himself liable as indorser. Duryea v. Dennison, 5 Johns. 248.

was made with full knowlege of the omission.[1] The weight of authority is that in order to sustain a waiver by subsequent promise, defendant's knowledge that he had not received regular notice may be inferred, as a fact, from the promise under the attending circumstances without requiring clear and affirmative proof of knowledge.[2] Evidence of a consideration for waiver is not necessary.[3]

Even a previous written waiver may be explained by parol,[4] within the limits elsewhere stated.[5] Where there is on the face of the instrument a written waiver of either act—demand or notice—oral evidence is competent to show that there was also a verbal waiver of the other act.[6]

95. *Want of funds as an excuse.*]—If a holder seeks to rely on want of funds as an excuse for omission to demand and give notice, the burden of proof is on him to show that there were no funds in the hands of the drawee to meet the bill; and this he must do by affirmative proof, as it will be presumed that there were funds, although the bill was dishonored. Having shown that there were no funds, a *prima facie* excuse is made out; and if there were qualifying circumstances entitling the drawer to require strict presentment and notice—such as his being an accommodation drawer, or keeping an open account, and the like—he must show them, for they lie peculiarly within his own knowledge.[7] Evidence that an indorser had funds which he might lawfully have applied to payment, but did not receive or hold solely for the purpose, is not necessarily an excuse for omission to give him notice; but is enough to go to the jury.[8]

VII.—Irregular Indorsement.

96. *Payee against irregular indorser: New York doctrine.*]—Evidence that defendant wrote his name on the back of the note before its delivery to the payee, without any extrinsic evidence of intention in so doing, raises a legal but not conclusive presumption that he did so for the payee's accommodation, intend-

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[1] Tebbetts v. Dowd, 23 Wend. 379; Walker v. Rogers, 40 Ill. 278. *Contra*, Loose v. Loose, 36 Penn. St. 538, compare Wade on Notice, 429, and 2 Dan. Neg. Inst. §§ 1152 and 1157.

Knowledge of the law or the legal liability, as distinguished from the fact, need not be shown. Matthews v. Allen, 16 Gray, 594.

[2] Tebbetts v. Dowd, 23 Wend. 379, and cases cited.

[3] 2 Dan. Neg. Inst. § 1147. The contrary opinion is urged in 4 So. L. Rev. 426, as to cases where the defendant shows that he was in fact injured by the omission.

[4] Union Bank v. Hyde, 6 Wheat. 572; Porter v. Kimball, 53 Barb. 467, compare Ayrault v. Pacific Bank, 47 N. Y. 570.

[5] Buckley v. Bentley, 48 Barb. 283; s. p. in a previous decision, 42 Id. 646, pages 294, 409, of this vol.

[6] 2 Dan. Neg. Inst. § 1098; see also p. 294 of this vol.

[7] 2 Dan. Neg. Inst. § 1084.

[8] Ray v. Smith, 17 Wall. 411.

ing to become indorser subsequent to the payee; that he knew the indorsement of the payee must be given before the note could become operative, and indorsed the note on that understanding.[1] On the face of the paper, therefore, without extrinsic evidence,[2] he cannot be held liable at suit of the payee, or of any one suing in behalf of the payee, or who has taken title from the payee after maturity,[3] or with knowledge of the facts.[4]

As between the parties and those subject to their equities, oral evidence is competent to rebut this presumption by showing[5] that the indorsement was made to give the maker credit with the payee,[6] and that the payee parted with value on the faith of it.[7] For this purpose oral evidence is admissible to show the circumstances under which the note was made and indorsed,[8] the consideration on which it was given,[9] the course of transactions between the parties,[10] that the indorser placed his name on the note at its inception, and before it passed to the plaintiff,[11] &c., and the form of the paper itself may aid the presumption.[12] Evidence of the indorser's privity with the negotiation and its result is competent,[13] although it be not shown that he knew the precise nature of the credit to be procured.[14] Showing that he indorsed with knowledge that it was required as a condition of credit to be given the maker, is enough.[15]

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[1] This is the New York Rule, 1 Abb. N. Y. Dig. new ed. 492, n.; Coulter v. Richmond, 59 N. Y. 478. It is applied also in *Indiana*, (Dale v. Moffitt, 22 Ind. 114); *Iowa*, (Frear v. Dunlap, 1 Iowa, 335, now otherwise by statute of 1851, Knight v. Dunsmore, 12 Iowa, 35); *Minnesota*, (Marienthal v. Taylor, 2 Minn. 147; McComb v. Thompson, 2 Id. 139); *Mississippi*, (Jennings v. Thomas, 13 Smedes & M. 617); *Pennsylvania*, (Fegenbush v. Lang, 28 Penn. St. 193; Eilbert v. Finkbeiner, 68 Penn. St. 243, s. c. 8 Am. R. 176); and *Wisconsin*, (Cady v. Shepard, 12 Wis. 642, followed in 13 Id. 229, 18 Id. 554).

After a long line of contrary decisions in *Massachusetts*, part of the New York rule has been adopted and extended in that State, by a statute entitling the indorser in all cases to demand and notice. L. 1874, c. 404.

[2] Lester v. Paine, 37 Barb. 617, 620. In New Jersey there is no presumption either way without extrinsic evidence. Chaddock v. Van Ness, 35 N. J. L. 517, s. c. 10 Am. R. 256. Compare Laubach v. Pursell, 35 N. J. L. 434.

[3] Bacon v. Burnham, 37 N. Y. 614.

[4] Phelps v. Vischer, 50 Id. 74.

[5] Under proper allegation. Meyer v. Hibsher, 47 N. Y. 265; Gfroehner v. McCarty, 2 Abb. New Cas. 76; Draper v. Chase Mfg. Co. Id. 79; Smith v. Smith, 37 Super. Ct. (J. & S.) 203.

[6] Coulter v. Richmond, 59 N. Y. 481.

[7] Id; or at least that the payee gave credit or forbearance on the face of it.

[8] The party may be asked, as a witness, to state the circumstances under which the note was made. Smith v. Smith, 37 Super. Ct. (5 J. & S.) 203.

[9] As, for instance, to enable the maker to buy goods of the payee, Moore v. Cross, 19 N. Y. 227; or to give the payee a security for a pre-existing debt, Clothier v. Adriance, 51 N. Y. 322.

[10] Coulter v. Richmond, 59 N. Y. 478.

[11] Rey v. Simpson, 22 How. (U. S.) 341. And an erasure of plaintiff's own indorsement may be explained. Austin v. Boyd, 24 Pick. 64.

[12] As, for instance, where it was made payable at the payee's house. Coulter v. Richmond (above).

[13] Meyer v. Hibsher, 47 N. Y. 268.

[14] Coulter v. Richmond, 59 N. Y. 483.

[15] Meyer v. Hibsher (above); Luft v. Graham, 13 Abb. Pr. N. S. 175, 178.

The burden is on plaintiff to show that the true relations of the parties were not those apparent on the instrument.[1]

If it appear by extrinsic evidence that the indorsement was given with intent to give the maker of the note credit with the payee, the payee may sustain his action against the indorser as such.[2] The defendant can only be charged as indorser by dishonor and notice or waiver, as in other cases.[3] It is not necessary that the payee actually exercise his implied right to overwrite the indorsement with his own indorsement "without recourse."[4]

97. — *defenses.*]—If it be shown that the payees were *bona fide* holders for value without notice, they cannot be affected by fraud or other equities between the maker and the irregular indorser.[5]

98. — *subsequent transferee against irregular indorser.*]—If it appear that the transferee knew that the note was indorsed by defendant before the payee overwrote his indorsement without recourse, the transferee cannot recover of the irregular indorser without the same extrinsic evidence which the payee would have to give.[6]

99. *The United States Court doctrine.*]—In the Supreme Court of the United States, the irregular indorser is held to be an original promisor, a guarantor, or an indorser, according to the nature of the transaction and the understanding of the parties at the time it took place;[7] under the following rules: 1. If he put his name in blank on the back of the note at the time it was made, and before it was indorsed by the payee, to give the maker credit with the payee, or if he participated in the consideration of the note, he must be considered as a joint maker of the note.[8] 2. If his indorsement was subsequent to the making of the note and to the delivery of the same to take effect, and he put his name there at the request of the maker, pursuant to the contract of the maker with the payee for further indulgence or forbearance, he can only be held as guarantor, which can only be done where there is legal proof of consid-

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[1] Hull v. Marvin, 2 Supm. Ct. 420, 422. It is a general rule that the presumption is that the liabilities, &c., of parties to negotiable paper are those indicated on face of the paper. Central Bank v. Hammett, 50 N. Y. 158. But an indorsee, who is also a prior indorser, can, nevertheless, recover of the one who indorsed to him where it was the intention of the parties that the intermediate indorser should be liable to him. Hubbard v. Matthews, 54 N. Y. 43, 48.

[2] 1 Abb. N. Y. Dig. new ed. 492, n.

[3] Id., and cases above cited. Griswold v. Stoughton, 2 Oreg. 61. *Contra*, Drake v. Markle, 21 Ind. 434.

[4] Moore v. Cross, 19 N. Y. 227; Chaddock v. Van Ness, 35 N. J. 517, s. c. 10 Am. R. 256.

[5] Clothier v. Adriance, 51 N. Y. 326.

[6] Phelps v. Vischer, 50 N. Y. 74.

[7] Good v. Martin, 95 U. S. (5 Otto), 90, 94, aff'g 1 Col. 165, 2 Id. 218.

[8] Id., citing Schneider v. Schiffman, 20 Mo. 571; Irish v. Cutler, 31 Me. 536. But see note 4 below.

eration for the promise, unless it be shown that he was connected with the inception of the note.[1] 3. But if the note was intended for discount, and he put his name on the back of the note with the understanding of all the parties that his indorsement would be inoperative until the instrument was indorsed by the payee, he is liable only as a second indorser in the commercial sense, and as such is entitled to the privileges which belong to such an indorser.[2]

Oral evidence is competent to show whether the indorsement was made before the indorsement of the payee and before the instrument was delivered to take effect, or after the payee had become the holder of the same.[3] In the absence of evidence on this point, an undated indorsement will be presumed to have been made at the inception of the note.[4]

If made at the inception of the note, it is *prima facie* presumed to have been made for the same consideration, and a part of the original contract expressed by the note.[5] If made after the inception of the note, and after an indorsement by the payee, it will be presumed it was not made for the same consideration;[6]

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[1] Good v. Martin, 95 U. S. (5 Otto), 90, 94, affi'g 1 Col. 165, 2 Id. 218.

[2] Id.

[3] Id.; Badger v. Barnabee, 17 N. H. 120. But he may be also co-surety with payee. Carrier v. Fellows, 27 N. H. 369.

[4] Good v. Martin (above) p. 94, and cases cited; Martin v. Boyd, 11 N. H. 385, 387; Parkhurst v. Vail, 73 Ill. 343; Childs v. Wyman, 44 Me. 441; Gilpin v. Marley, 4 Houst. (Del.) 284; Massey v. Turner, 2 Id. 79, 89; compare Union Bank v. Willis, 8 Metc. 504.

In different jurisdictions there is much diversity of opinion as to whether, under this presumption (or under direct evidence to the same effect), the irregular indorser should be held as *Joint maker or Surety*, as in the Supreme Court of the *United States*, and as has been held also in *Arkansas*, (Killian v. Ashley, 24 Ark. 515); *Delaware*, (Gilpin v. Marley, 4 Houst. [Del.] 284; Massey v. Turner, 2 Id. 79, 89); *Georgia*, (by statute: Collins v. Everett, 4 Geo. 273); *Louisiana*, (Lawrence v. Oakey, 14 La. 389; Chorn v. Merrill, 9 La. An. 533); *Maine*, (Childs v. Wyman, 44 Me. 441, Leonard v. Wilds, 36 Me. 265; Good v. Martin, above); *Maryland*, (Ives v. Bosley, 35 Md. 262, 268; Walz v. Alback, 37 Id. 404, 409); *Massachusetts*, (Hawks v. Phillips, 7 Gray, 284); *Michigan*, (Witterwax v. Paine, 2 Mich. 559; Rothchild v. Grix, 31 Id. 150); *Minnesota*, (Pierse v. Irvine, 1 Minn. 377); *Missouri*, (Scheider v. Schiffman, 20 Mo. 571); *New Hampshire*, (Martin v. Boyd, 11 N. H. 385, 387; but compare Currier v. Fellows, 27 Id. 369); *North Carolina*, (Baker v. Robinson, 63 N. C. 191); *Rhode Island*, (Perkins v. Barstow, 6 R. I. 507); *South Carolina*, (McCreary v. Bird, 12 Rich. 554); *Vermont*, (Strong v. Riker, 16 Vt. 557; Sylvester v. Downer, 20 Vt. 355); and *West Virginia*, (if the payee so elects, Burton v. Hansford, 10 W. Va. 470, 481); or as a *Guarantor*, as in England and in *Arkansas*, (if the payee overwrites a guaranty, Killian v. Ashley, 24 Ark. 515); *California*, (Pierce v. Kennedy, 5 Cal. 138; *contra*, Jones v. Goodwin, 39 Id. 493, s. c. 2 Am. R. 473); *Connecticut*, (Perkins v. Catlin, 11 Conn. 212; Ransom v. Sherwood, 26 Id. 437; Clark v. Merriman, 25 Id. 576); *Illinois*, (Webster v. Cobb, 17 Ill. 459, 465, and cases cited); *Iowa*, (by statute: Knight v. Dunsmore, 12 Iowa, 35); *Kansas*, (Firman v. Blood, 2 Kan. 496, 526); *Kentucky*, (by statute: Arnold v. Bryant, 8 Bush. 668); *Nevada*, (Van Doren v. Tjader, 1 Nev. 380, 387, 389); *Ohio*, (Champion v. Griffith, 13 Ohio, 228); *Texas*, Chandler v. Westfall, 30 Tex. 477); *Virginia*, (Watson v. Hunt, 6 Gratt. 633, 642; Orrick v. Colston, 7 Id. 189, 199) and *West Virginia*, (if the payee so elects, Burton v. Hansford, 10 W. Va. 470, 481).

In *New Jersey* there seems to be no liability without extrinsic evidence. Chaddock v. Van Ness, 35 N. J. L. 517, s. c. 10 Am. R. 256.

[5] Good v. Martin (above); Austin v. Boyd, 41 Mass. 64; Parkhurst v. Vail, 73 Ill. 343.

[6] Good v. Martin (above).

Partial failure is admissible, under an allegation of total failure,[1] unless defendant has been misled to his prejudice.

It is not sufficient for one of several joint makers to show that he received no consideration. He must also show that neither of the others did.[2]

103. *Accommodation paper.*]—This defense may be made available against another than the party accommodated, if defendant can show, either:

1. That plaintiff was a transferee after maturity;[3] or,
2. That he did not take for any consideration;[4] or,
3. That he took with notice of the accommodation character of the signature, and that the signature was beyond the scope of the writer's authority; or
4. That the paper was wrongfully diverted, and that plaintiff did not take for value.[5]

Evidence of accommodation character alone does not put on plaintiff the burden of proving what value he paid;[6] but coupled with evidence of fraud, duress, or fraudulent diversion of the paper, it does.[7] Where there is only the simple fact that it was an accommodation bill or note, then the inference is that the holder did give value for it, because that was the very object for which the instrument was given.[8] Evidence of consent to a diversion of the paper from the purpose originally intended should be clear and explicit, not doubtful or liable to misconstruction.[9]

Evidence that the paper was made for a special purpose, and fraudulently misappropriated, is not available under a mere denial of making or indorsing,[10] nor under a mere allegation of want of consideration.[11] The fact that the maker of the paper held and put it into circulation for his own advantage, is sufficient evidence of notice to the party taking it that the indorsements upon it were made for his benefit, and not in the course of business.[12]

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[1] Landry v. Durham, 21 Ind. 232; Willis v. Bullitt, 22 Tex. 330.

[2] Kinsman v. Birdsall, 2 E. D. Smith, 395.

[3] Chester v. Dorr, 41 N. Y. 279.

[4] But it is not enough to show that he took as collateral security for an antecedent debt. Grocers' Bank v. Penfield, 2 Abb. New Cas. 305, s. c. 69 N. Y. 502, qualifying 7 Hun, 279.

[5] A fraudulent diversion of the paper, as distinguished from a misapplication of the proceeds, must be shown for this purpose. Farmers' & Cit. Bank v. Noxon, 45 N. Y. 762; Wolfe v. Brouwer, 5 Robt. 601; Gray v. Bank of Ky. 29 Penn. St. 365.

If the accommodation character of the paper is shown, and a diversion of it, defendant need not show that the diversion was injurious to him; the burden is on plaintiff to show that it was not. Rochester v. Taylor, 23 Barb. 18.

[6] Harger v. Worrall, 69 N. Y. 370.

[7] Farmers', &c. Bank v. Noxon, 45 N. Y. 762.

[8] Seybel v. Bank, 54 N. Y. 291; Collins v. Gilbert, 94 U. S. (4 Otto), 753. According to some authorities, defendant must show that plaintiff had knowledge of the equity as well as of the accommodation character of the signature. 1 Dan. Neg. Inst. §§ 790, 791.

[9] People *ex rel.* Barton v. Rensselaer Ins. Co. 38 Barb. 323.

[10] Rosc. N. P. 365; Collins v. Gilbert, 94 U. S. (4 Otto), 757.

[11] Catlin v. Hansen, 1 Duer, 309.

[12] Fielden v. Lahens, 2 Abb. Ct. App. Dec. 111; Lemoine v. Bank of North America, 3 Dill. C. Ct. 44, and cases cited.

104. *Fraud.*]—As against a *bona fide* holder, it is not enough to show fraud even in regard to the nature or contents of the instrument, if it appears that the party meant to make some obligation, and left it to another to put in writing the limits of it, without due supervision.[1] The evidence of such fraud, however, is available if coupled with evidence that the defendant was free from negligence.[2] Thus evidence that defendant could not read will excuse a confidence which would otherwise be negligence.[3]

105. *Duress.*]—Evidence that the defendant's signature was obtained by duress puts on plaintiff the burden of proving his title.[4] Evidence that it was obtained by violent duress, without any consideration, avoids the note even as against a *bona fide* holder.[5]

106. *Impeaching Plaintiff's Title.*]—If the instrument, though not specially payable to plaintiff, is drawn or indorsed so as to be payable to bearer, its production by plaintiff, without any other evidence of his title, throws on defendant the burden of impeaching that title.[6] This may be done, under proper pleading, by evidence that he never acquired any title, or that he has absolutely divested himself of it, or that he acquired the paper with notice that his transferror had parted with title to another.[7]

If the complaint sets forth the plaintiff's title,—as, for instance, by alleging that defendant gave the note, or indorsed the note to B., &c.,[8] defendant may, under a denial, show that it was given or indorsed to others who still hold it. If the complaint makes only a general allegation of title, evidence that title is in another is not admissible as a defense, unless pleaded as new matter.[9] But in either case, if plaintiff shows that he has legal right to demand payment as against defendant, nothing short of evidence of his bad faith will avail the debtor to defeat the action.[10] Even if defendant should show that a stranger had a right to contest the plaintiff's title, the legal presumption is that the stranger does not intend to do so.[11] If plaintiff's title is not duly put in issue, evidence that he had none, and had not authorized

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[1] Chapman v. Rose, 56 N. Y. 137, rev'g 44 How. Pr. 364. Compare Brown v. Reed, 79 Penn. St. 370, s. c. 21 Am. R. 75; and see 16 Alb. L. J. 127.

[2] Walker v. Egbert, 29 Wisc. 194, s. c. 9 Am. R. 548, and cases cited; Briggs v. Ewart, 51 Mo. 245, s. c. 11 Am. R. 445.

[3] Whitney v. Snyder, 2 Lans. 477 (approved in 56 N. Y. 142); Griffiths v. Kellogg, 39 Wisc. 290, s. c. 20 Am. R. 48.

[4] McClintick v. Cummins, 2 McLean, 98; 1 Dan. Neg. Inst. 611.

[5] See Loomis v. Ruck, 56 N. Y. 465.

[6] Smith v. Sac County, 11 Wall. 139, and cases cited.

[7] Sheldon v. Parker, 3 Hun, 498, s. c. 5 Supm. Ct. (T. & C.) 616.

[8] Rosc. N. P. 364, 365; Hull v. Wheeler, 7 Abb. Pr. 411.

[9] See White v. Drake, 2 Abb. New Cas. 133, and cases cited. Compare Wedderspoon v. Rogers, 32 Cal. 569.

[10] City Bank of New Haven v. Perkins, 29 N. Y. 568; and see Poorman v. Mills, 35 Cal. 118.

[11] City Bank v. Perkins, 29 N. Y. 567.

the action, is inadmissible.[1] Under even a general denial, however, defendant may show that plaintiff has but a naked legal title, and that the real interest is in another, for the purpose of letting in evidence of the declarations and admissions of that other.[2]

The evidence of title afforded by producing the instrument on the trial may be rebutted by showing that the plaintiff did not obtain the right or title by which he seeks to recover until after the commencement of the action;[3] or that possession was originally acquired for a special purpose, and not as accompanying title.[4] The appearance of restrictive indorsements, subsequent to one which would charge defendant as liable to bearer, is not evidence of title in another.[5] The fact that the plaintiff suing indorsers on a bill of exchange acquired title from the acceptor is *prima facie* evidence that he is not a *bona fide* holder.[6]

If the instrument is not in plaintiff's possession, his recovery may be defeated by showing that it is in the possession of an adverse claimant who would have apparent right of recovery by its production.[7] But the mere fact that plaintiff has not actual possession of the instrument, does not necessarily defeat his recovery. It is sufficient if he has the right to the money due upon it.[8]

107. *Collateral security.*]—Evidence adduced by defendant that plaintiff took the paper merely as collateral security does not alone affect plaintiff's right to recover;[9] but if defendant also shows an equity against the pledgor,—such as that the paper was accommodation paper on his part,[10]—the law, for the purpose of preventing circuity of action, limits the recovery to the amount due from the pledgor.[11] The burden is on the plaintiff to prove

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[1] Way v. Richardson, 3 Gray, 412.

[2] Davis v. Carpenter, 12 How. Pr. 287.

[3] Hovey v. Sebring, 24 Mich. 232, s. c. 9 Am. R. 122; Reynolds v. Kent, 6 Cent. L. J. 155; compare 43 Me. 364.

[4] See Rogers v. Morton, 12 Wend. 487, affi'd in 14 Id. 675; Micklethwaite v. Thebaud, 4 Sandf. 97. Evidence that the payee had possession of the note after he had assigned it, for the purpose of demanding payment for plaintiff, and put it in an attorney's hands to sue, does not necessarily prove that he is the real party in interest. Grimes v. McAninch, 9 Ind. 278.

[5] Rider v. Taintor, 4 Allen, 356.

[6] Central Bank of Brooklyn v. Hammett, 50 N. Y. 158. *Contra*, Morley v. Culverwell, 7 Mees & W. 174; 1 Dan. Neg. Inst. § 781 *a*. Compare Hunter v. Kibbe, 5 McLean, 279.

[7] Van Alstyne v. Commercial Bank, 4 Abb. Ct. App. Dec. 452; Crandall v. Schrœppel, 1 Hun, 557, s. c. 4 Supm. Ct. (T. & C.) 78. See also Sheldon v. Parker, 3 Hun, 498, s. c 5 Supm. Ct. (T. & C.) 616.

[8] Selden v. Pringle, 17 Barb. 458.

[9] Atlas Bank v. Doyle, 9 R. I. 76, s. c. 11 Am. R. 219. See also Grocers' Bank v. Penfield, 2 Abb. New Cases, 305.

[10] Atlas Bank v. Doyle (above); 1 Dan. Neg. Inst. § 832.

[11] See cases collected in 18 Alb. L. J. 247; Holcomb v. Wyckoff, 35 N. J. 35, s. c. 10 Am. R. 219.

what debts were secured and the amount due.[1] But if defendant relies on the fact of a payment or discharge of such debts, that is for him to show.[2]

Irregularity in forfeiting the pledge is not available to one not a party to the contract of pledge.[3]

108. *Transfer after maturity.*]—Proving transfer after maturity is not available unless coupled with evidence of equities existing against prior parties,[4] and attaching to the paper itself, as distinguished from collateral transactions.[5] Even then, plaintiff may prove that he took from one who was a *bona fide* purchaser for value before maturity, although plaintiff himself may have purchased after maturity or with a knowledge of the infirmity.[6] Where the time of maturity depends on the time of delivery, and the date and the time of delivery are not coincident, the latter may be shown by parol, in order to avoid the presumption of dishonor before transfer.[7]

109. *Suretyship and Dealing with principal.*]—As between the original parties to the transaction, one of several may show by oral evidence that he signed as surety, so as to let in the defense of an extension discharging him;[8] but special conditions of suretyship not implied in the legal relation cannot be proved by parol evidence of contemporaneous agreement, if they would contradict the writing.[9] The like evidence of suretyship is competent against a subsequent holder if he is shown to have had knowledge of the true relation of the parties at the time of his dealing with the principal;[10] otherwise not.[11]

A defendant who is shown to be a surety under the foregoing rules, or who is charged as an indorser,[12] or drawer,[13] may show a valid agreement between the holder and the maker, or acceptor, or any party prior to defendant,[14] extending the time for payment, without consent of the defendant. But such agreement is matter of defence which must be affirmatively alleged[15] and proved[16] by the defendant.

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[1] Maitland v. Citizens' Nat. Bank of Baltimore, 40 Md. 540, s. c. 17 Am. R. 620. *Contra*, Atlas Bank v. Doyle (above).

[2] Hilton v. Smith, 5 Gray, 400.

[3] Hatch v. Brewster, 53 Barb. 276.

[4] Way v. Richardson, 3 Gray, 414.

[5] National Bank of Washington v. Texas, 20 Wall. 88, and cases cited.

[6] Roberts v. Lane, 64 Me. 108, s. c. 18 Am. R. 242.

[7] Cowing v. Altman, 71 N. Y. 441, rev'g 5 Hun, 556.

[8] Hubbard v. Gurney, 64 N. Y. 457; 3 So. Law Rev. 439.

[9] Thompson v. Hall, 45 Barb. 214, and cases cited.

[10] Oriental Financial Co. v. Overend, L. R. 7 Ch. 142; 7 H. L. 348. *Contra*, 1 Dan. Neg. Inst. § 1338. Compare 1 Pars. Pr. N. &c. 233.

[11] Summerhill v. Tapp, 52 Ala. 227.

[12] Artisans' Bank v. Backus, 36 N. Y. 100, s. c. 3 Abb. Pr. N. S. 273, affi'g 31 How. Pr. 242.

[13] English v. Darley, 2 Bos. & P. 61.

[14] Rosc. N. P. 393, citing Hall v. Cole, 4 Ad. & E. 577.

[15] Rosc. N. P. 393.

[16] Artisans' Bank v. Backus (above).

To invoke the rule that taking a new note suspends the right of action and discharges the surety not assenting, it should be made to appear that there was an agreement, either express, or implied from the facts proved, that the new note was taken in payment of the first note, or that the time of payment of the first note was extended in favor of the party who was primarily liable.[1] If either be proved, it is not necessary to show that the first note was surrendered.[2] If a new obligation was taken, evidence of a different contemporaneous oral agreement, is not competent.[3]

110. *Payment.*]—Payment must be affirmatively pleaded. A denial of the formal allegation of non-payment is not equivalent to an allegation of payment.[4] On an issue of payment, alone, the burden is on the defendant to show payment;[5] and this is so even where evidence is requisite, and has been given, that the instrument was present at the place where it was payable, on the day it fell due.[6] Where the only issue is payment, neither party is bound to produce the instrument.[7]

If a party to the instrument is shown once to have delivered it so as to become liable on it, the mere fact of its present production by him is generally *prima facie* evidence against those seeking to hold him liable on it, and in his favor, that it has been paid or otherwise discharged;[8] but this presumption does not necessarily arise where he is shown to have had other means of regaining possession.

The possession of the paper by the plaintiff is presumptive evidence that it has not been paid by those liable on it to him. But if he was liable on it to others, to whom he paid the amount at maturity, it may defeat his action, unless he gives evidence that he acquired title by transfer, not merely possession by surrender on payment.[9] A payment, for which a general receipt is indorsed upon the instrument, is presumed to have been made by the maker or acceptor, who was primarily liable, even when the drawer has possession and sues the acceptor.[10] If the instru-

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[1] Hubbard v. Gurney, 64 N. Y. 467. Testimony of a party to the alleged agreement of extension relied on to discharge an indorser, merely to the effect that he solicited indulgence to arrange his affairs and try and relieve his indorsers, and that he was given to understand that this would be extended to him, if he remembers nothing more than this, is insufficient to sustain a finding of an agreement. NELSON, Ch. J. Bank of Utica v. Ives, 17 Wend. 503.

[2] Hubbard v. Gurney (above).

[3] Burbank v. Beach, 15 Barb. 326.

[4] Edson v. Dillaye, 8 How. Pr. 273.

[5] Knapp v. Runals, 37 Wis. 135.

[6] Fullerton v. Bank of United States, 1 Pet. 604, 617.

[7] Rosc. N. P. 392; Mead v. Brooks, 8 Ala. 840. *Contra*, Marfield v. Davidson, 8 Gill & J. 209.

[8] See paragraph; Grey v. Grey, 47 N. Y. 552, rev'g 2 Lans. 173; and see Hackney v. Vrooman, 62 Barb. 650.

[9] See page 2 of this vol., paragraph 4.

[10] 1 Dan. Neg. Inst. § 1229.

ment is produced from the plaintiff's custody, it is for him to explain a receipt appearing thereon if he seeks to impeach it.[1]

Where a new bill or note is given in renewal of an earlier, and the earlier is retained, the new is presumptively only a suspension of the debt, and not a satisfaction until paid, unless it be shown that it was expressly agreed that the earlier one should be extinguished. Delivery of the earlier without such agreement does not of itself raise a presumption of extinguishment. And presumptive evidence of intent to extinguish may generally be rebutted by showing that by such construction the debt would be lost.[2]

111. *Qualifying agreement.*]—Evidence of an agreement between the original parties qualifying or suspending the apparent liability of the maker is not competent against a holder for value before maturity, unless it is first shown that he had knowledge thereof at the time the transfer was made.[3]

IX. Defendant's Evidence to Require Plaintiff to prove Title as a holder for value before Maturity.

112. *The general rule.*]—The right of a transferree to shut out defenses such as arise from equities between the antecedent parties, depends on his having the title of a purchaser and holder of a negotiable instrument, who took it, 1, in good faith; 2, for a valuable consideration; 3, in the ordinary course of business; 4, when it was not overdue; 5, without notice of its dishonor, and 6, without notice of facts which impeach its validity as between the antecedent parties. The plaintiff's production of the instrument, with proof of its execution, &c., as above stated, raise a sufficient presumption in his favor on all these points.[4]

Defendant, to lay the foundation for defenses arising from such equities, must adduce evidence sufficient to go to the jury,[5] tending to show either, 1. That plaintiff, when he took the paper, had notice of the equities—in other words, must negative plaintiff's good faith (in which case the burden is thrown on plaintiff to prove that one under whom he claims was in fact a purchaser for value, &c., before maturity);[6] or, 2. That there was fraud, duress,

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[1] See paragraph 51. Compare 2 Greenl. Ev. 13th ed. 480, § 527. Authority of an agent to receive payment is not necessarily implied from possession. Doubleday v. Kress, 50 N. Y. 410, rev'g 60 Barb. 181; Scoville v. Landon, Id. 686.

[2] 2 Dan. Neg. Inst. § 1266. Compare Nightingale v. Chafee, 11 R. I. 609, s. c. 23 Am. R. 531.

[3] Brown v. Spofford, 95 U. S. (5 Otto), 474, 483.

[4] Collins v. Gilbert, 94 U. S. (4 Otto), 754, and cases cited.

[5] Smith v. Sac County, 11 Wall. 139, 147, and authorities cited. If the cause is tried without a jury the judge may pass on the question, as preliminary to further evidence. Brookman v. Millbank, 50 N. Y. 378.

[6] Hill v. Sands, 5 N. Y. Leg. Obs. 19. On proof that the note was fraudulent and void as between the maker and payee, an *intermediate* holder will not be presumed,

or illegality in the inception of the contract, or negotiation in fraud of the rights of the defendant (in which case, and without evidence that plaintiff had notice thereof,[1] the burden is thrown upon plaintiff of supporting the presumption of title by showing due negotiation in fact.)[2] If defendant shows that the paper was lost or stolen, it throws the burden on plaintiff of showing that it came to him in due course of business and for value.[3]

113. *Failure or want of Consideration.*]—Failure or want of consideration,[4] as distinguished from a fraudulent or illegal inception of the contract,[5] is not enough to rebut the presumption that plaintiff is a *bona fide* holder, or put him to proof of the amount paid by him. Evidence that the consideration was positively illegal,[6] as distinguished from being merely void,[7] does throw the burden on plaintiff.

X. Plaintiff's Evidence of Title as Holder for Value before Maturity.

114. *Burden of proof.*]—To enable him to recover, after the burden is thrown upon him, plaintiff must prove that he (or one under whom he claims) took the paper before maturity, for value,[8] even although there were intermediate indorsers, unless there is evidence that they paid value.[9] Fraud being shown, the presumption is that the deceiver will transfer the paper, so as to enable some other to collect it; and this presumption avails against the holder to require him to show that value was paid.[10]

115. *Evidence that transfer was before Maturity.*]—Plaintiff must show that delivery,[11] and also indorsement, if indorsement was necessary, were made before maturity. Delivery and mistake do not excuse delay in indorsing.[12]

Against a maker or drawer who delivers paper after its date,

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in favor of plaintiff, to have paid value. Holcomb v. Wyckoff, 35 N. J. 35, s. c. 10 Am. R. 219, 222; Roberts v. Lane, 64 Me. 108, s. c. 18 Am. R. 242.

[1] N. Y. & Virginia State Stock Bank v. Gibson, 5 Duer, 574. But see Hutchinson v. Boggs, 28 Penn. St. 294.

[2] The necessity of evidence of this may be dispensed with by omitting to require it at the trial. Wilson v. Rocke, 58 N. Y. 642.

[3] Kuhns v. Gettysburgh Nat. Bk. 68 Penn. St. 445. So, perhaps, where it was lodged in *escrow*, and wrongfully delivered. Chipman v. Tucker, 38 Wisc. 43, and see pp. 52, 60.

[4] Mechanics' & Traders' Nat. Bank of N. Y. v. Crow, 60 N. Y. 85, affi'g 5 Daly, 191; Wilson v. Lazier, 11 Gratt. 477.

[5] Ross v. Bedell, 5 Duer, 465; Valhir v. Zane, 6 Gratt. 246.

[6] Holden v. Cosgrove, 12 Gray, 216.

[7] Rosc. N. P. 386.

[8] Collins v. Gilbert, 94 U. S. (4 Otto), 753, and cases cited.

[9] Bank of St. Albans v. Gilliland, 23 Wend. 311.

[10] Bailey v. Bidwell, 13 Mees. & W. 73; First Nat. Bk. v. Green, 43 N. Y. 298.

[11] A verbal pledge of the paper without delivery is not enough. Either a delivery, or some positive act showing an actual transfer of the paper itself, or of the right to dispose of it, should be proved. Russell v. Scudder, 42 Barb. 31, 35, Miller, J.; and see Woodruff v. Wicker, 2 Bosw. 613.

[12] Lancaster Nat. Bk. v. Taylor, 100 Mass. 18; 1 Am. R. 71, and cases cited.

or lodges it with a depositary with authority to make such a delivery, one claiming as a transferree for value may show that it was delivered at the time of the transfer, and thus remove the presumption of dishonor arising from the apparent date.[1]

If paper payable *on demand* is offered in evidence duly indorsed, but with an undated indorsement, the presumption is that it was indorsed before maturity; and the burden is on him impeaching it on the ground of dishonor before indorsement, to show that the transfer took place after a reasonable time had elapsed. But if the transfer is shown to have taken place after the expiration of a reasonable time, or if no demand was made within such time, so as to charge the indorser, the burden is on plaintiff to show excuse for the delay.[2]

116. — *and before notice.*]—If notice of the infirmity is shown to have been given to the holder before maturity, plaintiff must show that the title was perfected not only by delivery but by indorsement,[3] and (if necessary) by payment of value, all made before such notice; and on showing this he will be protected only to the extent of the value so paid.[4]

117. — *and for value.*]—Plaintiff must show what value was paid.[5] If the paper never had an inception until it came to the holder's hands, he cannot recover without proof of payment of full value. Usurious discount is fatal.[6] Otherwise, the amount of consideration is not material, except as bearing on the question of actual or constructive notice,[7] or as limiting the recovery in certain cases.

118. *Evidence of good faith.*]—At this stage of the case plaintiff is not called on to show that he had no notice.[8] If he shows that he, or the one under whom he claims, is a transferree for value and before maturity, within the foregoing rules, and there is nothing on the face of the paper, to charge him with inquiry,[9] or in the circumstances, to show his bad faith,[10] the burden is thrown on defendant to prove bad faith in taking the transfer.[11]

119. "*Taking up.*"]—To enable one already liable upon the

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[1] Cowing v. Altman, 71 N. Y. 441, rev'g 5 Hun, 556.

[2] 1 Pars. on Pr. N. &c. 380. For the mode of proving discount in the ordinary course of business, by producing the bank's books, see Ocean Nat. Bank v. Carll, 55 N. Y. 440, and again, 9 Hun, 237.

[3] Clark v. Whitaker, 50 N. H. 474, s. c. 9 Am. R. 286.

[4] Dresser v. Missouri, &c. Railway Construction Co. 93 U. S. (3 Otto), 92.

[5] First National Bank v. Green, 43 N. Y. 298, 301.

[6] Eastman v. Shaw, 65 N. Y. 522. Compare Miller v. Crayton, 3 Supm. Ct. (T. & C.) 360, and Williams v. Tilt, 36 N. Y. 319.

[7] Gould v. Segee, 5 Duer, 270.

[8] Cowing v. Altman, 71 N. Y. 440, rev'g 5 Hun, 556; Dalrymple v. Hillenbrand, 62 N. Y. 5, aff'g 2 Hun, 488, s. c. 5 Supm. Ct. (T. & C.) 57.

[9] See paragraph 121.

[10] Jones v. Gordon, H. of L. 37 Law Times, N. S. 480. Per BLACKBURN, J.

[11] Catlin v. Hansen, 1 Duer, 309; Hart v. Potter, 4 Id. 458; Davis v. Bartlett, 12 Ohio St. 534

paper, or already chargeable with notice of equities, to recover against others, as a *bona fide* holder on taking it up, he should show a transfer of it to him[1] as distinguished from a payment of it by him,[2] but the evidence that the transaction was so intended need not be express, for the intent may be inferred from circumstances.[3] If it be shown that he took it up, as distinguished from paying it, evidence of his knowledge of an original want of consideration, &c., is not admissible.[4]

XI. Defendant's evidence that Plaintiff is not a Holder in good faith.

120. *Bad faith.*]—To show bad faith, evidence of guilty knowledge, or of willful ignorance is essential.[5] For this purpose circumstances which ought to have put a prudent man on inquiry are admissible in evidence; and fraud established, whether by direct or circumstantial evidence, is sufficient;[6] but, on the whole evidence, notice or fraud must clearly appear.[7]

A very trivial price is a circumstance relevant on the question of bad faith.[8]

121. *Notice.*]—Notice, or other facts equivalent, must be alleged in order to be admissible. A general allegation of bad faith is not enough.[9]

Express notice given to the transferee prior to the transfer,—as, for instance notice that certain securities had been stolen,—is *prima facie*, but not conclusive, evidence of bad faith, and may be rebutted by proof that the notice was lost, or its existence or contents forgotten at the time of transfer.[10] Advertisement of loss is not competent unless brought home to the transferee;[11] but evidence from which it is probable that the advertisement was seen,—for instance that he took or habitually read the paper,—is enough to go to the jury.[12]

Marks on the instrument itself, of a character to apprise one

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[1] Freedman's Savings, &c. Co. v. Dodge, 93 U. S. (3 Otto), 382; and see p. 2 of this Vol.

[2] Lancey v. Clark, 64 N. Y. 209.

[3] Same cases.

[4] Benedict v. De Groot, 1 Abb. Ct. App. Dec. 125. Compare Burr v. Smith, 21 Barb. 262; Hooper v. De Long, 37 Super. Ct. (J. & S.) 127.

[5] Hotchkiss v. Nat. Bank, 21 Wall. 354; Collins v. Gilbert, 94 U. S. (4 Otto), 753; Commissioners of Marion County v. Clark, Id. 285; 1 Dan. Neg. Inst. § 775.

[6] Murray v. Lardner, 2 Wall. 121.

[7] Morehead v. Gillmore, 77 Penn. St. 118, s. c. 18 Am. R. 435; Hamilton v. Vought, 34 N. J. 18; Phelan v. Moss, 67 Pa. St. 59, s. c. 5 Am. R. 402. *Contra*, 43 Vt. 125, s. c. 5 Am. R. 265.

[8] 1 Dan. Neg. Inst. § 779. But see Scott v. Johnson, 5 Bosw. 213.

[9] 2 Pars. on Prom. N. &c. 274; Ball v. Consolidated, &c. Co. 32 N. J. L. 102; Parker v. Raynal, 1 La. Ann. 209.

[10] Lord v. Wilkinson, 56 Barb. 593.

[11] Pars. on Prom. N. &c. 258.

[12] Id.; and see p. 225 of this vol. Compare Kellogg v. French, 15 Gray, 354.

to whom it is offered, of the alleged defect, are sufficient to establish notice.[1] But the fact that the terms of the instrument indicate a special consideration, such as a warranty, for instance, do not charge the transferee with notice of a breach.[2] The duty of inquiry raised by a mistake of date apparent on the face of the note, is satisfied by inquiry as to the fact of date; and does not charge with knowledge of a disconnected matter, such as defect of authority in an agent.[3]

122. *Negligence.*]—Proof that the holder was in such a situation as that he might have had notice, had he been diligent in making inquiries which the situation offered and invited him to make, is not enough.[4] Hence suspicious circumstances,—such as that the seller, alleged to have diverted the paper, was embarrassed in circumstances and did business with plaintiff as agent;[5] or that he offered it for a less sum than at the legal rate of discount;[6] or that the paper was nearly due;[7] are not alone sufficient evidence of bad faith. Mere negligence in taking the paper, however gross, is not sufficient as matter of law.[8] But while gross negligence is not itself bad faith, it may be competent evidence for the jury.[9]

XII. Municipal and other Coupon Bonds.

123. *Title.*] Possession of bonds drawn or indorsed so as to be payable to bearer, is *prima facie* evidence of title.[10] The identity of the bonds produced with those alleged in the complaint, may be assumed if no objection is made at the trial.[11] In an action on coupons, the possession of the coupons is *prima facie* evidence that the holder of them is the holder of the bonds from which they were cut, without producing the bonds themselves.[12]

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[1] Goodman v. Simonds, 20 How. (U. S.) 342, 365; Iron Mountain Bank v. Murdock, 62 Mo. 70; Collins v. Gilbert, 94 U. S. (4 Otto), 753. As, for instance, where printed words were erased but still visible. Angle v. Northwestern Mutual Life Insurance Co. 92 U. S. (2 Otto), 330, 341. Absence from the bond of a scrip certificate which had been pinned to it and was referred to in it,—held competent but not sufficient evidence to put the purchaser on inquiry. Hotchkiss v. National Banks, 21 Wall. 358; and see 47 N. Y. 143.

[2] Mabie v. Johnson, 8 Hun, 309.

[3] Miller v. Crayton, 3 Supm. Ct. (T. & C.) 360.

[4] Lake v. Reed, 29 Iowa, 258, s. c. 4 Am. R. 209; Collins v. Gilbert, 94 U. S. (4 Otto), 753.

[5] Farmers' & Citizens' Nat. Bank v. Noxon, 45 N. Y. 762.

[6] Mechanics' Bank of Williamsburgh v. Foster, 44 Barb. 87, s. c. 19 Abb. Pr. 47; 29 How. Pr. 408.

[7] Marine Bank of New York v. Clements, 31 N. Y. 33.

[8] Chapman v. Rose, 56 N. Y. 137, rev'g 44 How. Pr. 364; Brown v. Spofford, 95 U. S. (5 Otto), 474, 478.

[9] Collins v. Gilbert (above); Jones v. Gordon (H. of L.) 37 Law Times, N. S. 480; 2 Pars on Prom. N. &c. 279.

[10] Martin v. Somerville Water Power Co. 27 How. Pr. 161, 169.

[11] Wickes v. Adirondack Co. 4 Supm. Ct. (T. & C.) 250. Compare Chambers County v. Clews, 21 Wall. 317.

[12] Aurora City v. West, 7 Wall. 82; Deming v. Inhabitants of Houlton, 64 Me. 254, s. c. 18 Am. R. 253; and see 6 Moak's Eng. 120, n.

124. *Evidence of regularity and power.*]—A municipal corporation is not estopped from asserting the invalidity of its bonds by the conduct of its officers or agents, or acts of acquiescence on the part of the inhabitants.[1] Want of power in the officer by whom the act was performed cannot be supplied by estoppel drawn from the conduct of the officer, nor by ratification by him; and want of power in the corporation cannot be supplied by estoppel against it or ratification by it. But if it had power, want of its delegation to the officer may be supplied by estoppel or by ratification, drawn from its own conduct or silence.[2]

In favor of a *bona fide* purchaser for value and before maturity, or an assignee of such a purchaser, the recital in municipal bonds, by officers empowered to determine the question, that the precedent conditions prescribed by law have been performed, is conclusive.[3] The recital is itself a decision of the fact by the appointed tribunal.[4] And the certificate of the proper officer that the bond has been duly issued and the signatures are genuine, and that the same has been duly registered in his office according to law, cannot be contradicted by evidence that there was actually no registration in his office.[5] But the validity or existence of the alleged statute may be impeached against any holder.[6] If it appear on the face of the bonds that they are not in conformity with the act, the holder cannot prove ignorance[7] of the terms of the act.

125. *Notice of defect, &c.*]—The non-payment of a single coupon overdue since the commencement of the month in which the bond was purchased, though competent on the question whether plaintiff is a *bona fide* holder, yet, in connection with the fact that previous coupons had been paid, is entirely insufficient to charge him with notice or duty of inquiry.[8] The number of a coupon bond, being essential to identity, may be regarded as material, within the rule as to alterations.[9]

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[1] Weismer v. Village of Douglass, 64 N. Y. 91, 105.

[2] 5 Abb. N. Cas. 49, note, and cases cited.

[3] Commissioners, &c. v. Bolles, 94 U. S. 108, and cases cited; and notwithstanding error in the recital. Commissioners, &c. v. January, Id. 206. Thus it is conclusive as to the validity and genuiness of the signatures of the requisite number of tax payers, (Town of Venice v. Murdock, 92 U. S. [2 Otto], 494); as to the giving of regular notice of the popular election, which was a condition precedent, (Humboldt Township v. Long, Id. 642); and that the value of the taxable property of the township was in amount sufficient, (Marcy v. Township of Oswego, Id. 637).

[4] Town of Coloma v. Eaves, 92 U. S. (2 Otto), 484; and see Van Hostrup v. Madison City, 1 Wall. 291.

[5] Township of Rock Creek v. Strong, 96 U. S. (6 Otto), 271, 278.

[6] Town of S. Ottawa v. Perkins, 94 U. S. (4 Otto), 267. As to the mode of doing this, see 8 Abb. New Cas. 372, note.

[7] Horton v. Town of Thompson, 71 N. Y. 514, rev'g 7 Hun, 452.

[8] Cromwell v. County of Sac, 96 U. S. (6 Otto), 51, 57.

[9] Force v. City of Elizabeth, 28 N. J. Eq. 403, and cases cited.

XIII. Bank Checks.

126. *Stamp.*]—The provision of the internal revenue law[1] excluding checks, drafts and orders, or copies thereof, from admission in evidence unless duly stamped, applies only to United States courts, not to the State courts.[2] Omission to stamp, to defeat the paper, must be shown to have been done with intent to defraud the revenue.[3] It is not enough to show that it was done intentionally for another purpose.[4] The burden of proving a lost instrument to have been unstamped is on the party objecting to its production. There being no evidence on either side, it will be presumed to have been stamped. When it has been shown that at any particular time it was unstamped, the burden is shifted, and the party relying upon it must prove that it was duly stamped.[5]

127. *Title.*]—Production is the same evidence of title as in the case of other negotiable paper.[6] The payee may recover in his own name, although another person may be interested in the proceeds.[7] Evidence of usage is competent to show that a bank which in good faith receives a check from a depositor and passes it to his credit, and on the same day pays, and charges against such deposit, checks drawn by him, is a *bona fide* holder of the deposited check for value.[8]

A check payable to a fictitious or impersonal payee, is admissible under an allegation of a check payable to bearer.[9]

128. *Oral evidence to vary.*]—In accordance with rules already stated,[10] it is not competent to vary the terms of the check by showing a contemporaneous oral agreement that payment was not to be demanded at maturity, but that time was to be given at the election of the drawer,[11] or was to be made in uncurrent funds.[12] But oral evidence that it was given as security for a proposed loan which was not made, and that it had therefore no consideration, is admissible.[13]

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[1] U. S. R. S. § 3421.

[2] People *ex rel.* Barbour v. Gates, 43 N. Y. 40, rev'g 57 Barb. 291, s. c. 39 How. Pr. 74. *Contra*, Chartiers & Robinson Turnpike Co. v. McNamara, 72 Penn. St. 278, s. c. 13 Am. R. 678.

[3] Baker v. Baker, 6 Lans. 509.

[4] Redlich v. Doll, 54 N. Y. 234. Rules applicable to affixing of stamps by collector, to cure omission. 14 Wall. 361.

[5] Marine Investment Co. v. Haviside, L. R. 5 H. of L. 624, s. c. 4 Moak's Eng. 17.

[6] Townsend v. Billinge, 1 Hilt. 353; Cruger v. Armstrong, 5 Johns. Cas. 7.

[7] Fish v. Jacobsohn, 2 Abb. Ct. App. Dec. 132.

[8] Market Bank v. Hartshorne, 3 Abb. Ct. App. Dec. 173, s. c. 3 Keyes, 137. Compare National Gold Bank & Trust Co. v. McDonald, 51 Cal. 64, s. c. 21 Am. R. 697.

[9] Mechanics' Bank v. Straiton, 3 Abb. Ct. App. Dec. 269, s. c. 36 How. Pr. 190.

[10] Paragraphs 36, &c.

[11] Hill v. Gaw, 4 Barr (Pa.) 493.

[12] Pack v. Thomas, 21 Miss. (13 Smedes & M.) 11.

[13] Bernhard v. Brunner, 4 Bosw. 528.

129. *Laches.*]—Unreasonable delay in the presentment of a check, if relied on as a defense, should be averred in the answer.[1] The better opinion is that the court will not presume laches against the plaintiff without some evidence indicating it;[2] but if delay and injury thereby is shown, the burden is on plaintiff to prove an excuse for the delay.[3] For this purpose evidence of usage of the place is competent;[4] but it must be shown; it cannot be presumed to exist without evidence.[5]

130. *Action against drawer.*]—A simple check which has not been presented for payment, is not evidence of indebtedness from the drawer to the payee, before demand. But after dishonor and notice the check imports a debt from the drawer to the payee, and it may be sued on without proving the consideration, value received being presumed.[6]

Plaintiff may show that the check, though drawn in the name of one partner only was so drawn pursuant to usage of the defendant's firm to keep their bank account in that name, and that he advanced the consideration upon credit of the firm, and not upon the individual security of the partner in whose name the check was drawn.[7] A check is presumed to be drawn against a deposit;[8] and plaintiff must aver and prove either demand, nonpayment, and notice to the drawer, or such facts—for example, want of funds at the bank, or stopping payment—as dispense with demand and notice.[9]

A check with "memorandum" or "mem." written on its face, is, according to the usage of merchants, a mere due bill,[10] and demand and notice are unnecessary.[11]

131. *Action against the Bank.*]—The holder of a bank check, whether a private person or a public officer, suing the bank thereon, must prove, either that the bank accepted or certified it, or that they charged it against the drawer.[12] Against a *bona fide* holder, evidence of violation of instructions,[13] or want of funds,[14] or the holder's delay in presenting for payment,[15] is not available.

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[1] See Harbeck v. Craft, 4 Duer, 122.
[2] Smith v. Janes, 20 Wend. 192.
[3] Hazleton v. Colburn, 1 Robt. 345, s. c. 2 Abb. Pr. N. S. 199.
[4] Turner v. Bank of Fox Lake, 4 Abb. Ct. App. Dec. 434, affi'g 23 How. Pr. 399.
[5] Smith v. Miller, 43 N. Y. 171, rev'g 6 Robt. 157, 413, s. c. 6 Abb. Pr. N. S. 234.
[6] 2 Dan. Neg. Inst. § 560.
[7] Crocker v. Colwell, 46 N. Y. 212.
[8] White v. Ambler, 8 N. Y. 170.
[9] Shultz v. Depuy, 3 Abb. (N. Y.) Pr. 252. But as to pleading, see Requa v. Guggenheim, 3 Lans. 51.
[10] U. S. v. Isham, 17 Wall. 502.
[11] Turnbull v. Osborne, 12 Abb. Pr. N. S. 200.
[12] Bank of the Republic v. Millard, 10 Wall. 152, and cases cited. And see Attorney General v. Continental Life Ins. Co. 71 N. Y. 325, rev'g 10 Hun, 604.
[13] Farmers' & Mechanics' Bank v. Butchers' & Drovers' Bank, 4 Duer, 219, affi'd in 16 N. Y. 125, s. c. Id. 623, 28 Id. 425; Merchants' Bank v. State Bank (below).
[14] Phœnix Bank v. Bank of America, 1 N. Y. Leg. Obs. 26; Meads v. Merchants' Bank of Albany, 25 N. Y. 143.
[15] Willets v. Phœnix Bank, 2 Duer, 121, s. c. 11 N. Y. Leg. Obs. 211, 1 Liv L.

The authority of a cashier to certify a check drawn by a third person[1] may be inferred by the jury from evidence that with the knowledge and acquiescense of the directors he had frequently pledged the credit of the bank, in other similar ways; for example, by certificates of deposit, memoranda, etc., and from evidence of usage to the same effect in other banks of the same place.[2]

XIV. Stock and Premium Notes.

132. *Stock notes.*]—Although the note sued on is in form for premiums, plaintiff may allege and prove that it was in fact given and taken as a capital-stock note, and used as such in organizing the company, so as to recover its entire amount, without showing that it has been assessed.[3]

133. *Premium notes.*]—In the absence of any denial, in pleading, an admission by the insured, in his premium note, of the policy, its number and date, is *prima facie* evidence of the issuing and existence of the policy, and of its contents.[4] From the fact that the note was given to a corporation whose business was insurance, as part of an insurance premium then payable, the insurance may be presumed to have been within the corporate powers.[5]

134. *Losses and Assessments.*]—In an action on a premium note for losses assessable, plaintiff, whether the corporation[6] or a receiver,[7] must give some evidence that losses, or other valid liabilities, which rendered an assessment proper,[8] actually occurred[9] during defendant's membership,[10] and that pursuant to the statute,[11] and upon inquiry had,[12] an assessment was actually[13] and legally[14] made. The evidence of losses should be such as would avail against the corporation,—for instance, a report adjudicating its insolvency;[15] or proof of judgments recovered against it, or the presentment and allowance of claims;[16] or the record of losses

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Mag. 649; Farmers' & Mechanics' Bank v. Butchers' & Drovers' Bank, 4 Duer, 219, 16 N. Y. 125, 14 Id. 623, 28 Id. 425.

[1] Claflin v. Farmers' & Citizens' Bank, 25 N. Y. 293, s. c. 24 How. Pr. 1, rev'g 36 Barb. 540; Pope v. Bank of Albion, 59 Barb. 226.

[2] Merchants' Bank v. State Bank, 10 Wall. 604.

[3] Sands v. St. John, 36 Barb. 628, s. c. 23 How. Pr. 140; s. p. Sand v. Son, 56 N. Y. 662, rev'g 1 Supm. Ct. (T. & C.) adden. 13.

[4] Way v. Billings, 2 Mich. (Gibbs), 397.

[5] Mutual Benefit Life Ins. Co. v. Davis, 12 N. Y. (2 Kern.) 569.

[6] Atlantic Mut. Fire Ins. Co. v. Fitzpatrick, 2 Gray, 279, 281.

[7] Jackson v. Roberts, 31 N. Y. 304.

[8] Jackson v. Roberts, 31 N. Y. 304; Devendorf v. Beasley, 22 Barb. 656; American Ins. Co. v. Schmidt, 19 Iowa, 502.

[9] Pacific Mut. Ins. Co. v. Guse, 49 Mo. 329, s. c. 8 Am. R. 132.

[10] Manlove v. Bender, 39 Ind. 371, s. c. 13 Am. R. 280.

[11] Thomas v. Whallon, 31 Barb. 172.

[12] Sands v. Graves, 58 N. Y. 94, rev'g 1 Supm. Ct. (T. & C.) adden. 13.

[13] Id.

[14] Augusta Mut. Fire Ins. Co. v. French, 39 Me. 522, 525.

[15] Sands v. Shoemaker, 4 Abb. Ct. App. Dec. 149.

[16] Sands v. Kimbark, 27 N. Y. 147, aff'g 39 Barb. 108; see, also, Sands v. Hill, 42 Barb. 651.

kept by the company.[1] Evidence that there was ground for an assessment cannot supply the omission to assess,[2] nor can the existence of an assessment raise a sufficient presumption of liabilities.[3]

135. *Defenses.*]—If defendant relies on want or failure of consideration, such as the fact that the company has not earned premiums from him to the amount of the note, the burden is on him to prove it.[4] So, if he relies on the insolvency of the company, at the time of issuing the policy, known to its officers and to the plaintiff, the burden is on him to prove such knowledge.[5]

The form of a note is not conclusive, but it may be shown to have been given as a stock or capital note, and thus let in the statute of limitations.[6] Nor is an apparent assessment conclusive.[7]

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[1] People's Mut. Ins. Co. v. Allen, 10 Gray, 297,

[2] Sands v. Graves, 58 N. Y. 94, rev'g 1 Supm. Ct. (T. & C.) adden. 13.

[3] Pacific Mut. Ins. Co. v. Guse, 49 Mo. 329, s. c. 8 Am. R. 132. Compare Sands v. Hill, 42 Barb. 651. As to demand, etc., see Sands v. Shoemaker, 4 Abb. Ct. App. Dec. 149; and Sands v. Graves (above), and cases cited; Sands v. Lilienthal, 46 N. Y. 541.

[4] Nelson v. Wellington, 5 Bosw. 178.

[5] Clark v. Metcalf, 54 N. Y. 683.

[6] Sand v. Son, 56 N. Y. 662, rev'g 1 Supm. Ct. (T. & C.) adden. 13.

[7] People's Mut. Fire Ins. Co. v. Westcott, 14 Gray, 440; and see Sands v. Sweet, 44 Barb. 108.

CHAPTER XXII.

ACTIONS ON NON-NEGOTIABLE PROMISSORY NOTES.

Peculiar rules.]—Most of the rules stated in the first division of the last chapter apply; but in qualification of them it it should be observed that in case of non-negotiable paper, possession by one other than the payee is not, alone, evidence of title;[1] nor is possession necessary, to enable to recover.[2] Consideration must be alleged and proved.[3] The words "for value received" in pleading are a sufficient allegation;[4] and in the instrument are *prima facie* evidence of consideration.[5] If a consideration is indicated, but its actual payment is not, the fact that it had passed should be alleged and proved.[6]

Oral evidence is not competent to show that a non-negotiable note was intended to have a negotiable quality,[7] such as that of entitling an indorser to notice,[8] but he is liable as guarantor or joint maker, according to the intention of the contract, which may be shown by oral evidence;[9] and notice need not be proved though alleged.[10]

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[1] Barrick v. Austin, 21 Barb. 241.

[2] Rosc. N. P. 351. Proof of loss is enough without proof of destruction. 2 Para. on Pr. N. 290.

[3] Spear v. Downing, 34 Barb. 522, s. c. 12 Abb Pr. 437, 22 How. Pr. 30.

[4] Id.

[5] Jerome v. Whitney, 7 Johns, 321.

[6] Spear v. Downing (above); Considerant v. Brisbane, 14 How. Pr. 487; Evans v. Williams, 60 Barb. 346.

[7] Ballard Pavement Co. v. Mandel, 2 MacArthur, 351, 359.

[8] Richards v. Warring, 4 Abb. Ct. App. Dec. 47; Cromwell v. Hewitt, 40 N. Y. 491, 16 Alb. L. J. 47, and cases cited.

[9] Id., and see pp. 437–440 of this vol.

[10] Billingham v. Bryan, 10 Iowa, 317.

CHAPTER XXIII.

ACTIONS ON ACCOUNTS STATED.

1. Grounds of action.
2. Pleading.
3. Character of the parties.
4. The account and its statement.
5. The promise.
6. Testimony of witness: production of account.
7. Res gestæ.
8. Express assent.
9. Tacit assent to account stated.
10. Defendant's evidence to disprove assent.
11. Incapacity.
12. Impeaching the account itself.
13. Consideration.
14. Omissions and errors.
15. Offsets.
16. Limitations.

1. *Grounds of action.*]—An account stated is an agreement between persons who have had previous transactions, fixing the amount due in respect of such transactions, and promising payment. As distinguished from a mere admission or acknowledgment, it is a new cause of action,[1] and hence, if appearing to have been made since the action commenced, is not competent in evidence.[2] An account stated is not now regarded as a contract upon new consideration, and does not create an estoppel, but it establishes *prima facie* the accuracy of the items without further proof. The statement is not the equivalent of an express promise to pay the balance when the items do not constitute a legal debt or duty.[3]

2. *Pleading.*]—An allegation that one party made a statement of an account, and delivered it to the other, who made no objection to it, is not an allegation that an account was stated between them. These are but matters of evidence tending to show, but not conclusively, an account stated. If an account stated is alleged, the original consideration need not be alleged nor proved.[5]

Under the new procedure, the question whether evidence of the original indebtedness is competent where plaintiff fails to

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[1] An unsigned account is not a new cause of action for the purpose of enabling plaintiff to recover in an action brought after the original cause of action was barred by the statute where the statute requires a new promise to be in writing, signed, &c. Chace v. Trafford, 116 Mass. 529, s. c. 17 Am. R. 171. Compare Smith v. Forty, 4 C. & P. 126; N. Y. Code Civ. Pro. § 395.

[2] Rosc. N. P. 590.

[3] Young v. Hill, 67 N. Y. 162, rev'g 6 Hun, 613. Compare Melchior v. McCarty, 31 Wisc. 252, s. c. 11 Am. R. 605; Seago v. Deane, 4 Bing. 459. As to jump settlements, see Calkins v. Griswold, 11 Hun, 208; Hamilton, &c. Co. v. Goodrich, 6 Allen, 191, 199.

[4] Emery v. Pease, 20 N. Y. 62. But if there is no dispute as to the facts, it is competent for the court to instruct the jury that such an account is a stated account. Toland v. Sprague, 12 Pet. 300.

[5] 1 Steph. N. P. 362; 1 Chit. Pl. 358; Milward v. Ingram, 2 Mod. 43.

prove the statement of an account, depends on whether defendant has been misled to his prejudice by the variance. If not, the pleading is amendable.[1]

3. *Character of the parties.*]—If defendant accounted with plaintiff in a particular character, he will be taken to have admitted that character.[2]

4. *The account and its statement.*]—It is not necessary to show a mutual account[3] between the parties, nor even any account in the commercial sense, nor more than one item.[4] The transactions must be past transactions,[5] but the dates in the statement are sufficient proof of this. The statement must be express, and fix a sum,[6] but it is not essential that it include, or purport to include, all indebtedness between the parties. If it fix the sum for a certain period, it is competent, leaving defendant to establish a set-off.[7]

An allegation of account stated is supported by evidence that the parties actually met and considered and agreed upon the items and the result,[8] or by evidence of a bill rendered by one and not objected to by the other,[9] or by the delivery of the common pass-book of the parties, balanced,[10] or by an award of arbitrators if coupled with an admission that the balance was due;[11] but without some such ratification an award is not competent.[12]

5. *The promise.*]—To prove an account stated the evidence must justify the inference of an agreement[13] as distinguished from a mere admission.[14] Thus a compulsory admission by a witness,[15]

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[1] Woolsey v. Village of Rondout, 4 Abb. Ct. App. Dec. 639; and see Goings v. Patten, 1 Daly, 168, s. c. 17 Abb. Pr. 339; Smith v. Glens Falls Ins. Co. 66 Barb. 556; 62 N. Y. 85; Greenfield v. Mass. Mut. Life Ins. Co. 47 N. Y. 430. Otherwise at common law.

[2] Peacock v. Harris, 10 East, 104; Rosc. N. P. 590.

[3] See Case v. Hotchkiss, 1 Abb. Ct. App. Dec. 324; Cobb v. Arundell, 26 Wisc. 553.

[4] See cases below.

[5] Mellon v. Campbell, 11 Penn. St. 415. But money due on a sealed instrument is not alone matter for an account stated; Middleditch v. Ellis, 2 Exch. 623; Rosc. N. P. 590. Otherwise if it be included with other items. Foster v. Allanson, 2 Term. R. 479. Compare Young v. Hill, 67 N. Y. 162, rev'g 6 Hun, 613. Compound interest is not recoverable merely because included in an account stated. Young v. Hill (above).

[6] Bouslog v. Garrett, 39 Ind. 338; Lane v. Hill, 18 Q. B. 252; Bernasconi v. Anderson, M. & M. 183.

[7] Filer v. Peebles, 8 N. H. 226.

[8] Darlington v. Taylor, 3 Grant. 195; and see McCullough v. Judd, 20 Ala. 703.

[9] Cobb v. Arundell (above); Wiggins v. Burkham, 10 Wall. 129, and without itemizing. May v. Kloss, 44 Mo. 300.

[10] Hutchinson v. The Bank, 48 Barb. 302.

[11] Buschman v. Morling, 30 Md. 384; Salmon v. Watson, 4 B. Moore, 73.

[12] Bates v. Townley, 2 Exch. 152.

[13] Robertson v. Wright, 17 Gratt. 534.

[14] Breckon v. Smith, 1 Ad. & E. 488.

[15] Tucker v. Barron, 7 B. & C. 623.

or assent obtained by a threat to sell the property of the party,[1] or the act of a clerk in giving a transcript from corporate books, without evidence of intent to state the account,[2] is not enough. But the agreement may be implied from circumstances.[3] A written promise need not be proved,[4] nor even an express promise.[5] But a written admission, such as implies a promise, may be proved, though made in any form, such, for instance, as a signature of the account;[6] or a due bill, though naming no payee;[7] or a note, if absolute as to the indebtedness, though conditional as to time of payment;[8] or a letter acknowledging correctness of,[9] or making no objection to, an account rendered, and drawing for the precise balance.[10] An admission in a writing under seal will sustain the action if the instrument is not a substitute for or merger of the original simple contract.[11]

A qualified acknowledgment is not enough;[12] but an unqualified admission of a single item is competent;[13] and objection to one item alone may imply admission of the rest.[14]

If the account was stated by or to an agent there must be evidence of his authority[15] at the time.[16] Admission to a stranger is not evidence of account stated.[17]

6. *Testimony of witness: Production of account.*]—The witness may state what he understood at the time as the agreement of the parties, if it be his impression as to what was said,[18] though he cannot recollect the precise language;[19] but he cannot state his belief, as an inference from what was said,[20] or as a matter of opinion respecting the bearing of what was said upon the question of fact.[21] The

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[1] Stenton v. Jerome, 54 N. Y. 480.

[2] Harvey v. West Side Elevated Rw. Co. 13 Hun, 392.

[3] Stebbins v. Niles, 25 Miss. 267.

[4] Freeman v. Howell, 4 La Ann. 196. A corporate resolution, though unrecorded, is enough. St. Mary's Church v. Cagger, 6 Barb. 576.

[5] But between partners, an express promise must be proved, 4 Abb. N. Y. Dig. new ed. 736; Rosc. N. P. 590.

[6] Montgomerie v. Ivers, 17 Johns. 38.

[7] Fesenmayer v. Adcock, 16 Mees. & W. 449. If defendant relies on the fact that plaintiff is not the true payee, it is for defendant to prove it. Id.

[8] Nunez v. Dautel, 19 Wall. 560; Morgan v. Jones, 1 C. & J. 162, s. p. Rosc. N. P. 382; Lemere v. Elliott, 6 H. & N. 656.

[9] Vinal v. Burrill, 16 Pick. 401.

[10] Lockwood v. Thorne, 11 N. Y. 170, rev'g 12 Barb. 487.

[11] Hoyt v. Wilkinson, 10 Pick. 33.

[12] Rosc. N. P. 588.

[13] 2 Whart. Ev. § 1140.

[14] Rosc. N. P. 590.

[15] Rosc. N. P. 589; Harvey v. West Side Elevated Rw. Co. 13 Hun, 392.

[16] Thallimer v. Brinckerhoff, 4 Wend. 394. An account stated by the treasurer of a corporation is evidence to charge the corporation. Davis v. Georgetown Bridge Co. 1 Cranch C. Ct. 147. Compare note 2, above.

[17] Rosc. N. P. 590.

[18] Thomas v. White, 11 Ind. 132.

[19] See Chaffee v. Cox, 1 Hilt. 78.

[20] Williams v. Dewitt, 12 Ind. 309, 311.

[21] As to this distinction, see 2 Abb. New Cas. 229, note.

parol testimony of a witness that the parties made a settlement of accounts in his presence, his knowledge being derived from declarations and admissions to each other in his hearing, is not rendered incompetent by the fact that the settlement was based on a written memorandum produced by one of the parties at the time, and which was not shown to, and never in the possession of the witness.[1] But if the agreement proved by the witness was an assent to the written statement, the paper should be produced, or its absence accounted for.[2] If the statement so agreed to was a copy, it is not necessary to produce the books or other original;[3] but the original is better evidence than a copy of the copy.[4] Defendant's admission that the account examined by him was correct is admissible against him, although made during a negotiation for settlement.[5] And after the correctness of the items of an account has been proved, the account and entries and vouchers concerning the items are admissible, not as evidence in themselves, but as explaining what is referred to.[6] If the witness's testimony is to the identity of the written statement produced, the paper is competent, although he cannot recollect from memory the items he was directed to set down, and vouchers referred to in the account are not produced.[7]

7. *Res gestæ.*]—What one of the parties said immediately after the settlement, and in explanation of it, but in the absence of the other, is not a part of the *res gestæ* so as to be competent in his own favor.[8]

8. *Express assent.*]—If defendant's express assent to the account is proved, he may prove in his own favor all that was said by him in the same conversation[9] that in any way qualifies or explains the statement already in evidence, or modifies the use that plaintiff might otherwise make of it.[10]

9. *Tacit assent to account rendered.*]—Between merchants of the same[11] or different[12] countries, or other persons between whom there are accounts current in the ordinary course of business,[13] if an account has been presented, and no objection has been made thereto, after a reasonable time,[14] it is treated, under ordinary cir-

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[1] Cramer v. Shriner, 18 Md. 140.
[2] Vinal v. Burrill, 16 Pick. 401.
[3] See Phillips v. Tapper, 2 Penn. St. 323.
[4] Reddington v. Gilman, 1 Bosw. 235.
[5] Bartlett v. Tarbox, 1 Abb. Ct. App. Dec. 120.
[6] Id.
[7] M'Clelland v. Crawford, 2 Bibb (Ky.) 336. And see p. 320 of this vol.
[8] Rockwell v. Taylor, 41 Conn. 55.
[9] Compare Nesbit v. Stringer, 2 Duer, 26.
[10] Rouse v. Whited, 25 N. Y. 170, rev'g 25 Barb. 279. Compare Delamater v. Pierce, 3 Den. 315, affi'd in How. App. Cas. 1.
[11] Wiggins v. Burkham, 10 Wall. 129.
[12] Freeland v. Heron, 7 Cranch, 147; Tickel v. Short, 2 Ves. Sr. 239.
[13] Shepard v. Bank, 15 Mo. 143.
[14] Two or three posts. Sherman v. Sherman, 2 Vern. 276. Story says several posts. 1 Story's Eq. Jur. § 520.

cumstances, as being, by acquiescense, a stated account, because the silence of the one to whom the account is sent warrants the inference of an admission of its correctness.[1] This inference is more or less strong according to the circumstances of the case. Plaintiff better be prepared with some evidence that he received no objection from defendant within a reasonable time;[2] and to prove the ordinary course of mail, if necessary, in order to show that a reasonable time elapsed, for the court will not take judicial notice of it.[3] If such proof is made and no excuse for not objecting shown by defendant, the account will be admitted as a stated account.[4] When thus admitted, the burden is thrown upon defendant to impeach it,[5] in the manner stated below. If express promise or assent is not shown by direct evidence, the account is not conclusive,[6] but only shifts the burden of proof.[7]

10. *Defendant's evidence to Disprove assent.*]—The inference of assent may be repelled not only by direct evidence of objection made before the account was rendered,[8] or even after acting on it,[9] but by any circumstances tending to a contrary conclusion,[10] such as that the party was absent from home, suffering from illness, or expected shortly to see the other, and intended and preferred to make his objections in person.[11] Express assent may be rebutted by evidence that it was hastily and inconsiderately made.[12]

11. *Incapacity.*]—It is not competent to prove that in the opinion of a witness the defendant was dull of comprehension, and not of sufficient capacity or education to understand long accounts,[13] unless in connection with evidence of unsoundness of mind, or undue influence or fraud.[14]

12. *Impeaching the account itself.*]—An account stated if established, whether by express or implied assent, throws upon the other party the burden of showing its incorrectness. He may prove fraud, omission, or mistake, and in these respects he is in no wise concluded by the admission implied from his silence after

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[1] *Contra*, 2 Whart. Ev. § 1140.
[2] According to some authorities the burden is on defendant to prove objection made. Ruffner v. Hewitt, 7 W. Va. 585.
[3] Wiggins v. Burkham, 10 Wall. 129.
[4] Tolland v. Sprague, 12 Pet. 330; Towsley v. Dennison, 45 Barb. 490. Compare Guernsey v. Rexford, 63 N. Y. 631.
[5] Wiggins v. Burkham (above).
[6] Guernsey v. Rexford, 63 N. Y. 631.
[7] Towsley v. Dennison, 45 Barb. 490; Freeland v. Heron, 7 Cranch, 147.
[8] Cobb v. Arundell, 26 Wisc. 553.
[9] Lockwood v. Thorne, 18 N. Y. 285, rev'g 24 Barb. 391; and explaining 11 N. Y. 170.
[10] Guernsey v. Rexford, 63 N. Y. 631; Champion v. Joslyn, 44 Id. 653.
[11] Wiggins v. Burkham, 10 Wall. 129.
[12] Stewart v. Conner, 13 Ala. 94.
[13] Stewart v. Conner, 13 Ala. 94.
[14] See p. 14, of this vol.

it was rendered.[1] He must, however, prove fraud, or show clearly the error or mistake on which he relies;[2] and it is conclusive unless some fraud, mistake, omission or inaccuracy is shown.[3] An exception is recognized when the parties are not upon equal terms, and then a court of equity may wholly disregard it.[4]

Even the signing of the account by a party is not conclusive evidence of accuracy.[5] And, on the other hand, a clause stating that the settlement is subject to the correction of errors and omissions which may afterward be found, does not render the account any the less a settled account, and subject to all the rules applicable to stated accounts.[6] A mistake in footing does not affect the legal effect of an account stated, which may be ascertained by a correct footing.[7]

Under the new procedure, it is the better practice to allege, in pleading, the fraud or mistake on which defendant relies to surcharge or falsify plaintiff's account.[8] To falsify items the original books, if any, should be produced, or the accounting party subpœnaed,[9] or given notice to produce them.

13. *Consideration.*]—Evidence that the original consideration of an item was positively illegal, is competent; but evidence that the original agreement, of which that consideration was a part, was not valid, is not competent, if defendant had a legal consideration.[10]

14. *Omissions and errors.*]—For the purpose of explaining or negativing an omission or other error, it is competent to adduce the original books from which the account was drawn off,[11] and to prove why the party failed to discover, and how he did discover the error;[12] but a party cannot testify, as a witness, to his reason, not communicated to the other party, for the omission.[13] A mere omission of a questioned item by assent of both parties, is not conclusive against it.[14]

15. *Offsets.*]—A claim of offsets as distinguished from an omission, should be alleged in pleading; and even if anterior to

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[1] Wiggins v. Burkham, 10 Wall. 129; Perkins v. Hart, 11 Wheaton, 256.
[2] Towsley v. Dennison, 45 Barb. 490.
[3] Young v. Hill, 67 N. Y. 162, rev'g 6 Hun, 613. It is never an absolute estoppel. Hutchinson v. Bank, 48 Barb. 302.
[4] Young v. Hill (above). *Contra*, as to all but professional relations. Phillips v. Belden, 2 Edw. Ch. 1, 17, and see Ogden v. Astor, 4 Sandf. 336.
[5] Nichols v. Alsop, 6 Conn. 477; Stewart v. Conner, 13 Ala. 94.
[6] Young v. Hill (above).
[7] Walling v. Rosevelt, 1 Harr. 41.
[8] Compare Bouslog v. Garrett, 39 Ind. 338.
[9] Upton v. Bedlou, 4 Daly, 216.
[10] This seems to be the true principle. See Melchoir v. McCarty, 31 Wis. 252, s. c. 11 Am. R. 605; Youngs v. Hill, 67 N. Y. 162, rev'g 6 Hun, 613.
[11] Hampton v. Michael, 6 Gratt. (Va.) 151.
[12] Glenn v. Salter, 50 Geo. 170.
[13] Champion v. Joslyn, 44 N. Y. 653.
[14] Bright v. Coffman, 15 Ind. 371.

the account, it is not merely on that ground admissible unless alleged.[1] A general settlement raises a legal,[2] but not conclusive[3] presumption that earlier demands were satisfied. A subsequent accounting, including fresh items, should be pleaded; otherwise of a mere correction of the first.[4]

16. *Limitations.*]—If no new consideration upon the statement of account is shown, other than the mutual assent, the statute of limitations applicable to the original indebtedness may serve to bar it, if pleaded,[5] but the statement itself may take the case out of the statute, if it be such as to satisfy the requirement of an acknowledgment or new promise.

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[1] Johnson v. Johnson, 4 Call (Va.) 38.
[2] Smith v. Tucker, 2 E. D. Smith, 193.
[3] Bushee v. Allen, 31 Vt. 631.
[4] Rosc. N. P. 591.
[5] See paragraph 1, note 1.

CHAPTER XXIV.

ACTIONS ON AWARDS.

1. Fact of submission.
2. Its scope.
3. Promise to abide award.
4. Umpire, &c.
5. Oath.
6. Enlargement of time.
7. Making award.
8. Presumptions in favor of award.
9. Extrinsic evidence to vary.
10. Effect of award.
11. Competency of arbitrator as witness.
12. Defenses; pleading.
13. — omissions; excess of authority.
14. — other objections.

1. *Fact of submission.*]—The submission, if in issue, must be proved by evidence that both the parties were bound.[1] If it was in writing, the rules stated in chapter XXI and chapter XXVII will apply to mode of proving execution. A rule of court entered on the submission is not a sufficient authentication of the submission; but a submission by order of the court, in a case where the court had power to refer, is proved by production of the order,[2] or a duly certified copy. Even where the statute prescribes the formalities of submissions, the presumption is in favor of the validity of a submission, unless the contrary appears.[3] In case of an oral submission, or in a conflict of evidence as to the execution of a written submission, or as secondary evidence of the making of a written submission, it is competent to show that defendant had partly performed the award, or that he had, on presentation of the award, promised to perform it, or his admission of having submitted the matter to arbitration.[4] Unless the statute requires writing, assent to a submission, even by a corporation, may be inferred from circumstances.[5]

The authority of an agent or attorney to submit may be inferred from evidence of the principal's acquiescence in similar submissions.[6] It is conclusively proved by evidence that the principal appeared and proceeded before the arbitrator,[7] or otherwise acquiesced in and ratified the submission.[8]

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[1] Rosc. N. P. 471.
[2] Id; Morse on Arb. 600.
[3] Morse on Arb. 49. But see paragraph 14.
[4] Morse on Arb. 602, and cases cited.
[5] Isaacs v. Beth Hamedash Soc., 1 Hilt. 469.
[6] Wood v. Auburn & Rochester R. R. Co. 8 N. Y. (4 Seld.) 160.
[7] Diedrick v. Richley, 2 Hill, 271.
[8] Smith v. Sweeny, 35 N. Y. 291.

An oral submission, and proceeding upon it, do not estop the party from setting up that the controversy was one not a subject for arbitration, or not a subject for oral submission.[1]

2. *Its scope.*]—A submission is to be given a liberal, but not a forced construction, in favor of including and terminating controversies.[2] Documents referred to in it are competent evidence to show what was in controversy.[3] If ambiguous, the course of evidence and discussion before the arbitrators in presence of both parties, is competent as tending to show that matters presented on both sides were embraced, and matters not mentioned by either were not embraced in the submission.[4] A written submission is a contract within the rule that its terms cannot be varied by an oral contemporaneous or previous agreement;[5] but it may be modified or superseded by a subsequent oral agreement.[6]

3. *Promise to abide award.*]—When a submission is proved, an agreement to abide by the award is implied, and an express promise need not be proved.[7]

4. *Umpire, &c.*]—Under an allegation of submission to and award by arbitrators, submission to and award by an umpire, is a variance.[8] The appointment of an umpire, or additional arbitrator, if any, such were appointed and made the award, must be proved. It cannot be proved by a recital in his award.[9] Appointment by parol is good unless otherwise provided by statute or by agreement.[10]

5. *Oath.*]—The arbitrator's oath, if required by statute,[11] and notice of hearing,[12] are presumed, unless the contrary appear. Evidence of waiver excuses the omission; and the fact that defendant proceeded without them is sufficient evidence of waiver.[13]

6. *Enlargement of time.*]—An enlargement of the time to award implies a new submission, and the new agreement in strict-

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[1] French v. New, 2 Abb. Ct. App. Dec. 209, s. c. 28 N. Y. 147, rev'g 20 Barb. 481.

[2] Munro v. Alaire, 2 Cai. 320; Curtis v. Gokey, 68 N. Y. 305.

[3] Winship v. Jewett, 1 Barb. Ch. 173.

[4] Morse on Arb. 59–64; but compare Feidler v. Cooper, 19 Wend. 285.

[5] For this rule see pp. 294, 364, &c., of this vol.

[6] French v. New, 28 N. Y. 147, rev'g 20 Barb. 481.

[7] Smith v. Morse, 9 Wall. 76; Valentine v. Valentine, 2 Barb. Ch. 430; Efner v. Shaw, 2 Wend. 567.

[8] Lyon v. Blossom, 4 Duer, 318. Unsound in so far as it holds that the variance cannot be cured by amendment.

[9] Still v. Halford, 4 Campb. 19. Compare Morse on Arb. 446, and cases cited.

[10] Elmendorf v. Harris, 5 Wend. 516, s. c. 23 Wend. 628. Compare Smith v. Morse, 9 Wall. 76.

[11] See Browning v. Wheeler, 24 Wend. 258.

[12] Mayor, &c. of N. Y. v. Butler, 1 Barb. 325.

[13] This is the rule in New York and some other States. *Contra*, in Kentucky, Louisiana, Missouri and New Jersey. Day v. Hammond, 57 N. Y. 479.

ness should be alleged;[1] and if in issue must be proved,[2] if the validity of the award depends upon it. If the time was fixed by a sealed submission, written evidence, though unsealed, is competent to show extension,[3] and so, in any case, is oral evidence of waiver by proceeding without objection after the time had passed.[4]

7. *Making award.*]—The execution of a written award may be proved like that of other deeds or writings.[5] If the submission was to several, the concurrence of all must be shown;[6] unless the statute,[7] or the terms of submission,[8] sanction a decision by a less number; in which case oral evidence is competent to show that the one not signing, had jointly with the others, heard the case.[9]

If the submission required the award to be ready for delivery at a time named, it is sufficient to prove that all the formalities, if any, were completed at that time, so that it was ready to be delivered to defendant (if he was entitled to delivery),[10] on request,[11] and on payment of fees if any.[12] A tardy date to the award is not alone enough to rebut the presumption of timely completion.[13] A waiver of delivery by the defendant may be proved by parol.[14] Under an allegation that the award was duly made or published on, &c., readiness to deliver may be proved.[15] Unless publication to the party is required by the submission, plaintiff need not prove that defendant had notice of the award.[16]

Objections to the award which do not show it to be positively illegal, or absolutely void under the statute, may be cured by evidence of its ratification by the parties.[17]

8. *Presumptions in favor of awards.*]—All presumptions and intendments are in favor of an award,[18] as in case of a judgment,[19] and for this purpose arbitrators are presumed to have per-

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[1] Myers v. Dixon, 2 Hall, 456.
[2] Rosc. N. P. 471.
[3] Bloomer v. Sherman, 5 Paige, 575, affi'g 2 Edw. 452.
[4] Morse on Arb. 83, 173.
[5] Rosc. N. P. 472, see pp. 391, &c., of this vol.
[6] Green v. Miller, 6 Johns. 39, and cases cited.
[7] 2 N. Y. R. S. 542, § 7.
[8] Isaacs v. Beth Hamedash Soc. 1 Hilt. 469.
[9] Schultz v. Halsey, 3 Sandf. 405.
[10] Pratt v. Hackett, 6 Johns. 14.
[11] Burnap v. Losey, 1 Lans. 111; Morse on Arb. 279.
[12] Ott v. Schroepel, 3 Barb. 56.
[13] Owen v. Boerum, 23 Barb. 187.
[14] Perkins v. Wing, 10 Johns. 143; Warren v. Haight, 65 N. Y. 169; Sellick v. Addams, 15 Johns. 197. But compare Buck v. Wadsworth, 1 Hill, 321.
[15] Munro v. Alaire, 2 Cai. 320.
[16] Rosc. N. P. 471; Morse on Arb. 285. *Contra*, Id. 290.
[17] Morse on Arb. 530.
[18] Morewood v. Jewett, 2 Robt. 496; Morse on Arb. 179.
[19] Lowenstein v. Mackintosh, 37 Barb. 251; Morse on Arb. 446, and cases cited.

formed all their duties.[1] They are presumed to have considered every subject brought before them within the submission,[2] and nothing more,[3] unless the terms of the award affirmatively show that they did not.[4] The award, although appearing less extensive in its terms than the submission, is presumed to embrace every question before the arbitrators.[5] If the submission expressly or by just implication makes it a condition that all matters submitted be determined, the same presumption applies, if there are general words in the award which can give any support to it. But this presumption is not conclusive.[6]

9. *Extrinsic evidence to vary.*]—An award apparently uncertain, may, like a deed, be aided by extrinsic evidence of undisputed facts, or documents referred to in it, for the purpose of showing what it is that was referred to;[7] but the terms of a written award cannot be varied by parol,[8] nor uncertainty in it aided by testimony of the arbitrator, or evidence of his declarations, as to what was intended;[9] but oral evidence of an award is not necessarily excluded by the fact that the arbitrator delivered a memorandum on its face incomplete.[10]

10. *Effect of award.*]—The award unimpeached is conclusive as a judgment.[11]

11. *Competency of Arbitrator as Witness.*]—An arbitrator may be required to testify to facts upon which his legal power depended: but not to the propriety or impropriety of his exercise of it. To illustrate this distinction:—he is a competent witness in a legal proceeding in which it is sought to enforce his award;[12] and like any other witness, may testify to the extent of an oral submission,[13] or to what passed before him at a hearing of the parties,[14] what matters were presented for consideration,[15] and what were or were not considered,[16] and what was openly decided

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[1] Owen v. Boerum, 23 Barb. 187; and see Butler v. Mayor, &c. of N. Y. 1 Hill, 489, rev'd in 7 Id. 329; see also 1 Barb. 325.

[2] Morewood v. Jewett, 2 Robt. 496.

[3] Solomons v. McKinstry, 13 Johns. 27, affi'g 2 Id. 57; Pierce v. Morrison, 6 Hun, 235.

[4] Wright v. Wright, 5 Cow. 197; Backus v. Fobes, 20 N. Y. 204.

[5] Ott v. Schroeppel, 5 N. Y. 482, rev'g 7 Barb. 431.

[6] Morse on Arb. 342–350, 363.

[7] Jackson v. Ambler, 14 Johns. 96; Morse on Arb. 411–413, 445.

[8] Cobb v. Dostch, 52 Geo. 548.

[9] Morse on Arb. 435, 563.

[10] See Becker v. Boon, 61 N. Y. 324.

[11] Brazell v. Isham, 12 N. Y. 9; Lowenstein v. McIntosh, 37 Barb. 251; and see Coleman v. Wade, 6 N. Y. 44. But not more so. Morse v. Osborn, 64 Barb. 546.

[12] Duke of Buccleuch v. Metropolitan Board of Works, L. R. 5 Ho. of L. 418, s. c. 2 Moak's Eng. 448; Mayor, &c. of N. Y. v. Butler, 1 Barb. 325.

[13] Birbeck v. Burrows, 2 Hall, 51.

[14] Duke of Buccleuch v. Metropolitan Board of Works (above); Cole v. Blunt, 2 Bosw. 116.

[15] Id. Id.

[16] Mayor, &c. of N. Y. v. Butler (above).

in the presence of the parties;[1] as well as other incidents of the proceedings; such, for instance, as delivery of the award. He is thus competent, even when the object of the testimony is to avoid the award in which he joined,[2] unless by showing mistake, bad faith, misconduct or other irregularity, in making it,[3] for which purpose he is not competent, unless he declared his dissent at the time of the irregularity.[4] Nor can he be asked any questions as to what passed in his own mind when exercising his discretionary or judicial power on the matters submitted to him.[5]

One who signed cannot testify that in fact he did not concur;[6] nor is it relevant to prove that one who signed afterwards dissented;[7] unless there be evidence of fraud or misconduct, or misrepresentation practiced upon him and inducing signature.[8]

12. *Defenses; Pleading.*]—A denial that an award was made of and concerning the premises, &c., does not put in issue the making, but only the fitness of the award to the submission.[9] A denial of award admits evidence that there was none in fact; but if there was one in fact, there should be an allegation of the irregularity,[10] departure from submission,[11] subsequent *vacatur*,[12] or other ground of invalidity relied on,[13] to admit evidence of the objection. Under the new procedure proper allegations may admit as a defense whatever is a ground for application to the equitable power of the court to vacate the award.[14]

13. *Omissions; Excess of authority.*]—If defendant relies on the objection that the arbitrators omitted to pass upon a matter within the submission and brought before them by the parties, or that they considered a matter not submitted, the burden is on him to show the fact. It may be shown by parol unless it contradicts the terms of a written award, or unless the omission was caused by defendant himself.[15] The fact that matters not considered were brought before the arbitrator, may be shown by parol, or by recitals in the award.[16] The fact that they were not

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[1] Cole v. Blunt (above), and Boughton v. Seamans, 9 Hun, 392, 394, where the arbitrators testified to their oral award.
[2] Briggs v. Smith, 20 Barb. 409.
[3] Newland v. Douglass, 2 Johns. 62.
[4] Jackson v. Gager, 5 Cow. 383.
[5] Duke of Buccleuch v. Metropolitan Board of Works (above).
[6] Campbell v. Western, 3 Paige, 124.
[7] Winship v. Jewett, 1 Barb. Ch. 173.
[8] Wellington v. Warren, 10 Metc. 431.
[9] Id.
[10] Knowlton v. Mickles, 29 Barb. 465. Failure to deliver within the time limited was not, at common law, available under a denial of award. Perkins v. Wing, 10 Johns. 143; Morse on Arb. 284. *Contra*, Dresser v. Stansfield, 14 Mees. & W. 822.
[11] Bean v. Farnum, 6 Pick. 269. *Contra*, Rosc. N. P. 473.
[12] Rosc. N. P. 472.
[13] Morewood v. Jewett, 2 Robt. 496; Morse on Arb. 594.
[14] Day v. Hammond, 57 N. Y. 484, 489.
[15] Morse v. Osborn, 64 Barb. 546.
[16] Morse on Arb. 359, 361.

considered or determined cannot be shown by extrinsic evidence if the award is in terms adequate to conclude the parties as a judgment would.[1] Excess of authority must be clearly shown. It is not enough that it may have occurred.[2]

14. *Other objections.*]—An award may be proved void, without showing corruption or bad faith, by evidence, under proper allegation, that the arbitrator's oath, required by statute, was not taken;[3] that the arbitrators took evidence or heard argument at a meeting of which defendant had no notice;[4] or made award before defendant had closed his proofs;[5] that they resigned, even by parol, before award, and their resignation was accepted;[6] that before award the submission was revoked by operation of law, or by act of a party, notified to the other, in a form equally solemn as the submission;[7] that defendant being entitled to the award on a day named, then demanded it and was refused;[8] or that they had made an award[9] previous to the award sued on.

If the submission, and the conformity of the award with it, are not impeached, nothing extrinsic to the award can be proved against it except corruption or misconduct in the arbitrators,[10] and (under the new procedure) such mistake of fact,—as, for instance, a miscalculation of figures, or the like,—as is a proper ground for equitable relief. Mistake of law is available only when it appears expressly or by inference, from the face of the award,[11] or in some connected paper delivered with it.[12] An allegation of corruption or partiality must be clearly made out;[13] but evidence that the award was grossly excessive will entitle the defendant to go to the jury on the question.[14]

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[1] Lowenstein v. Mackintosh, 37 Barb. 251.

[2] Solomons v. McKinstry, 13 Johns, 27, affi'g 2 Id. 57; Bacon v. Wilber, 1 Cow. 117; Morse on Arb. 443, 445.

[3] Day v. Hammond, 57 N. Y. 483. Unless the oath was waived, Id.

[4] Elmendorf v. Harris, 23 Wend. 628, rev'g 5 Id. 516; Knowlton v. Michles, 29 Barb. 465. Compare Mosely v. Simpson, L. R. 16 Eq. 226, s. c. 6 Moak's Eng. 728; Day v. Hammond, 57 N. Y. 487.

[5] Garvey v. Carey, 4 Abb. Pr. N. S. 159, s. c. 7 Robt. 286. But evidence that there was a heated discussion between the arbitrators, ending in a refusal of the majority to discuss the question further, does not impeach the award. Roberts v. Old Colony R. R. Co. 5 Reporter, 175.

[6] Kelyea v. Ramsay, 2 Wend. 602.

[7] Morse on Arb. 230–232.

[8] Morse on Arb. 283.

[9] Doke v. James, 4 N. Y. 568.

[10] Herrick v. Blair, 1 Johns. Ch. 101, and cases cited. In the arbitrators personally, as distinguished from injustice in their award. Perkins v. Giles, 50 N. Y. 228, affi'g 53 Barb. 342.

[11] Bissell v. Morgan, 56 Barb. 369; Campbell v. Western, 3 Paige, 124; Fudickar v. Guardian Mut. Ins. Co. 62 N. Y. 392, 401, affi'g 37 Super Ct. (J. & S.) 358.

[12] Morris Run Coal Co. v. Salt Co. of Onondaga, 58 N. Y. 667.

[13] Wood v. Auburn, &c. R. R. Co. 8 N. Y. 168; Perkins v. Giles, 50 N. Y. 232.

[14] Smith v. Cooley, 5 Daly, 401.

CHAPTER XXV.

ACTIONS ON GUARANTIES.

1. Oral contract.
2. Promise to answer for debt, &c. of another.
3. Execution of the contracts.
4. Consideration.
5. Rules of interpretation.
6. Oral evidence to vary.
7. Transactions under the guaranty.
8. Non-payment or non-performance.
9. Admissions and declarations of the principal debtor.
10. Judgments.
11. Defenses.

1. *Oral contract.*]—The fact that a promise was in form to pay the debt, &c., of another, does not conclusively require evidence such as satisfies the statute of frauds.[1] Evidence of the surrounding circumstances is competent to enable the jury to determine whether ambiguous words were a guaranty of payment or performance by another, or were an original undertaking.[2] For this purpose plaintiff's evidence must be clear and satisfactory.[3]

2. *Promise to answer for debt, &c., of another.*]—If the contract is within the statute of frauds,[4] plaintiff should be prepared with written evidence, if the making of the contract is in issue.[5] If the making is admitted, or if the terms only are in issue, the statute of frauds is not available unless the want of a memorandum is pleaded.[6] The necessary writing is admissible under a general allegation of the promise, without mentioning a writing.[7] The form of the instrument is not material; but if made out by several papers, they must refer to each other in such a manner as to show that they are parts of the same contract, requiring nothing to be supplied for this purpose, by verbal evidence, except the identity of the documents.[8] The statute precludes resort to oral evidence to supply any substantial element lacking in the writing and necessary to constitute a contract;[9] except the consideration,[10]

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[1] Emerson v. Slater, 22 How. U. S. 28.
[2] Brandt on Sureties & G. 82, §§ 63, 64.
[3] Haverley v. Mercur, 78 Penn. St. 257.
[4] 2 N. Y. R. S. 135, § 2, sub. 2.
[5] Lewin v. Stewart, 10 How. Pr. 509.
[6] Id.
[7] Brandt on Sur. & G. 102, § 77; De Colyar (by Morgan), 178, 209.
[8] Peirce v. Corf, L. R. 9 Q. B. 210; Broom's Phil. of L. § 90; p. 292 of this vol. Compare Lee v. Dick, 10 Pet. 482.
[9] Holmes v. Mitchell, 7 C. B. N. S. (Scott), 361; L. J. 28 C. P. 301; Williams v. Lake, 2 El. & El. 349; L. J. 29 Q. B. 1.
[10] 2 N. Y. R. S. 135, § 2, as am'd by L. 1863, p. 802, c. 464, dispensing with expression of consideration. Speyer v. Lambert, 1 Sweeny, 335, s. c. 6 Abb. Pr. N. S. 309, 37 How. Pr. 315. (*Contra*, Castle v. Beardsley, 10 Hun, 343.) So at common law, and under some earlier statutes, Leonard v. Vredenburgh, 8 Johns. 29; Packard v.

the delivery and acceptance, and such matters as may be necessary under any contract to show a *quantum meruit* arising upon facts specified in the writing: these may be shown by parol. An instrument inadequate under the statute cannot be helped by parol evidence of mistake on the part of the writer only.[1]

3. *Execution of the contracts.*]—Production and proof of execution of the guaranty indorsed on[2] or correctly describing[3] the evidence of debt guaranteed, with production of the latter, is sufficient without other proof of execution of the latter. The authority of an agent, subscribing, need not be in writing;[4] and slight evidence is *prima facie* sufficient.[5] A guaranty written over an indorsement of a bill or note is presumed to have been written at the time of making the indorsement,[6] even though in a different hand.[7] A guaranty is conclusive against the guarantors as to the power of the principal debtors to make their contract,[8] and as to its validity in respect to formalities required by foreign law.[9]

Production of an instrument transferable by delivery, with the guaranty indorsed or annexed, is *prima facie*,[10] but not conclusive,[11] evidence of plaintiff's title to both contracts. A parol assignment of guaranty may be proved.[12]

4. *Consideration.*]—If it appear that the guaranty was executed at or before delivery of the principal contract, the consideration of the latter is enough.[13] If execution of the guaranty after delivery is shown, the burden is on plaintiff to show a new consideration.[14] The date is not conclusive.[15]

A seal,[16] or words in the guaranty importing a consideration,—such as "value received,"[17]—are sufficient *prima facie* evidence of

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Richardson, 17 Mass. 122, 144; Reed v. Evans. 17 Ohio, 128, 133. *Contra*, Deutsch v. Bond, 46 Md. 164; Palmor v. Haggard, 78 Ill. 607. Under statutes requiring the consideration to be stated, the words "for value received," are sufficient. Mosher v. Hotchkiss, 3 Abb. Ct. App. Dec. 326.

[1] Grant v. Naylor, 4 Cranch, 224.

[2] Cooper v. Dedrick, 22 Barb. 516.

[3] Forman v. Stebbins, 4 Hill, 181.

[4] De Colyar (by Morgan), 189.

[5] Pow. Ev. 261; 2 Greenl. Ev. 13 ed. 52; Watkins v. Vince, 2 Stark. 368.

[6] Gilman v. Lewis, 15 Me. 452.

[7] Small v. Sloan, 1 Bosw. 352.

[8] Remsen v. Graves, 41 N. Y. 471.

[9] Smeltzer v. White, 92 U. S. (2 Otto), 392; and it seems, also, of validity generally, unless positively illegal. Id.

[10] Smith v. Schanck, 18 Barb. 344; Cooper v. Dedrick, 22 Id. 516.

[11] Gallagher v. White, 31 Id. 92.

[12] Gould v. Ellery, 39 Id. 163.

[13] Toppan v. Cleveland, &c. R. R. Co. 4 West. Law Month. 67, and cases cited; Petrie v. Barkley, 47 N. Y. 653. A re-delivery pursuant to an original stipulation for security is enough within this rule. McNaught v. McClaughry, 42 N. Y. 22.

[14] Klein v. Currier, 14 Ill. 237.

[15] Draper v. Snow, 20 N. Y. 331, affi'g 6 Duer, 662.

[16] 2 N. Y. R. S. 406, § 77.

[17] Quimby v. Morrill, 47 Me. 470.

consideration. If the statement of consideration is general,[1] nominal,[2] or ambiguous,[3] or consideration is only presumed from a seal,[4] the particular consideration may be shown by oral evidence not contradictory of the writing.[5] Words in the past tense are not conclusive evidence that the consideration was past.[6] If the particular consideration is specified in a written guaranty, it cannot be varied by parol,[7] but may be contradicted by defendant. Inadequacy of consideration is irrelevant;[8] and so is evidence that even a nominal consideration remains unpaid.[9]

5. *Rules of interpretation.*]—In order to apply the rule that the words of a guaranty are to be construed as strongly against the guarantor as the sense will admit,[10] it is proper to admit evidence of surrounding circumstances at the time of the transaction, to discover the subject-matter the parties had in view, and thus ascertain the scope and object of the guaranty.[11]

6. *Oral evidence to vary.*]—A written guaranty, like any other contract, excludes oral evidence of its terms,[12] upon principles already stated.[13] But extrinsic evidence of all the surrounding circumstances, and the pre-existing relation between the parties, is admissible to enable us to see what they mean by the language used;[14] to show, for instance, whether equivocal language contemplated past or future transactions;[15] and a limit of amount,[16] or time,[17] or person;[18] or a continuing guaranty.[19]

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[1] Sterns v. Marks, 35 Barb. 565; Quimby v. Morrill, 47 Me. 470.

[2] Redfield v. Haight, 27 Conn. 31, 40.

[3] Goldshede v. Swan, 1 Exch. 154; Haigh v. Brooks, 10 Ad. & E. 309, 323, 334; Walrath v. Thompson, 4 Hill, 200. Compare Parker v. Bradley, 2 Hill, 584.

[4] Morgan v. Smith, 7 Hun, 244.

[5] De Coly. (by Morgan), 177. Compare, for a freer rule, the chapters on actions affecting REAL PROPERTY and CREDITORS ACTIONS.

[6] For instances, see Agawam Bank v. Strever, 18 N. Y. 502; Williams v. Marshall, 42 Barb. 524, and cases above cited. *Contra*, Parker v. Bradley, 2 Hill, 584.

[7] De Colyar (by Morgan), 179. *Contra*, Morgan v. Smith, 7 Hun, 244.

[8] De Colyar (by Morgan), 34.

[9] Childs v. Barnum, 11 Barb. 14, affi'g 1 Sandf. 58.

[10] Drummond v. Prestman, 12 Wheat. 515; Wood v. Prestner, L. R. 2 Exch. 66.

[11] Sheffield v. Meadows, L. R. 4 C. P. 595; Smeltzer v. White, 92 U. S. (2 Otto), 392. As to the different rules of interpretation dependent on such evidence, compare Russell v. Clark, 7 Cranch, 69; Ludlow v. Simond, 2 Cai. Cas. 1; Gates v. McKee, 13 N. Y. 232; Rochester City Bk. v. Elwood, 21 Id. 88; Benjamin v. Hillard, 23 How. (U. S.) 149; Mauran v. Bullus, 16 Pet. 528; Belloni v. Freeborn, 63 N. Y. 388, and cases cited.

[12] Laurie v. Scholfield, L. R. 4 C. P. 622; Ellmaker v. Franklin, 5 Barr, 183, 190.

[13] Page 294 of this vol.

[14] Spencer v. Babcock, 22 Barb. 326. The instrument may be reformed where it is the subject of fraud or mutual mistake. Prior v. Williams, 3 Abb. Ct. App. Dec. 624.

[15] Bainbridge v. Wade, 16 Q. B. 89, 98, s. c. 20 L. J. N. S. 7; Broom v. Batchelor, 1 H. & N. 255; Hoad v. Grace, 7 Id. 494, s. c. L. J. 31 Exch. 98.

[16] Laurie v. Scholfield (above).

[17] Id.

[18] Lowry v. Adams, 22 Vt. 160; and see Drummond v. Prestman, 12 Wheat. 515; Leathy v. Speyer, L. R. 5 C. P. 595.

[19] Agawam Bank v. Strever, 18 N. Y. 502; Wood v. Priestner, 4 H. & C. 681;

7. *Transactions under the guaranty.*]—Evidence of usage is not competent to being within the effect of the guaranty a transaction not within its terms,[1] but a transaction within its terms having been shown, evidence of usage is competent to explain subsequent dealings with the debtor which might, unexplained, exonerate the defendant.[2] The original bill of sale given by plaintiff on delivery of the goods, &c., is conclusive against him as to whether the terms of credit conformed to the guaranty.[3] Otherwise of a bill subsequently delivered, which is a mere admission.[4]

The fact that the plaintiff acted on the credit and faith of the guaranty, may be proved by parol,[5] by his testimony of or that of a witness cognizant of the fact.[6]

8. *Non-payment or non-performance.*]—Plaintiff should usually be prepared with some evidence of a breach by the principal debtor.[7]

If request or other condition is expressed or fairly implied in the contract of guaranty, it must be alleged and proved.[8] A condition only in the contract of the principal debtor, does not require proof against the guarantor unless it would as against the former,[9] except where the fact is peculiarly in plaintiff's knowledge. Under a guaranty of collection, the due exhaustion of remedy by judgment and execution unsatisfied, is *prima facie* enough.[10] Where absolute insolvency excuses, an adjudication in bankruptcy is conclusive.[11]

9. *Admissions and declarations of principal debtor.*]—The admissions and declarations of the principal debtor are competent against the guarantor, when made in the transaction of the business for which the guarantor is bound, so as to be part of the *res*

Heffield v. Meadows, L. R. 4 C. P. 595. A guaranty is presumed to be not a continuing guaranty, in the absence of anything in it or in extrinsic evidence to indicate that it was such. Fellows v. Prentiss, 3 Den. 512; Whitney v. Groot, 24 Wend. 82. *Contra*, Rosc. N. P. 457.

[1] See Carkin v. Sarony, 14 Gray, 528.

[2] See Fox v. Parker, 44 Barb. 541.

[3] Per Lord ELLENBOROUGH, Bacon v. Chesney, 1 Stark. 192; and see Leeds v. Dunn, 10 N. Y. 469.

[4] Bacon v. Chesney (above).

[5] Douglas v. Reynolds, 7 Pet. 113, 118.

[6] Pages 240, 265, of this vol.

[7] See Schlesinger v. Hexter, 34 Super. Ct. (J. & S.) 499.

[8] Nelson v. Bostwick, 5 Hill, 37, and cases cited; Douglass v. Rathbone, Id. 143. For conflicting opinions on the necessity of demand, notice, &c., see Central Savings Bank v. Shine, 48 Mo. 456, s. c. 8 Am. R. 112; Safford v. Stevens, 2 Wend. 158, 164; McMillan v. Bull's Head Bank, 32 Ind. 11, s. c. 1 Am. R. 323; Clay v. Edgerton, 19 Ohio St. 549.

[9] Douglass v. Howland, 24 Wend. 35, citing conflicting cases.

[10] Backus v. Shepherd, 11 Wend. 629. As to what are such guaranties, see Alb. L. J. 1878, p. 360, and cases cited.

[11] First Nat. Bank of Charlotte v. Nat. Exchange Bank of Baltimore, 92 U. S. (2 Otto), 122.

gestæ, or when made in a transaction subsequent to the guaranty, and which the guaranty contemplated and authorized;[1] but other admissions and declarations, such as subsequent acknowledgment of having had goods or the like, are not competent[2] unless brought home to the guarantor.[3]

10. *Judgments.*]—A judgment against the principal debtor is in all cases evidence against the guarantor, of the fact of its recovery,[4] but not of the indebtedness, &c., unless recovered on notice to him,[5] or unless his guaranty binds him by the result of the proceeding.[6]

11. *Defenses.*]—The fact that there was no writing is available under the general issue.[7] The fact that his principal was indebted to the guarantor, or forbade him to fulfill his guaranty, is no defense.[8] Fraud of the principal is not available against a creditor who innocently parted with value on the faith of the guaranty.[9] Evidence that the principal delivered money or property to plaintiff is not sufficient to prove payment, without evidence which may sustain an inference that it was applied to the debt.[10]

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[1] Hatch v. Elkens. 65 N. Y. 489; and see Brandt on Sur. & G. 656, &c.
[2] Evans v. Beattie, 5 Esp. 26.
[3] Griffith v. Turner, 4 Gill (Md.) 111.
[4] Clark v. Carrington, 7 Cranch, 308.
[5] Compare Drummond v. Prestman, 12 Wheat. 515.
[6] Douglass v. Howland, 24 Wend. 35, 54, &c.; Rapelye v. Prince, 4 Hill, 119.
[7] Brandt on Sur. & G. 103, § 77; Rosc. N. P. 459.
[8] East River Bank v. Rogers, 7 Bosw. 493.
[9] McWilliams v. Mason, 31 N. Y. 294.
[10] Tyler v. Stevens, 11 Barb. 465.

CHAPTER XXVI.

ACTIONS ON CONTRACTS OF INSURANCE.

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I. General Rules.

1. *Action on preliminary agreement.*]—An oral contract of insurance is valid,[1] unless the charter forbids; but it must not be indefinite as to time, and rate of premium, &c.[2] The evidence must justify the inference of a completed contract; and, if the language contemplated a policy, that none was made.[3] A general agent has implied authority to make a preliminary agreement,[4] and his usual course of business to make such contracts for defendants is evidence of his authority.[5]

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[1] Relief Fire Insurance Co. v. Shaw, 94 U. S. (4 Otto), 574; First Baptist Ch. v. Brooklyn Fire Ins. Co. 19 N. Y. 305. For the English usage compare Fisher v. Liverpool Marine Ins. Co. L. R. 8 Q. B. 328, s. c. 7 Moak's Eng. 82, aff'd in L. R. 9 Q. B. 418, s. c. 9 Moak's Eng. 352.

As to mode of proving terms of agreement, see Fabri v. Phœnix Ins. Co. 55 N. Y. 129. Mode of proof of contract by correspondence, see p. 289 of this vol. and May on Ins. 45.

[2] Strohn v. Hartford Fire Ins. Co. 37 Wis. 625, s. c. 19 Am. R. 777; s. p. 28 N. Y. 153.

[3] Insurance Co. v. Lyman, 15 Wall. 664. And see Audubon v. Excelsior Ins. Co. 27 N. Y. 216.

[4] Ellis v. Albany City Fire Ins. Co. 50 N. Y. 402; Angell v. Hartford Fire Ins. Co. 59 Id. 171.

[5] Putnam v. Home Ins. Co. 123 Mass. 324.

A witness cannot be asked whether the facts stated were in his opinion a completed contract.[1] To allow him to explain ordinary terms used in the negotiation, it should appear that they are terms of art, or employed in the particular business, and that the witness has qualifications for interpreting not equally possessed by the judge and jury.[2]

Where the preliminary agreement rests in writing,—as, for instance, a written application, a note for premium and a receipt therefor,—parol evidence is not admissible to show that it was to take effect contrary to the terms so expressed.[3] In an action on an agreement to issue a policy in a form used by a specified company, a blank form of that company is admissible.[4] The amount agreed to be insured may be recovered.[5]

2. *Execution of policy.*]—The policy, unless admitted,[6] should be produced or accounted for, and the signatures (including countersigning) proved.[7] Physical delivery is *prima facie* evidence of a binding contract.[8] Where the facts connected with the delivery of the policy show that the insured was called on to manifest by some act that he accepted the policy, it is not binding without proof of some such act;[9] mere silence will not alone suffice, but it will in connection with evidence that he was in substance told he would be considered as accepting unless he refused.[10] Payment, with delivery, is nerely conclusive evidence of consummation of the contract. Payment, without delivery, is ambiguous. If made at time of application it is of little weight, except as throwing light on other acts.[11] Lack of delivery is not conclusive.[12] Even the fact that there was neither payment nor delivery is only *prima facie*, not conclusive, evidence that there was no contract.[13] A policy, although expressed to be made in consideration of representations made in the application, is competent without the application, if it does not, in any other manner, refer to it, and is itself a complete con-

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[1] Lindauer v. Delaware Ins. Co. 13 Ark. 461, 470.

[2] Baptist Ch. v. Brooklyn Fire Ins. Co. 28 N. Y. 153, affi'g 23 How. Pr. 448.

[3] Winnesheik Ins. Co. v. Holzgrafe, 53 Ill. 516, s. c. 5 Am. R. 64. Compare Livingston v. Delafield, 1 Johns. 522.

[4] Van Tuyl v. Westchester Fire Ins. Co. 55 N. Y. 657.

[5] Angell v. Hartford Fire Ins. Co. 59 N. Y. 171.

[6] Hunter v. Am. Pop. Life Ins. Co. 4 Hun, 794.

[7] As to mode of proving handwriting, see chapter XXI. As to effect of charter provisions on mode of executing, see 24 Ohio St. 345, s. c. 15 Am. R. 612; May on Ins. 65.

[8] Bliss on Life Ins. 253, § 163; May on Ins. 58, § 56.

[9] Id.; May on Ins. 55. Such, for instance, as payment of premium; or, if this be waived, some other affirmative act of acceptance. Bliss on Life Ins. 253, § 163.

[10] Id.

[11] Id.

[12] Fried v. Royal Ins. Co. 50 N. Y. 243, affi'g 47 Barb. 127. Authentication as "signed, sealed and delivered," without physical delivery, held conclusive evidence of contract. Xenos v. Wickham, L. R. 2 H. L. 296.

[13] May on Ins. 57, § 56.

tract.[1] The fact that there was no application,[2] or that it was not signed,[3] does not affect the competency of the policy, though it refer to an application.

If subscribed by agent, his handwriting and authority must be proved. If the authority was in writing, it should generally be produced; but it may also be proved by showing that defendants had recognized the act of the agent in this instance, or in other similar instances in which he had subscribed policies for them.[4]

If defendants, having possession of the contract, refuse to produce it on notice, parol evidence of its contents may be given; and all inferences arising from necessary ambiguities in the secondary evidence may be taken most strongly against the company.[5]

The usual blank form of the company is competent secondary evidence, in the absence of the actual policy.[6]

3. *Delivery.*]—Possession by the plaintiff is *prima facie*, but not conclusive, evidence of delivery. Delivery, in legal effect, may be proved by any act manifesting the intent of the parties that the instrument should have present vitality, although not physically handed over.[7] Delivery is not proved by admissions even of a general agent, made after loss.[8] The date in the policy raises a legal though not conclusive presumption of the time of the execution and delivery of the instrument.[9]

4. *The application.*]—In an action on a policy, the slip, or application for insurance, unless referred to in the policy, or annexed, as a part of it,[10] is inadmissible to show the intention of the parties;[11] except on an application to reform the policy,[12] or on an issue of fraud or misrepresentation in obtaining

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[1] Edington v. Mut. Life Ins. Co. 67 N. Y. 185, rev'g 5 Hun, 1.

[2] May on Ins. 174, § 169.

[3] Bohringer v. Empire Mut. Life Ins. Co. 2 Supm. Ct. (T. & C.) 610.

[4] Rosc. N. P. 403, s. p. Putnam v. Home Ins. Co. 123 Mass. 324. Thus, for instance, where a witness stated that he was authorized by power of attorney, but added that defendants had been in the habit of paying losses upon policies which the witness had subscribed in their name, the power need not be produced. Rosc. N. P. 403.

[5] Caken v. Continental Life Ins. Co. of N. Y. 69 N. Y. 300, 305, rev'g 41 Super. Ct. (J. & S.) 296. The refusal to produce does not supply the place of secondary evidence so as to raise a presumption that the fact is as alleged; but it aids the secondary evidence by a presumption in favor of the construction of it most adverse to the party refusing.

[6] Van Tuyl v. Westchester Fire Ins. Co. 55 N. Y. 657.

[7] May on Ins. 61, § 60.

[8] *Contra*, Insurance Co. v. Woodruff, 26 N. J. L. (2 Dutch.) 541; disapproved by Redfield, in 1 Greenl. Ev. 135, n.

[9] St. John v. Am. Mut. Life Ins. Co. 2 Duer, 419, s. c. less fully, 12 N. Y. Leg. Obs. 265, affi'd 13 N. Y. 31.

[10] Murdock v. Chenango Mut. Ins. Co. 2 N. Y. 210.

[11] Ewer v. Washington Ins. Co. 16 Pick. 502; Dow v. Whetten, 8 Wend. 160; Vandervoort v. Smith, 2 Cai. 155. *Contra*, Ionides v. Pacific Ins. Co. L. R. 7 Q. B. 517; 6 Id. 674, s. c. 6 Am. L. Rev. 297.

[12] Dow v. Whetten, 8 Wend. 160.

it.[1] Verbal representations are equally incompetent. A written application is presumed to contain the representations which induced the contract, and renders evidence of prior or subsequent oral representations incompetent,[2] in the absence of fraud; for their admission would vary the written contract by parol; and if they be relied on as showing fraud or a collateral warranty, the fact must be specially pleaded as such in order to be admissible.[3] If the policy refers to an application, it may be identified by parol; and the usual printed questions and written answers made before an insurance is effected are presumed, until the contrary is shown, to be those referred to.[4] The application is admissible in evidence if pleaded;[5] but its effect depends on the privity of the parties with it, and the intent manifested by its language and that of the policy. The policy is admissible without it unless it is in plaintiff's possession.[6]

The law presumes that the applicant understood the application signed by him, though drawn up by the insurer's agent.[7] Still, where the alleged false warranty is an ambiguous answer, plaintiff may prove that before applying he stated the facts fully to the agent, who advised him that his answer should be as made in the application; and that he believed the answer to be truthful, and would not have signed the application but for such advice.[8] The purpose of such evidence is not to vary or contradict the contract of the parties, but to preclude the party who framed it from relying upon incorrect recitals to defeat it, when he, himself, had drafted those recitals, and was morally responsible for their truthfulness.[9] So parol evidence is admissible that such agent who filled out the application was, at the time of application, answered truly by the insured, but inserted the answer alleged to be false, or omitted answers which should have been inserted, without the knowledge of the latter, even though the answer written was thereupon read to and signed by the latter.[10] Facts relied on as establishing such fraud on the part of the agent must be clearly and satisfactorily established.[11]

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[1] Folsom v. Mercantile Ins. Co. 9 Blatchf. 201; Rawls v. Am. Mut. Life Ins. Co. 27 N. Y. 282, affi'g 36 Barb. 357. See also Valton v. National Loan Fund Ass. Co. 4 Abb. Ct. App. Dec., s. c. 1 Keyes, 21, rev'g 17 Abb. Pr. 268.

[2] Jennings v. Chenango County Mut. Ins. Co. 2 Den. 75; Gates v. Madison County Mutual Ins. Co. 5 N. Y. 469; May on Ins. 202, § 192.

[3] Mayor, &c. of N. Y. v. Brooklyn Fire Ins. Co. 3 Abb. Ct. App. Dec. 251.

[4] Clark v. Manufacturers' Ins. Co. 2 Woodb. & M. 472.

[5] Weed v. Schenectady Ins. Co. 7 Lans. 452.

[6] Mut. Ben. Life Ins. Co. v. Robertson, 59 Ill. 123, s. c. 14 Am. R. 8.

[7] Geib v. International Ins. Co. 1 Dill. C. Ct. 443; and in Mass. & R. I. May on Ins. 148, § 145.

[8] Ætna Live Stock, Fire & Tornado Ins. Co. v. Olmstead, 21 Mich. 246, s. c. 4 Am. R. 483.

[9] North American Fire Ins. Co. v. Throop, 22 Mich. 146, s. c. 7 Am. R. 638.

[10] Insur. Co. v. Mahone, 21 Wall. 155; Union Mut. Ins. Co. v. Wilkinson, 13 Id. 222. *Contra*, Ryan v. World Mut. Life Ins. Co. 41 Conn. 168, s. c. 19 Am. R. 490.

[11] Geib v. International Ins. Co. 1 Dill. C. Ct. 443.

5. *Authority and scope of agency.*—Neither the fact nor the scope of agency can be proved by the agent's acts, representations, declarations or admissions. The agency must first be established; and either a specific authority, or one of so general a nature as to give him authority to do the act in question, or a subsequent ratification with full knowledge, or a holding out to the world, must be proved.[1] But the agent's course may be proved in connection with evidence that the company tacitly assented to it, or held the agent out to the world as such,[2] or repeatedly adopted, with knowledge, similar acts of his in other dealings, either with plaintiff or third persons.[3] The court may take judicial notice of the way in which contracts for insurance are usually negotiated, and that the application of the insured is usually drawn up by the agent of the insurer.[4] In proof of general agency, the possession of blank policies and renewal receipts is relevant.[5] Where the act of a sub-agent is within the scope of the authority of the superior agent, ratification by the principal is not necessary.[6]

Restrictions of authority, though expressed in the policy, are not conclusive; but a waiver of them by parol may be shown, and may be inferred from the company's course of dealing.[7] To sustain an unratified act in excess of express authority, the evidence must show, if not a succession of cases, at least several, in which the agent had done acts similar to those for which authority is claimed, and the subsequent acquiescence of the principal therein, upon their coming to his knowledge.[8]

The authority of a person to do acts within the ordinary duty of a clerk, such as to receive payments and give receipts, and respond to inquiries for information, may be inferred from evidence that he was behind defendant's counter, and assumed to act as clerk.[9]

Notice to the agent is notice to the company, if given while the agency exists, and referring to business then within the scope of his authority,[10] or if he is one whose duty it is to communicate such notice to the company.[11] If given before the agency or authority, it must be shown to have been so near that he must be

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[1] Stringham v. St. Nicholas Ins. Co. 4 Abb. Ct. App. Dec. 315; Miller v. Phoenix Ins. Co. 27 Iowa, 203, s. c. 1 Am. R. 262.

[2] As, for instance, by circulars, even though at the time unknown to plaintiff. Walsh v. Ætna Life Ins. Co. 30 Iowa, 133, s. c. 6 Am. R. 664.

[3] Bunten v. Orient Ins. Co. 4 Bosw. 254; 2 Greenl. Ev. 13 ed. 51. As to ratification by apparent officer, see Buchanan v. Exchange Fire Ins. Co. 61 N. Y. 26.

[4] N. A. Fire Ins. Co. v. Throop, 22 Mich. 146, s. c. 7 Am. R. 638.

[5] Carroll v. Charter Oak Ins. Co. 40 Barb. 292; May on Ins. 126, § 126.

[6] Excelsior Fire Ins. Co. v. Royal Ins. Co. of Liverpool, 55 N. Y. 343.

[7] Insurance Co. v. Norton, 96 U. S. (6 Otto), 234.

[8] Bunten v. Orient Mutual Ins. Co. 4 Bosw. 254, and see further decision in 8 Id. 448; 2 Greenl. Ev. 13 ed. 51.

[9] Leslie v. Knickerbocker Life Ins. Co. 63 N. Y. 27, affi'g 2 Hun, 616, s. c. 5 Supm. Ct. (T. & C.) 193; and see Buchanan v. Exchange Fire Ins. Co. 61 N. Y. 26.

[10] Hayward v. Nat. Ins. Co. 52 Mo. 181, s. c. 14 Am. R. 400.

[11] May on Ins. 156.

presumed to have recollected it.[1] The principal is not chargeable with knowledge on part of the agent, as towards one acting in collusion with the agent.[2]

6. *Payment of Premium.*]—A recital in the policy that the premium has been paid is *prima facie*, but not conclusive[3] evidence of payment.

If the agent giving receipt is interested in the insurance, a receipt given by him in his capacity of agent is not sufficient without some additional evidence of payment.[4]

7. *Waiver of non-payment: Excuse for failure.*]—Waiver of a condition in an insurance policy requiring payment to make the policy valid, may be inferred from delivery without payment;[5] and a general agent[6] has authority to waive pre-payment, whatever his secret instructions.[7] Evidence of a prior dealing by plaintiff with the company for years, and that he was in the habit of getting policies without paying for them at the time, is competent, but not controlling evidence of the intention of the agent to waive payment.[8] The fact that on a single occasion credit was given for the premium, upon the present,[9] or even on a prior policy,[10] is relevant on the question of waiver. Evidence of a general usage of insurance companies to receive payment after the day, is competent[11] in aid of other evidence of a waiver.[12]

To prove excuse for non-payment, evidence of an oral agreement prior to the policy, that the company should give the plaintiff notice of the time when each payment should be due, and that they failed to do so, which caused the default, is not competent.[13] But evidence of the course of dealing of the company af-

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[1] Hayward v. Nat. Ins. Co. (above).

[2] Nat. Life Ins. Co. v. Minch, 53 N. Y. 144; rev'g 6 Lans. 100.

[3] Baker v. Union Mut. Ins. Co. 43 N. Y. 283, rev'g 6 Robt. 393, s. c. 6 Abb. Pr. N. S. 144; Sheldon v. Atlantic Fire & Marine Ins. Co. 26 N. Y. 460. *Contra*, Basch v. Humboldt Mut. F. & M. Ins. Co. 6 Vroom, 429; Prov. Life Ins. Co. v. Fennell, 49 Ill. 180; Rosc. N. P. 70.

[4] Nuendorff v. World Mut. Life Ins. Co. 69 N. Y. 392. Compare Norton v. Phœnix Life Ins. Co. 36 Conn. 303.

[5] Boehen v. Williamsburgh Ins. Co. 35 N. Y. 131.

[6] Otherwise of a local agent (see Bush v. Westchester Fire Ins. Co. 63 N. Y. 531, rev'g 2 Supm. Ct. (T. & C.) 629), and of a clerk authorized to collect maturing premiums only (Kolgers v. Guardian Life Ins. Co. 9 Abb. Pr. N. S. 91, s. c. 58 Barb. 185; 2 Lans. 480)

[7] Sheldon v. Atlantic Fire & Marine Ins. Co. 26 N. Y. 460; Wood v. Poughkeepsie Mut. Ins. Co. 32 Id. 619; and see Bodine v. Exchange Fire Ins. Co. 51 N. Y. 117. Proof that the agent was given credit for the payment of premium, and the company demanded subsequent premiums without insisting on forfeiture, held not, as matter of law, a payment. Wright v. Equitable Life Assur. Soc. 41 Super. Ct. (J. & S.) 1.

[8] Church v. Lafayette Fire Ins. Co. 66 N. Y. 222.

[9] Id.

[10] Bowman v. Agricultural Ins. Co. 59 N. Y. 521, aff'g 2 Supm. Ct. (T. & C.) 261.

[11] Helme v. Philadelphia Life Ins. Co. 61 Penn. St. 107; Pino v. Merchants' Mut. Ins. Co. 19 La. An. 214, 233.

[12] It is not alone enough to vary the contract. Howell v. Knickerbocker Life Ins. Co. 3 Robt. 232, s. c. 19 Abb. Pr. 217, and cases cited.

[13] Insurance Co. v. Mowry, 96 U. S. (6 Otto), 544.

ter the issue of the policy, revoking the authority of the agent who first collected premiums, and notifying the insured from time to time where and to whom to pay, will show that he was entitled to rely on receiving such notice, and will estop them from claiming a forfeiture in consequence of their omitting to give it.[1] So evidence that the insured, not having other means of knowledge, applied at the company's office for information as to time of payment, and was told by an apparent clerk behind their desk that they would send notice, is sufficient to excuse delay in waiting for notice.[2] Evidence that the general agent to whom premiums had been paid, without objection from the company, received a renewal premium on the day when due, is sufficient and conclusive as against the company, unless previous to such payment the assured had notice that the agent's authority had been revoked or qualified.[3] Evidence that the company refused to receive the premiums and repudiated the contract, wholly dispenses with the necessity of proving the offer of subsequent premiums.[4]

8. *Renewal.*]—A renewal may be proved by parol, unless the charter forbids oral contract.[5] A witness may state generally that there was or was not a renewal,[6] subject to cross-examination, but not whether specified facts amounted to a renewal.[7] A request for renewal is evidence that the representations on which the policy originally issued were adopted or assented to by the one making the request.[8]

9. *Ordinary course of proof. Prima facie case.*]—In ordinary cases plaintiff makes out a *prima facie* case by proving the policy, the renewal receipts, if any relied on, the loss, the giving proof of loss as required by the policy, and, if on property not valued, the value of the property destroyed.[9]

10. *Warranties.*]—Even when warranties are proved or admitted, plaintiff is not bound to prove their truth, unless it is put in issue.[10] In that case the burden of proof is on him to show

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[1] Insurance Co. v. Eggleston, 96 U. S. (6 Otto), 572.

[2] Leslie v. Knickerbocker Life Ins. Co. 63 N. Y. 27, affi'g 2 Hun, 616, s. c. 5 Supm. Ct. 193.

[3] Insurance Co. v. McCain, 96 U. S. (6 Otto), 84.

[4] Shaw v. Republic Life Ins. Co. 69 N. Y. 286, affi'g, with modification, 67 Barb. 586.

[5] First Baptist Church v. Brooklyn Fire Ins. Co. 19 N. Y. 305, 18 Barb. 69.

[6] Baptist Church v. Brooklyn Fire Ins. Co. 23 How. Pr. 448, affi'd on the merits in 28 N. Y. 153.

[7] See Lindauer v. Delaware Ins. Co. 13 Ark. 461, 470.

[8] Clark v. Manuf. Ins. Co. 2 Woodb. & M. 472.

[9] Geib v. International Ins. Co. 1 Dill. C. Ct. 443; Mut. Benefit Life Ins. Co. v. Robertson, 59 Ill. 123, s. c. 14 Am. R. 8. See New Eng. Fire, &c. Ins. Co. v. Wetmore, 32 Ill. 221.

[10] Boos v. World Mut. Fire Ins. 6 Supm. Ct. (T. & C.) 364; Jones v. Brooklyn Life Ins. Co. 61 N. Y. 79.

performance of the warranty,[1] whether material or immaterial;[2] past or promissory;[3] or acted on by the insurers or not;[4] and even though this require plaintiff to prove a negative.[5]

But plaintiff has not the burden of proving the truth of representations as distinguished from warranties. Evidence that the insurer's agent had notice that the fact was not according to the condition is not alone competent.[6]

A literal and strict compliance with an express warranty must be proved; it is not sufficient to show something tantamount to a performance, unless it be a waiver or dispensation of performance;[7] which must be pleaded as such, and not as a compliance.[8] But indirect evidence is competent from which to infer strict performance. In proportion as the warranty is general or in the nature of a legal conclusion, general evidence is sufficient until some doubt is raised.[9] Evidence of usage,[10] or a prior oral agreement,[11] is not competent to show that what is not strictly a compliance was so regarded.

11. *General rule as to oral evidence to vary policy.*]—The general principles[12] that words must have the sense in which the parties understood them; and, that to understand them as the parties understood them, the nature of the contract, the objects to be attained, and all the circumstances must be considered, are freely applied to these contracts.[13] The intention is to be ascertained, except in cases of latent ambiguity, by a development of the circumstances under which the instrument was made. Mere declarations are not admissible for the purpose, but the state of the party's knowledge of facts is competent. Thus, notice to the in-

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[1] McLoon v. Commercial Mut. Ins. Co. 100 Mass. 472, s. c. 1 Am. R. 129; May on Ins. 192, § 183.

[2] Id. § 184; Ripley v. Ætna Ins. Co. 30 N. Y. 136, 160, rev'g 29 Barb. 552; Jeffries v. Econom. Life Ins. Co. 22 Wall. 47. Compare Mut. Life Ins. Co. v. Snyder, 4 Cent. L. J. 106.

[3] Wilson v. Hampden Fire Ins. Co. 4 R. I. 159, 172; Ripley v. Ætna Ins. Co. (above).

[4] Brennan v. Security Life Ins. Co. 4 Daly, 296.

[5] McLoon v. Commercial Mut. Ins. Co. (above). *Contra*, Piedmont Life Ins. Co. v. Ewing, 92 U. S. (2 Otto), 378.

[6] Dewees v. Manhattan Ins. Co. 6 Vroom (N. J.), 366.

[7] Nat. Life Ins. Co. v. Minch, 53 N. Y. 144, rev'g 6 Lans. 100.

[8] Rosc. N. P. 409.

[9] Pacific Ins. Co. v. Catlett, 4 Wend. 75, affi'g 1 Id. 561; Rosc. N. P. 410, 414.

[10] Ripley v. Ætna Ins. Co. (above). Compare Crocker v. People's, &c. Ins. Co. 8 Cush. 79. As to limits of this principle, see pp. 296, 365, of this vol.

[11] Hovey v. American Mutual Ins. Co. 2 Duer, 554.

[12] Discussed on p. 294 of this vol.

[13] Reed v. Ins. Co. 95 U. S. (5 Otto), 31. Compare Van Schoick v. Niagara Fire Ins. Co. 68 N. Y. 434, 438, and cases cited; Insurance Co. v. Wright, 1 Wall. 456 (an extreme case in excluding oral evidence); and Insurance Co. v. Wilkinson, 13 Wall. 222.

For the purpose of upholding a contract of insurance, its provisions will be construed strictly against the underwriter (McMaster v. Ins. Co. of North America, 55 N. Y. 222, affi'g 64 Barb. 536; compare Rann v. Home Ins. Co. 59 N. Y. 387), and liberally in favor of the insured (Rolker v. Great Western Ins. Co. 4 Abb. Ct. App. Dec. 76, rev'g 8 Bosw. 222; and see Reed v. Ins. Co. 95 U. S. (5 Otto), 23, 30).

surers that a change had been made in the use of the property, is competent to explain the intention of an ambiguous policy in respect to rates of hazard. Such evidence is to be received as will place us, as nearly as may be, in the position of the author of the instrument, and enable us to consider the facts surrounding him, with his knowledge or ignorance, and his belief as to the facts.[1]

Ambiguity may arise either from inconsistent provisions or from equivocal terms; and an equivocal term exists alike when a word has, in ordinary use, two or more meanings or applications, or when it may have been used technically in a sense different from its ordinary meaning or application. Extrinsic evidence is competent to show the existence of the technical meaning in a trade or business involved in the transaction, and thus, at once, to manifest and to cure the ambiguity.[2] An ambiguity, whether apparent in the ordinary meaning of the language, or introduced by extrinsic evidence either of a technical use of language, or of the existence of several objects corresponding to the designation, may be explained by oral evidence identifying the thing referred to.[3]

But the rule that parol testimony may not be given to contradict a written contract is applied only in suits between the parties or their privies. It does not apply to prevent a party from proving the truth contrary to the instrument, in a contention with a stranger to it.[4]

12. *Circular or prospectus.*]—To render a circular or prospectus issued by the company, competent against them as qualifying the contract, it is not enough to show that it was publicly circulated before the policy issued.[5] There should be evidence tending to show that the insured or the plaintiff had knowledge of the statement and acted on it.[6]

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[1] Reynolds v. Commerce Fire Ins. Co. 47 N. Y. 597.

[2] This is the sound general principle, though some cases ignore it: see, for instance, Ins. Co. v. Wright, 1 Wall. 456.

[3] For instance, to show what building was meant by the words, "known as D. & Co.'s car factory" (Blake v. Ins. Co. 12 Gray, 265, 270); or by a statement that the things insured were in plaintiff's "barn or barns" (Bowman v. Agricultural Ins. Co., 59 N. Y. 521, affi'g 2 Supm. Ct. [T. & C.] 261). But where the building is defined, the fact that the insurer indorsed on the policy a simple consent that a communication opened into an adjoining building, should not prejudice the insurance, does not let in parol evidence to show that the parties intended thereby to extend the insurance over such building. Liddle v. Market F. Ins. Co. 4 Bosw. 179, affi'd in 29 N.Y. 184.

So, again, under a policy on timber in a specified building, parol evidence is not admissible to show intent to include such timber piled in the adjoining yard (North American Fire Ins. Co. v. Throop, 22 Mich. 146, s. c. 7 Am. R. 638), for here is no ambiguity; but under a policy on a stock of "ship-timber in a ship-yard," bounded by streets, &c., evidence of usage of language is competent to show that "ship-yard," as used by the parties, means the yard, as in fact used, thus embracing timber on the sidewalks (Webb v. National Fire Ins. Co. 2 Sandf. 497).

So if there are two buildings, each nearly but neither precisely answering the designation, parol evidence to identify the intent of the parties is admissible. Burr v. Broadway Ins. Co. 16 N. Y. 267.

[4] McMaster v. Ins. Co. of North America, 55 N. Y. 222, affi'g 64 Barb. 536.

[5] Rosc. N. P. 436.

[6] Whether this is enough is disputed. Steel v. St. Louis Life Ins. Co. 5 Cent.

13. *Mistake.*]—Under the new procedure, if the complaint alleges facts constituting a mistake, though without the formal allegation of mistake, and demands a reformation of the policy, parol evidence is competent to show that both the insurer and the insured meant to insure the thing lost, and meant to put into the policy no expression as to its character or situation different from the facts, but, by misconception as to language, they used terms expressing that which they did not, and failing to express that which they did intend.[1] Under allegations permitting him to prove mistake, plaintiff may show that he was thrown off his guard and dissuaded from a correction of the language of the policy by the acts or declarations of the agent of the insurer.[2]

14. *Usage.*]—Ambiguous words in a policy may be construed by extrinsic evidence of accompanying circumstances and the usages of the business in which the property insured was employed;[3] but evidence of usage is not competent to vary or contradict what is expressed, nor even what is necessarily implied,[4] in unambiguous language. Yet it is competent, to show the course of trade and business to which the parties refer; and when that is ascertained, the court must apply the language of the policy. To justify departure from the ordinary meaning of its language, a usage of language must be shown, from which the court may see that the phraseology used had, in the intent of the parties adopting it, a special or technical meaning. When this is shown, the court still apply the language of the policy, but apply it as thus understood.[5] When, however, the language, properly interpreted, calls for a certain thing, evidence of usage of trade to suffer or be satisfied with something else, under that language, is

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L. J. 158; Ruse v. Mut. Benefit Life Ins. Co. 23 N. Y. 518; 24 Id. 653; and see 16 Alb. L. J. 175, and cases cited. According to settled general principles, it should be enough, if subsequent to the policy, thus bringing the case within the rules as to waiver and estoppel. See paragraph 22.

[1] Maher v. Hibernia Ins. Co. 67 N. Y. 283, affi'g 6 Hun, 353.

[2] Id. As to ignorance of fine print clause, see Ervin v. N. Y. Central Ins. Co. 3 Supm. Ct. (T. & C.) 213.

[3] N. Y. Belting Co. v. Washington Fire Ins. Co. 10 Bosw. 428, and cases citeo.

[4] Hearne v. Marine Ins. Co. 20 Wall. 488.

[5] Thus, respecting the phrase "glassware in casks," usage of trade-language may be proved to show that it means open casks (Bend v. Georgia Ins. Co. 1 N. Y. Leg. Obs. 12; 1 Greenl. Ev. 13 ed. 344); "bundles of rods" may be shown to include, in trade usage, bar iron (Evans v. Commercial, &c. Ins. Co. 6 R. I. 47, 53); "cargo" to include live stock (Allegre's Admr. v. Maryland Ins. Co. 2 Gill & J. 136); "roots" not to include perishable roots such as sarsaparilla (Coit v. Com. Ins. Co. 7 Johns. 385); "skins" not to include furs (Astor v. Union Ins. Co. 7 Cow. 202); and that in a policy upon goods out, and upon their proceeds home, "proceeds" includes the same goods on the return voyage (Dow v. Whetten, 8 Wend. 160); and "brick buildings" may be shown to include buildings, the partitions separating which were of wood, filled in with brick (Mead v. Northwestern Ins. Co. 7 N. Y. 530). But, on the other hand, under a policy on tackle, apparel, "boats," &c., it is not admissible to show that boats slung outside the ship's quarter, are not deemed to be included (Blackett v. Royal Exch. Assurance Co. 2 Cr. & J. 244).

not competent.[1] In no case is usage competent to vary the settled rules of commercial law,[2] nor the meaning of words which have received a settled judicial interpretation.[3] Where the law is unsettled, the construction may be determined by the usage, but not by the opinion of witnesses.[4]

A general usage of trade may be judicially noticed.[5] Other usages must be proved: and it is better to be prepared with some evidence even of a general usage.[6] If the usage is that of the trade of the insured, the insurers are presumed to have known it.[7] If it is that of insurers, knowledge of it must be brought home to the insured.[8] Evidence of a known usage of trade is not objectionable merely because it shows only a usage in the particular trade in question.[9] The local usage of the insurers only, which does not prevail where the policy was executed, nor where the insured resided, is not admissible, to countervail the local usage of the place where the policy was made.[10] A general usage of trade may be shown, although it is founded on the laws or edicts of the government of the place. The usage may be proved by parol, and its effects are the same, whether it originated in an edict or in instructions given by a government to its officers.[11] Usage is to be proved, as a fact, by evidence of usage, not by the opinion of the witness as to the effect or meaning of the contract.[12] The witness must be conversant with the particular business, whether that of insurance or of another trade, the usage of which is sought to be proved as controlling.[13]

15. *Ownership or insurable interest.*]—Interest need not be proved, unless put in issue.[14] It cannot be proved by the policy alone;[15] but plaintiff cannot contradict the language of the policy[16] or of his application,[17] by proving a different interest from that stated.

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[1] Upon this distinction, nearly all the well-considered cases, however much apparent conflict they involve, arrange themselves in harmony.

[2] Randall v. Smith, 63 Me. 105, s. c. 18 Am. R. 200, and cases cited. *Contra*, Fulton Ins. Co. v. Milner, 23 Ala. 423, 427.

[3] Bargett v. Orient Mutual Ins. Co. 3 Bosw. 385.

[4] Winthrop v. Union Ins. Co. 2 Wash. C. Ct. 7.

[5] Sleght v. Hartshorne, 2 Johns. 531.

[6] See p. 297 of this vol.

[7] Noble v. Kennoway, 2 Dougl. 513; see also 1 Abb. N. C. 470, note. Compare Ripley v. Ætna Ins. Co. 30 N. Y. 136.

[8] Hill v. Hibernia Ins. Co. 10 Hun, 26.

[9] Astor v. Union Ins. Co. 7 Cow. 202; Thompson v. Sloan, 23 Wend. 70, COWEN, J.

[10] Child v. Sun Mutual Ins. Co. 3 Sandf. 26.

[11] Livingston v. Maryland Ins. Co. 7 Cranch, 506, 539, 547.

[12] Steinbach v. La Fayette Fire Ins. Co. 54 N. Y. 90; and see Steinbach v Ins. Co. 13 Wall. 183.

[13] Evans v. Commercial, &c. Ins. Co. 6 R. I. 47, 53.

[14] Rosc. N. P. 404.

[15] See Clendining v. Church, 3 Cai. 141; Rosc. N. P. 404. Compare Huth v. N. Y. Mut. Ins. Co. 8 Bosw. 538.

[16] Jennings v. Chenango Mut. Ins. Co. 2 Den. 72, 79.

[17] Birmingham v. Empire Ins. Co. 42 Barb. 457.

Where it appears upon the face of the policy, by a fair interpretation, that there was an intention to insure the owner or owners, then extrinsic evidence may be given to show who such owner is, and the nature and extent of the interest covered.[1] If the name of the one for whose benefit the insurance is made does not appear upon the face of the policy, or if the designation used is applicable to several persons, or so imperfect that it cannot be understood alone, extrinsic evidence may be resorted to, to ascertain the meaning of the contract.[2] The rules allowing oral proof to show the real party in interest[3] are now freely administered, so far as explaining the instrument is concerned;[4] but are subject to important qualification, resulting from the peculiar nature of insurance, and the usual clauses as to ownership requiring that the real interest must not be concealed.[5]

Under a general averment of interest in the entire subject of insurance, plaintiff may prove his particular interest.[6]

The amount and absolute or contingent character of the interest of the insured, or the validity of his title, are not material, except on the question of fraud or of wager policy, or amount of loss.[7]

16. *Mode of proving ownership.*]—Evidence of possession and acts of ownership is *prima facie* evidence of title.[8]

Property in a ship may be proved by parol evidence of the possession, unless disproved by the production of the written documents of the ship under the register acts.[9] Property in goods may be shown by evidence that plaintiff bought and paid for them;[10] or by producing a bill of lading, stating the property to belong to plaintiff,[11] or directing delivery to him,[12] the captain

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[1] Mead v. Mercantile Mut. Ins. Co. 67 Barb. 519; Catlett v. Pacific Ins. Co. 1 Wend. 561; Foster v. United States Ins. Co. 11 Pick. 85; Bidwell v. Northwestern Ins. Co. 24 N. Y. 302.

[2] Clinton v. Hope Ins. Co. 45 N. Y. 454, aff'g 51 Barb. 647; Turner v. Burrows, 8 Wend. 144, aff'g 5 Id. 541; explained by Burrows v. Turner, 24 Wend. 276.

[3] Page 298 of this vol.

[4] Pitney v. Glenn's Falls Ins. Co. 65 N. Y. 6.

[5] See, for instance, Solms v. Rutger's Fire Ins. Co. 4 Abb. Ct. App. Dec. 279.

[6] Murray v. Columbian Ins. Co. 11 Johns. 302.

[7] See May on Ins. 82, § 83; 105, § 109.

[8] Thomas v. Foyle, 5 Esp. 88 (of a ship); Bartol, C. J., Franklin Fire Ins. Co. v. Chicago Ice Co. 36 Md. 102, s. c. 11 Am. R. 469 (of a building); Rosc. N. P. 405 (of goods).

[9] And such parol evidence of ownership, arising from possession at a particular period, is not disproved by showing a prior register in the name of another and a subsequent register to the same person. Robertson v. French, 4 East, 130, 136. Compare Sharp v. United Ins. Co. 14 Johns. 201; Leonard v. Huntington, 15 Id. 298.

[10] Sturm v. Atlantic Mutual Ins. Co. 38 Supr. Ct. (6 J. & S.) 281. Compare Franklin Fire Ins. Co. v. Vaughan, 92 U. S. (2 Otto), 516. Where, to prove property in a cargo by purchase beyond seas, the plaintiff produced a bill of parcels of one G., at Petersburg, with his receipt to it, and proved his hand, Lee, C. J., admitted it as evidence against the insurers. Russel v. Boheme, 2 Str. 1127; Rosc. N. P. 405.

[11] Maryland Ins. Co. v. Ruden, 6 Cranch, 338.

[12] Rosc. N. P. 405.

proving that he received the goods under it.[1] And where the goods are made deliverable to the consignor, the bill indorsed by him, either specially or in blank, is evidence of interest in the indorsee or holder;[2] but such evidence is *prima facie* only, and not conclusive.[3] The word "consigned" implies agency, not ownership in the consignees.[4] In marine insurance, a common mode of proof is to call the captain or master, who will prove that he was appointed and employed by the parties in whom the interest is averred; and though it should appear, on cross-examination, that the plaintiff claims under a bill of sale, it is not, on that account, necessary for him to produce the bill or the ship's register, unless such further evidence should be rendered necessary in support of the *prima facie* proof of ownership, in consequence of proof to the contrary.[5] Where interest is in one who was never in possession, it may be proved by showing the ownership of the persons under whom he claims, and the derivative title from them, such as a bill of sale.[6]

The mere fact that a third person was in possession does not render his declarations that he was owner admissible against plaintiff.[7]

17. *The peril.*]—Insurers are presumed to be acquainted with the customs of the place where they transact their business, as well as with the usages of the trade to which their contract relates;[8] but not necessarily with all the intelligence contained in the papers taken at their office; although the general presumption is, that the agents of a marine office will examine with some care those items of marine intelligence which are expressly designed speedily to diffuse information upon a subject so immediately interesting to them, especially in relation to vessels belonging to their own port.[9] To aid in the construction of the policy, it is competent to show that the defendants had insured the property for several years, and knew the uses to which it was applied, and generally the nature and extent of the risk;[10] but such evidence cannot vary explicit language in the policy.[11]

18. *Loss.*]—The burden of proving a loss from a cause, and to an amount for which the insurers are liable, is upon the in-

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[1] M'Andrew v. Bell, 1 Esp. 373.
[2] Lickbarrow v. Mason, 2 T. R. 71.
[3] Rosc. N. P. 405; Maryland Ins. Co. v. Ruden, 6 Cranch, 338; Blagg v. Phœnix Ins. Co. 3 Wash. C. Ct. 5.
[4] Rolker v. Great Western Ins. Co. 4 Abb. Ct. App. Dec. 76.
[5] Rosc. N. P. 405, citing Robertson v. French, 4 East, 136.
[6] Rosc. N. P. 405.
[7] Eureka Ins. Co. v. Robinson, 56 Penn. St. 256, 266.
[8] Hartshorne v. Union Mut. Ins. Co. 36 N. Y. 172, affi'g 5 Bosw. 538; paragraph 14, above.
[9] Green v. Merchants' Ins. Co. 10 Pick. 406.
[10] Mayor, &c. of N. Y. v. Exchange Fire Ins. Co. 3 Abb. Ct. App. Dec. 261, affi'g 9 Bosw. 424, and 9 Abb. Pr. 243, note.
[11] Pindar v. Resolute Fire Ins. Co. 47 N. Y. 114; but compare 36 N. Y. 648.

sured.[1] The preliminary proofs, being *ex parte*, are not competent on this question,[2] unless connected with an admission on the part of the insurers.[3] The opinion of a witness to the effect that a loss has occurred of a nature and extent entitling the plaintiff to recover, is not competent;[4] but to explain obscure causes of injury, evidence of similar injuries to other property similarly situated may be relevant.[5]

19. *Value; Damage.*]—In addition to general rules as to proving value and damage, elsewhere stated, it should be observed that the invoice, or bill of parcels showing the cost, are competent *prima facie* evidence of value;[6] and its correspondence with the books of the party producing it need not be shown.[7] Price or value of similar property is not competent without evidence of identity in quality or value.[8]

The valuation in a valued marine policy is conclusive[9] on the insurers, if there was a total loss, and no fraud, imposition,[10] or accidental overrating.[11] Hence plaintiff need not prove value.[12] On a partial loss, or on an open policy, he must.[13] A provisional valuation in a preliminary agreement is not conclusive.[14]

20. *Preliminary proofs.*]—If preliminary proofs of loss are required by the contract, plaintiff must prove substantial and timely compliance,[15] or waiver by the insurers. Statements or acts by the insurers, justly leading the insured to rest on his proofs as a compliance with the condition, or even silence when they are delivered, coupled with plain assertion of a distinct objection, or a mere general denial of liability, are evidence of waiver of other objections which might have been remedied. Where the pre-

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[1] Cory v. Boylston Fire & Marine Ins. Co. 107 Mass. 140, s. c. 9 Am. R. 14, and cases cited. And see Ogden v. N. Y. Mutual Ins. Co, 4 Bosw. 447; 35 N. Y. 418. What is necessary to prove a total loss of machinery and other cargo, see Ins. Co. v. Fogarty, 19 Wall. 640, and cases cited.

[2] Citizens' Fire Ins. Security & Loan Co. v. Doll, 35 Md. 89, s. c. 6 Am. R. 360; Yonkers & N. Y. Fire Ins. Co. v. Hoffman Fire Ins. Co. 6 Robt. 316.

[3] Insurance Co. v. Newton, 22 Wall. 32.

[4] Rider v. Ocean Ins. Co. 20 Pick. 259, 262.

[5] Bradford v. Boylston Fire & Marine Ins. Co. 11 Pick. 162.

[6] Graham v. Pennsylvania Ins. Co. 2 Wash. C. Ct. 113. *Contra*, De Groot v. Fulton Fire Ins. Co. 4 Robt. 504; Wolf v. Nat. Marine and Fire Ins. Co. 20 La. Ann. 583.

[7] Graham v. Penn. Ins. Co. (above). Compare Insurance Co. v. Weide, 9 Wall. 677.

[8] De Groot v. Fulton Fire Ins. Co. 4 Robt. 504.

[9] Marine Ins. Co. v. Hodgson, 6 Cranch. 206, 220.

[10] Kane v. Commercial Ins. Co. 8 Johns. 229; Whitney v. American Ins. Co. 8 Cow. 210.

[11] Watson v. Ins. Co. of North America, 3 Wash. C. Ct. 1. If the valuation is by weight, &c., the standard of the place where the insurance was effected will be presumed intended. Gracie v. Bowne, 2 Cai. 30.

[12] Sturm v. Atlantic Mutual Ins. Co. 38 Super. Ct. (6 J. & S.) 281, 303, aff'd 63 N. Y. 77; Delano v. Am. Ins. Co. 42 Barb. 142.

[13] Rose. N. P. 426.

[14] Fabbri v. Merchants' Mut. Ins. Co. 6 Lans. 446.

[15] Bliss on Life Ins. 435, § 257, &c.; May on Ins. 564, § 460, &c.

liminary proofs are in defendant's possession, and not produced by them, evidence that they were made in presence of defendant's agent, by filling a blank furnished by them, and were received without objection, is enough to go to the jury, without proof of contents.[1] Notice of loss is not equivalent to proof of loss;[2] and silence on its receipt is not a waiver.[3] Slight evidence that the certifying magistrate was the nearest one is enough.[4] Evidence that the nearest magistrate, &c., on a proper application by the insured, refused to give a certificate such as the policy stipulated for, is not sufficient to dispense with the requirement, in the absence of any evidence of interference or waiver by defendants.[5]

The preliminary proofs, duly furnished, are admissible; but are not competent evidence in favor of plaintiff of the facts therein stated.[6] They are competent evidence in favor of the insured, and against plaintiff, as his admissions of the facts represented therein.[7] They are not, however, conclusive;[8] but they are generally sufficient against the insured, unless it be shown that the representations were made under a misapprehension of the facts, or in ignorance of material information subsequently had.[9] And even then the insured will not be allowed on the trial to show that the facts were different from those stated, if the insurers have been prejudiced in their defense by relying on the statements contained in the proofs. In these cases the question is one of equitable estoppel.[10] A statement which was not called for by the contract may be corrected by evidence of mistake, without giving notice to the insurers before the trial.[11]

21. *Notice to company.*]—Duly mailing notice or proofs of loss, is evidence for the jury,[12] but not conclusive evidence,[13] that

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[1] Life Insurance Co. v. Francisco, 17 Wall. 672; Hincken v. Mut. Benefit Life Ins. Co. 50 N. Y. 657, affi'g 6 Lans. 21.

[2] O'Reilly v. Guardian Mut. Life Ins. Co. 60 N. Y. 169.

[3] Id.

[4] May on Life Ins. 571, § 466.

[5] Johnson v. Phœnix Ins. Co. 112 Mass. 49. s. c. 17 Am. R. 65; Brown v. Mayor of N. Y. 63 N. Y. 239.

[6] Newton v. Mut. Benefit Life Ins. Co. 2 Dill. 154; paragraph 18 (above); Howard v. City Fire Ins. Co. 4 Den. 502. *Contra,* Jones v. Mechanics' Fire Ins. Co. 36 N. J. (7 Vroom), 29, s. c. 13 Am. R. 405.

[7] But a separate narrative, such as a newspaper slip, submitted with the proofs, but not sworn to, nor necessary as a part of them, is not admissible in favor of the insurers. Clieff v. Mut. Ben. Ins. Co. 99 Mass. 317.

[8] A statement in the proof of loss that the premises were vacant at the time of the fire, is not conclusive to prevent the insured from proving the circumstances of vacancy, so as to show that it was not within the terms of the policy. Cummins v. Agricultural Ins. Co. 67 N. Y. 260, rev'g 5 Hun, 554.

[9] Insur. Co. v. Newton, 22 Wall. 32.

[10] Campbell v. Charter Oak Ins. Co. 10 Allen, 213; Irving v. Excelsior Ins. Co. 1 Bosw. 507, as explained in 22 Wall. 36. Compare, however, McMaster v. Ins. Co. of N. Am. 55 N. Y. 222, affi'g 64 Barb. 536; Parmelee v. Hoffman Fire Ins. Co. 54 N. Y. 193.

[11] Connecticut Mut. Life Ins. Co. v. Schwenk, 94 U. S. (4 Otto), 593.

[12] Killips v. Putnam Fire Ins. Co. 28 Wis. 472, s. c. 9 Am. R. 506.

[13] Plath v. Minnesota Farmers' Mutual Fire Ins. Association, 23 Minn. 479, s. c. 23 Am. R. 697.

the company received them in due course of mail. Evidence of notice to one who was not the proper agent to receive it, may be aided by evidence that the company acted on it, and will sustain an inference of waiver.[1]

22. *Waiver of conditions or forfeiture.*]—Waiver of a condition prior to[2] or contemporaneous[3] with the execution of the writing containing the condition cannot be proved by parol. A waiver subsequent to the policy may be shown by parol, notwithstanding the policy expressly requires a writing.[4] To prove a waiver of a condition, the evidence must justify the inference of an agreement founded on a valuable consideration; or the act relied on must be such as to estop the insurer from insisting on performance of the contract or forfeiture of the condition.[5] If the forfeiture was not absolute, but optional, there must be evidence that the option was manifested.[6] Even after forfeiture, a waiver, and the revival of the policy, may be shown by any act from which the consent of the underwriters may be inferred.[7]

A general agent has power to waive most forfeitures; a local agent or clerk has not.[8] The charter and by-laws are admissible in evidence against the insured to show who are competent to waive a forfeiture.[9] Where facts tending to show waiver are in evidence, the question of waiver is a conclusion, and a witness should not be allowed to express his opinion on it, or be asked generally whether there was a waiver.[10]

23. *Adjustment.*]—An adjustment of loss, if made by the insurer, with knowledge of all the facts, is conclusive on him;[11] otherwise, if he show that it was made on the misrepresentation (whether intentional or not) of the insured.[12] In a case of con-

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[1] Inland Ins. Co. v. Stauffer, 9 Casey, 397, 403; and see Kendall v. Holland Purchase Ins. Co. 2 Supm. Ct. (T. & C.) 375. As to what amounts to notice to the company, see Thomas v. Builders' Mut. Fire Ins. Co. 20 Am. R. 317, 322, note.

[2] Hartford Fire Ins. Co. v. Davenport, Mich. S. Ct. Oct. 1877, Cent. L. J.

[3] Lamatt v. Hudson River Ins. Co. 17 N. Y. 199, note.

[4] Carroll v. Charter Oak Ins. Co. Abb. Ct. App. Dec. 316, affi'g 40 Barb. 292; Insurance Co. v. Norton, 96 U. S. (6 Otto), 234; and see Bodine v. Exchange Fire Ins. Co. 51 N. Y. 117. For conflicting cases on waiver of clauses as to consent to other insurance, see Gilbert v. Phœnix Ins. Co. 36 Barb. 372; Couch v. City Fire Ins. Co. of Hartford, 38 Conn. 181, s. c. 9 Am. R. 375; Goodall v. New Eng. Mut. Fire Ins. Co. 5 Foster (N. H.), 169, 189; Barrett v. Union Mut. Fire Ins. Co. 7 Cush. 175, 180; Union Mut. Ins. Co. v. Wilkinson, 13 Wall. (U. S.) 222; 1 Greenl. Ev. 13 ed. 326, § 281; Thomas v. Builders' Mutual Fire Ins. Co. 119 Mass. 121, s. c. 20 Am. R. 317; Lindley v. Union Farmers' Mutual Fire Ins. Co. 65 Me. 368, s. c. 20 Am. R. 701.

[5] Ripley v. Ætna Ins. Co. 30 N. Y. 136, rev'g 29 Barb. 552; Leslie v. Knickerbocker Life Ins. Co. 63 N. Y. 27; affi'g 2 Hun, 616, s. c. 5 Supm. Ct. 193; Insurance Co. v. Eggleston, 96 U. S. (6 Otto), 572; Beatty v. Lycoming Co. Mut. Ins. Co. 66 Penn. 9, s. c. 5 Am. R. 318; Insurance Co. v. Wolff, 95 U. S. (5 Otto), 326.

[6] Mut. Life Ins. Co. v. French, 30 Ohio St. 240.

[7] Shearman v. Niagara Falls Ins. Co. 46 N. Y. 326, affi'g 2 Sweeny, 470.

[8] Paragraph 5.

[9] Kolgers v. Guardian Life Ins. Co. 9 Abb. Pr. N. S. 91, s. c. 58 Barb. 185, 2 Lans. 480.

[10] Adams v. Greenwich Ins. Co. 4 L. & Eq. R. 291.

[11] Dow v. Smith, 1 Cai. 32.

[12] Faugier v. Hallett, 2 Johns. Cas. 233; Rosc. N. P. 425.

tributing policies, an adjustment by an expert may be submitted to the jury, not as evidence of the facts stated therein, nor as obligatory, but to assist the jury in calculating the amount of liability upon the several hypotheses of fact mentioned in the adjustment, if they find either hypothesis correct.[1]

24. *Declarations and admissions of officers and agents.*]—In addition to what has been already said on this point,[2] it may be useful to add that evidence of admissions or declarations of a distinct fact, made by the president or other proper officer having power to settle and adjust claims, when the matter was presented to him for settlement, is competent against the company.[3] Otherwise, if the admission was not a part of the *res gestæ* of the actual dealing of the officer or agent with the subject.[4] Evidence of the agent's declarations of his opinion, based upon past occurences, is not to be received as an admission of his principals, especially when the agent was not a party to the occurrences;[5] and it is to be excluded even where the agent had been deputed to examine the question of liability of the principal.[6] An admission is to be taken, as an entirety, of the fact which makes for the one side, with the qualifications which limit, modify or destroy its effect, on the other.[7]

25. *Defenses.*]—Special matters of defense, including false warranty and representations, and concealment, must be pleaded or cannot be proved,[8] and the burden is on defendants to prove them.[9]

26. — *false representations.*]—The burden is on defendants to show the untruthfulness of representations, and either their materiality,[10] or actual fraudulent design and deceit thereby. The materiality of a representation is to be presumed from the fact of its having been made in answer to a specific question.[11]

27. —*false warranty.*]—A warranty or condition not in the

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[1] Home Ins. Co. v. Baltimore Warehouse Co. 93 U. S. (3 Otto), 527, s. c. 16 Am. Law Reg. 162, 169.

[2] Page 44 of this vol.

[3] Northrup v. Miss. Valley Ins. Co. 47 Mo. 435, s. c. 4 Am. R. 337. So *held* even of a general promise to pay, if the other companies did.

[4] Baptist Church v. Brooklyn Fire Ins. Co. 28 N. Y. 153, aff'g 23 How. Pr. 448.

[5] Packet Co. v. Clough, 20 Wall. 528.

[6] Insurance Co. v. Mahone, 21 Wall. 157.

[7] Insurance Co. v. Newton, 22 Wall. 32. Thus, where proofs of death showed that the death was by suicide, the company's admission that the proofs were sufficient in form, coupled with the objection at the same time that they were not liable for suicide, are to be taken together, and only admit death in a mode not rendering them liable.

[8] Marine Ins. Co. of Alexandria v. Hodgson, 6 Cranch, 206; Northrup v. Miss. Valley Ins. Co. 47 Mo. 435, s. c. 4 Am. R. 337.

[9] Piedmont & Arlington Life Insurance Co. v. Ewing, 92 U. S. (2 Otto), 377; Trenton Ins. Co. v. Johnson, 24 N. J. L. (4 Zab.) 576; Elkin v. Janson, 13 M. & W. 655; Ins. Co v. Folsom, 18 Wall. 252.

[10] May on Ins. 193, § 183; N. Y. Life Ins. Co. v. Graham, 2 Duv. (Ky.) 506.

[11] May on Ins. 194, §§ 185, 186.

policy cannot be proved by parol.[1] A variance between an allegation of false warranty and its proof, if not substantial, will be disregarded.[2] Neither materiality of the warranty, fraudulent intent, nor that the insurer acted on it, need be shown.[3]

28. — *concealment.*]—The application is not evidence, as that plaintiff did not communicate all he knew on subjects not referred to in it.[4] But slight evidence of non-communication is enough, in the first instance.[5] Knowledge by the concealer is essential; but for this purpose an insurer is conclusively presumed to know what a man of ordinary intelligence ought to know,[6] and what his agent at the time knew.[7] The jury may also infer knowledge as a matter of fact, from probabilities, such as the situation of the person and the character of the fact.[8]

The insurers are presumed to be skilled in their business, and to know (and therefore need no communication of) those general facts, geographical, political, and others, which are open to the public, and may be known to all who are interested to inquire.[9] A newspaper taken by them is competent as raising an inference that they had knowledge of information, affecting the business, contained in it.[10]

29. — *materiality to the risk.*]—On the question whether a fact, representation or concealment was material to the risk, if it be on a point of common experience, not requiring special knowledge.—as, for instance, whether a change in the occupation of a dwelling altered the risk—the opinions of witnesses are not competent.[11] If it be a matter requiring special knowledge or skill, the opinions of skilled witnesses are competent.[12] But in either class of cases the actual usage of insurance companies generally, to charge a greater or less rate (as distinguished from a custom of the particular company not shown to have been communicated to the insured), is competent,[13] and may be proved by the testimony of experts in insurance,[14] stating the usage as a fact,[15] as distinguished from stating what would or would not be considered an insurable subject or a greater or less risk.[16] For the purpose of

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[1] Alston v. Mechanics' Mut. Ins. Co. 4 Hill, 329, and cases cited.
[2] McComber v. Granite Ins. Co. 15 N. Y. 495.
[3] Brennan v. Security Life Ins. Co. 4 Daly, 296.
[4] Ins. Co. v. Folsom, 8 Blatchf. 170; 9 Id. 202; 18 Wall. 252.
[5] Elkin v. Janson, 13 Mees. & W. 655, 663; Steph. Dig. Ev. 100.
[6] May on Ins. 211, § 202.
[7] Id.
[8] Id. 213, § 202.
[9] May on Ins. 217, § 207; De Longuemere v. N. Y. Fire Ins. Co. 10 Johns. 120.
[10] Green v. Merchants' Ins. Co. 10 Pick. 402.
[11] Luce v. Dorchester Mut. Fire Ins. Co. 105 Mass. 297, s. c. 7 Am. R. 522; Hartford Protective Ins. Co. v. Harmer, 2 Ohio St. 452.
[12] See Leitch v. Atlantic Mut. Ins. Co. 66 N. Y. 100.
[13] Luce v. Dorchester Mut. Fire Ins. Co. 105 Mass. 297, s. c. 7 Am. R. 522.
[14] Id.; Hobby v. Dana, 17 Barb. 111.
[15] Luce v. Dorchester Ins. Co. (above).
[16] Rawls v. American Mut. Life Ins. Co. 27 N. Y. 282, aff'g 36 Barb. 357; Jeffer-

determining the question of materiality, it is not competent to ask a witness, even one who acted in the transaction, whether he considered the fact material; or whether he would have taken the risk had he known the fact; or what influence the fact would have on the mind of an insurer.[1] But one to whom a material representation was made may be asked what effect it actually had on his mind in the transaction.[2]

To qualify a witness to express opinion, it is not enough that he is conversant with insurance business in general; but he should be shown to have special knowledge upon the particular topic in question.[3]

Testimony given by experts, and especially by insurers, when necessary on the question of materiality, because without it the fact is not sufficiently obvious to sustain a decision, is to be treated like the testimony of credible witnesses upon any other fact; and is controlling if there is no conflict. It is only where there is a difference of opinion that the question is one for the jury.[4]

30. — *over-valuation.*]—Evidence of over-valuation in the policy,[5] or in the proofs of loss,[6] without evidence of bad faith, does not bar the action.[7] Evidence that other dealers in the same trade and place usually had a much less stock, is not competent evidence of over-statement or valuation.[8] The usual proportion of stock to annual sales may be proved, for the purpose of raising an inference, by comparison with the annual sales of the insured, that his statement of amount of stock was grossly exaggerated.[9] This should be proved by merchants of the same trade and place;[10] those of other places, different in size and business usages, are not competent on the point.[11]

31. *Charge of Crime.*]—Where the issue requires the defend-

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son Ins. Co. v. Cotheal, 7 Wend. 72. Compare Kern v. South St. Louis Mut. Ins. Co. 40 Mo. 19, 26; Schenck v. Mercer Co. Ins. Co. 24 N. J. L. (4 Zabr.) 447, 451.

[1] Jefferson Ins. Co. v. Cotheal (above); Rawls v. Am. Mut. Life Ins. Co. (above); Walsh v. Ætna Life Ins. Co. 30 Iowa, 133, s. c. 6 Am. R. 664; and see Atlantic Dock Co. v. Libby, 45 N. Y. 499. *Contra*, Hawes v. New England, &c. Ins. Co. 2 Curt. C. Ct. 229; Roberts v. Continental Ins. Co. 3 Law & Eq. R. 767; Hartman v. Keystone Ins. Co. 9 Harr. (Penn.) 466, 478. Compare, on this subject, 5 Am. L. Rev. 231.

[2] Valton v. National Loan Fund Assurance Society, 4 Abb. Ct. App. Dec. 437, rev'g 17 Abb. Pr. 268.

[3] Schmidt v. Peoria Marine Ins. Co. 41 Ill. 295, 299; Nelson v. Sun Mut. Ins. Co. 71 N. Y. 453, affi'g 40 Super. Ct. (J. & S.) 417.

[4] Leitch v. Atlantic Mut. Ins. Co. 66 N. Y. 100.

[5] Huth v. New York Mutual Ins. Co. 8 Bosw. 538.

[6] Owens v. Holland Purchase Ins. Co. 56 N. Y. 565, affi'g 1 Supm. Ct. (T. & C.) 285.

[7] Franklin Fire Ins. Co. v. Vaughan, 92 U. S. (2 Otto), 516.

[8] Phœnix Fire Ins. Co. v. Philip, 13 Wend. 81; Townsend v. Merchants' Ins. Co. 36 Super Ct. (4 J. & S.) 172.

[9] Ins. Co. v. Weide, 11 Wall. 440.

[10] Id.

[11] Jones v. Mechanics' Fire Ins. Co. 36 N. J. (7 Vroom), 29, s. c. 13 Am. R. 405.

ant to establish a charge of crime,—such as arson, in burning the thing insured; or perjury, in swearing to false preliminary proofs,—the rule followed by the greater number of American authorities is that proof beyond a reasonable doubt, such as is required in criminal cases, is not necessary.[1] Whether a mere preponderance of evidence is enough,[2]—or whether the jury should be instructed to consider the gravity of the charge, and the legal presumption of innocence,[3] and that the legal evidence must be such as taken together clearly satisfies them,[4]—is still disputed.[5]

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[1] So held in *Kentucky*, (Ætna Ins. Co. v. Johnson, 11 Bush. 587, s. c. 21 Am. R. 223); *Louisiana*, (Hoffman v. Western Mar. & F. Ins. Co. 1 La. Ann. 216, 219; Wightman v. The Same, 8 Rob. La. 442); *Massachusetts*, (Schmidt v. N. Y. Union Mut. F. Ins. Co. 1 Gray, 529, 534); *Missouri*, (Rothschild v. Am. Cent. Ins. Co. 62 Mo. 356; Marshall v. Thames Fire Ins. Co. 43 Id. 586); *Wisconsin*, (Washington Union Ins. Co. v. Wilson, 7 Wisc. 169; Blaeser v. Milwaukee Mech. Mut. Ins. Co. 37 Id. 31, s. c. 19 Am. R. 747); and by DILLON, J., in the U. S. Circ. Court, Scott v. Home Ins. Co. 1 Dill. C. Ct. 105; see also Huchberger v. Merchants' Fire Ins. Co. 4 Biss. C. Ct. 265; s. p. in other issues; *Michigan*, (Watkins v. Wallace [Fraud], 19 Mich. 57); *New Hampshire*, (Mathews v. Huntley [Slander], 9 N. H. 150; Folsom v. Brown [Slander], 5 Fost. N. H. 122); *North Carolina*, (Kincade v. Bradshawe [Slander], 3 Hawks, 63); *Wisconsin*, (Wright v. Hardy [Fatal Malpractice], 22 Wisc. 348).

Contra, and requiring proof beyond reasonable doubt, are decisions in *England*, (Thurtell v. Beaumont, 1 Bing. 339; Steph. Dig. Ev. 98); *Illinois*, (McConnell v. Delaware, &c. Ins. Co. 18 Ill. 228); and *Ohio*, (Lexington Ins. Co. v. Paver, 16 Ohio St. 324). So in other civil actions, where the issue involves a charge of crime, &c., the same and some other courts require proof beyond reasonable doubt. *Indiana*, (Wonderly v. Nokes [Slander], 8 Blackf. 589. Compare Bissel v. West, 35 Ind. 54); *Iowa*, (Ellis v. Lindley [Slander], 38 Iowa, 461; Fountain v. West [Libel], 23 Id. 1); *Missouri*, (Polston v. See [Slander], 54 Mo. 291); *New York*, (Clark v. Dibble [Slander], 16 Wend. 601; Hopkins v. Smith [Slander], 3 Barb. 592, 602); *New Jersey*, (Berckmans v. Berckmans [Charge of Adultery in Divorce], 17 N. J. Eq. 453; Taylor v. Morris [Usury], 22 Id. 606); *Ohio*, (Strader v. Mulvane [Slander], 17 Ohio, 624); *Pennsylvania*, (Steinman v. McWilliams [Slander], 6 Penn. St. 170; Gorman v. Sutton, 32 Id. 247); *Tennessee*, (Coulter v. Stewart [Slander], 2 Yerg. 225); and *Wisconsin*, (Freeman v. Freeman [Charge of Adultery in Divorce], 31 Wisc. 235. Compare Warner v. Commonwealth, 2 Va. Cas. 105); and in the *Supreme Court of the United States*, in debt for a statute penalty. Chaffee v. U. S. 18 Wall. 516.

[2] As is held in *Alabama*, (Spruil v. Cooper [Slander], 16 Ala. 791); *California*, (Ford v. Chambers [Fraud], 19 Cal. 143); *Colorado*, (Downing v. Brown [Justification in Libel], 3 Col. 591); *Connecticut*, (Munson v. Atwood [Felonious Taking], 30 Conn. 102); *Georgia*, (Wright v. Hicks [Adulterine Bastardy], 12 Geo. 155); *Maine*, (Knowles v. Scribner [Bastardy], 57 Me. 497); *Missouri*, (Rothschild v. American Cent. Ins. Co. [Insurance], 62 Mo. 356; Marshall v. Thames Fire Ins. Co. 43 Id. 586); and *Wisconsin*, (Blaeser v. Milwaukee Mech. Mut. Ins. Co. 37 Wisc. 31, s. c. 19 Am. R. 747); and see 10 Am. Law Rev. N. S. 642.

[3] As held in Kane v. Hibernia Ins. Co. 10 Vroom N. J. 697, s. c. 23 Am. R. 239; and Brandish v. Bliss [Action for Burning Plaintiff's Barn], 35 Vt. 326.

[4] As held in Kane v. Hibernia Ins. Co. (above), and Scott v. Home Ins. Co. 1 Dill. C. Ct. 106.

[5] The reasons assigned for following mere preponderance of probabilities are, 1st, that this is the rule in all civil issues; and, 2d, that the issue is really not a question of crime, but of dollars and cents. To this it may be replied that there is no such universal rule in civil cases. It has been a general (but not universal), rule for *juries*, in civil cases at common law, never a general rule for the chancellor nor for juries in feigned issues. Again, how ought the fact that a question of dollars and cents is presented, to affect the rule? If plaintiff makes a charge of crime for the sake of recovering money, or the defendant sets up a charge of crime to exonerate him from an otherwise admitted obligation, ought either to succeed on evidence that would be inadequate if the State undertake to investigate? On the other hand, ought one to be

But in a doubtful case evidence of his previous successive losses, and collection of insurance moneys, may be competent as tending to show that the loss now in question was not accidental.[1]

A defense of this nature does not put character in issue;[2] and plaintiff's general character not having been impeached, evidence of his good character is not admissible in his own behalf.[3] Evidence of another firing in the same town, at the same time, is not alone relevant as tending to prove that it was set by a stranger.[4]

II. Rules peculiarly applicable to Marine Insurance

32. *Interest.*]—The registry is competent[5] but not conclusive[6] evidence of ownership. A copy of a register from the proper department of the United States where the original is required by the act of Congress to be filed, duly certified, is proof of the register; and proof that there was a register, with very slight evidence that it was on board during the voyage, is *prima facie* proof that the vessel was duly documented.[7]

Interest in freight is proved by showing an interest in the ship, founding an interest in its freight, and then a shipment or other act or contract sufficient to give that interest in the particular freight in question.[8]

33. *Warranties.*]—In general, the performance of an express warranty in marine insurance is said to be a condition precedent, to be averred and proved by plaintiff;[9] but if no question arises on the warranty,—as where there is a warranty "free from average," and no claim as to average is made,—or where the warranty is in terms negative,—such as that certain goods shall not be carried,—affirmative proof of performance is not necessary unless the evidence indicates a breach,[10] or a breach is averred by defendant.

34. *Seaworthiness.*]—Where there is an implied warranty of

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made to respond in damages for expressing his belief in a charge of crime, because the evidence on which he acted proves insufficient to convict? It seems difficult to justify the proposition that the jury are to proceed on the preponderance of *testimony*, disregarding the presumption of innocence. Compare 2 Whart. Ev. § 1245. For other cases of proof beyond reasonable doubt required in civil actions, see Chaffee v. U. S. 18 Wall. 545; The Mohler, 21 Id. 230; and page 234 of this vol. n. 2.

[1] Rex v. Gray, 4 Fost. & F. 1102; Steph. Dig. Ev. 19.

[2] Schmidt v. N. Y. &c. Ins. Co. 1 Gray, 529.

[3] Fowler v. Ætna Fire Ins. Co. 6 Cow. 673.

[4] Faucett v. Nichols, 4 N. Y. Sup. Ct. 597.

[5] 2 Pars. Mar. Ins. 512. *Contra*, 2 Phil. 657.

[6] Draper v. Commercial Ins. Co. 21 N. Y. 378, rev'g 4 Duer, 234.

[7] Pacific Ins. Co. v. Catlett, 4 Wend. 75, affi'g 1 Id. 561. Compare R. S. of U. S. §§ 882, 4131–4195; Catlett v. Pacific Ins. Co. 1 Paine, 594; Code Civ. Pro. §§ 944, 945.

[8] 2 Pars. Mar. Ins. 515.

[9] 2 Pars. Mar. Ins. 510,; Craig v. U. S. Ins. Co. 1 Pet. C. Ct. 410; Wilson v. Hampden, &c. Ins. Co. 4 R. I. 159.

[10] This, at least, is the opinion of Prof. Parsons. 2 Pars. Mar. Ins. 511.

seaworthiness, parol evidence of the nature of the vessel, &c.—such as that she was known to the insurers to be not constructed for the kind of navigation for which they insured her—is competent for the purpose of showing that such degree of seaworthiness as she was capable of would satisfy the policy.[1]

It is held by high authority that on a marine policy,[2] the insured must aver and prove that the ship was seaworthy when the risk commenced;[3] but slight and general evidence, if not contradicted, is sufficient, and shifts the burden upon the insurer.[4] Evidence that inability of the ship to perform its voyage became evident in port,[5] or soon after leaving port, and that it foundered without stress of weather, or other apparent and adequate cause of injury, raises a legal but not conclusive presumption of unseaworthiness.[6] And it is immaterial whether these facts are shown by plaintiff's or defendant's evidence.[7] The presumption thus raised is rebutted by proof that the ship was seaworthy on leaving port, and that it encountered marine perils such as might disable a staunch and well-manned vessel. To carry the question to the jury, it is enough that there is other evidence of the ship's condition and of cause of loss, than the mere fact of sinking in smooth water, tending to show seaworthiness and some peril insured against; and it is not necessary that the jury be able to determine the particular cause of loss if it be within those covered by the policy.[8] The presumption of unseaworthiness, on the other hand, is much strengthened by the length of time that the vessel has been at sea, and by former manifestations of weakness and decay by leaking or otherwise.[9] There is no presumption that defects found to exist in the hull during the voyage were produced by a peril of the sea. The burden is on the assured to prove this.[10] Evidence of the performance of other voyages is competent only as they were such, in point of time, &c., as to raise just inferences as to her actual condition at the time in question.[11]

What is a competent crew for the voyage;—at what time

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[1] Burges v. Wickham, 3 B. & S. 669, 697; Powell Ev. 430; Rosc. N. P. 412.

[2] Compare paragraph 10.

[3] Moses v. Sun Mutual Ins. Co. 1 Duer, 159. *Contra*, Paddock v. Franklin Ins. Co. 11 Pick. 227 (Shaw, Ch. J.); Rosc. N. P. 411, and cases cited.

[4] Moses v. Sun Mutual Ins. Co. 1 Duer, 159; Martin v. Fishing Ins. Co. 20 Pick. 389, 396.

[5] Anderson v. Morice, L. R. 10 C. P. 58, s. c. 11 Moak's Eng. 252.

[6] Walsh v. Washington Ins. Co. 32 N. Y. 427, affi'g 3 Rob. 202; Wright v. Orient Mut. Ins. Co. 6 Bosw. 269; Davidson v. Burnand, L. R. 4 C. P. 117. *Contra*, Pickup v. Thames, &c. Ins. Co. L. R. 3 Q. B. Div. 594. The controversy is whether there is a shifting of the burden of proof or only ground for an inference by the jury.

[7] Paddock v. Franklin Ins. Co. (above).

[8] Anderson v. Morice, L. R. 10 C. P. 58, s. c. 11 Moak's Eng. 252.

[9] Paddock v. Franklin Ins. Co. (above).

[10] Bullard v. Roger Williams' Ins. Co. 1 Curt. C. Ct. 148; Talcot v. Commercial Ins. Co. 2 Johns. 124.

[11] The Vincennes, 3 Ware, 171.

they should be on board;—what is pilot ground;—and what the usage of trade, as to the master and crew being on board, when the ship breaks ground for the voyage;—are questions of fact for the jury, admitting of expert testimony.[1] Unusual prolongation of voyage is relevant, but not alone sufficient, evidence of inadequacy of crew.[2]

To testify directly to the question of seaworthiness as a fact, the witness must be an expert.[3] A shipwright may give his opinion, even on facts stated by others.[4]

Seaworthiness is conclusively shown by an admission in the policy.[5]

35. *Rating.*]—The proof of the rating of a vessel consists, not only of testimony as to her construction, materials, age, &c., but also of the opinion of experts, such as ship-builders and ship-masters and others familiar with the subject. The opinion of the witnesses, as to the rating of a vessel, is but the expression of the result of their examination of her. The rating by official inspectors, with a view to an entry in the books of a company, is evidence of the same character.[6]

36. *Shipment.*]—The shipment of goods insured is usually proved by the captain or any eye witness. If the captain be dead, the production of the bill of lading and proof of his handwriting is evidence of the shipment as well as of the interest; but not if he added "contents unknown."[7] A witness to the loading of the goods may refresh his memory by inspection of the bill of parcels, and the receipt given by the drayman who delivered them on board the vessel.[8]

On a valued marine policy, plaintiff need not prove that the whole property was shipped, but it is enough to prove a substantial interest in a subject corresponding to and satisfying the description in the policy. It then devolves on the insurer to

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[1] M'Lanahan v. Universal Ins. Co. 1 Pet. 170.

[2] The Gentleman, Olc. 110.

[3] Marcy v. Sun Ins. Co. 11 La. Ann. 748.

[4] Thornton v. The Royal Exch. Ass. Co. 1 Peake, 25; Rosc. N. P. 412.

[5] Rosc. N. P. 412; Parfitt v. Thompson, 13 M. & W. 392.

[6] Insurance Companies v. Wright, 1 Wall. 456. In the case of a vessel in one port, insured at another, the rating at the former is not the criterion, but is competent with other evidence tending to prove her quality and condition. Id.

[7] Rosc. N. P. 408; Haddow v. Parry, 3 Taunt. 303. Nor if he be alive. Dickson v. Lodge, 1 Stark. 226. *Contra*, Wolf v. National, &c. Ins. Co. 20 La. Ann. 583.

[8] Sturm v. Atlantic Mut. Ins. Co. 38 Super. Ct. (6 J. & S.) 281. Duplicate receipts for the cases of goods, given and signed by the officer of the vessel who received them, which had been, at the time, compared with the cargo-book, lost with the ship, are admissible in evidence to prove the receipt of the cases though not their contents. Id. See, also, pp. 319–326 of this vol. A general statement by the plaintiff, admitted in evidence, to the effect that he had the goods put on board the ship, though not evidence of the actual shipment, is not ground for reversal on appeal where other competent evidence was afterward given of the receipt of the merchandise on board. Id.

show that, either by mistake or design, the whole of the property insured was not put on board, and thus entitle himself to a proportionate deduction from the valuation of the policy.[1]

That a particular line of vessels was exclusively intended as the course of shipment cannot be shown by parol, where the language of the policy is general.[2]

37. *The voyage.*]—In insurance on a voyage, there must be some evidence of the ship having left port.[3] The time may be proved by the shipping list at Lloyd's,[4] or by the log-book of the commander of the convoy under which she is proved to have sailed.[5] If the policy designates the termini, oral evidence is not competent to substitute others,[6] but if a designation of terminus is indefinite, because of the nature of the terminus,[7] or of the voyage and trade itself,[8] oral evidence of the surrounding circumstances, and of usage, is competent.[9] So also of an indefinite period of time;[10] but a definite limit cannot be varied by parol.[11] On a question of reasonableness of delay, the facts should be proved; the letters of the plaintiff's agents, to him explaining the causes, are not competent in his favor, because not part of the *res gestæ*.[12]

38. *Weather.*]—The official registries of a signal service or coast-guard office, noting the state and changes of weather, kept pursuant to the requirement of law, are competent on production, with proof that they come from the proper official custody, and the oath of the officer keeping them is unnecessary.[13]

39. *Loss.*]—On evidence that the ship sailed apparently in a seaworthy condition, and has never been heard from, the law presumes that the loss was occasioned by a peril of the sea.[14] It is *prima facie* enough to prove that she has not been heard of in the country whence she sailed, without calling witnesses from the port of destination to prove that she never arrived there,[15] or even members of crew who were reported to be saved from the

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[1] Atlantic Ins. Co. v. Lunar, 1 Sandf. Ch. 91, and cases cited.

[2] N. Y. Fire Marine Ins. Co. v. Roberts, 4 Duer, 141. Compare Weston v. Emes, 1 Taunt. 115.

[3] Cohen v. Hinckley, 2 Camp. 51.

[4] Macintosh v. Marshall, 11 M. & W. 116, 125; 1 Greenl. Ev. 13 ed. 236, § 198.

[5] D'Israeli v. Jowett, 1 Esp. 427; Rosc. N. P. 410.

[6] Kaines v. Knightly, Skin. 54.

[7] Reed v. Ins. Co. 95 U. S. (5 Otto), 23, 30.

[8] Vallance v. Dewar, 1 Campb. 503, 508.

[9] Reed v. Ins. Co. (above).

[10] Chaurand v. Angerstein, Peake, 43.

[11] Rosc. N. P. 26.

[12] Langhorn v. Allnutt, 4 Taunton, 511.

[13] The Catherine Maria, L. R. 1 Adm. & Ecc. 53. And see De Armond v. Neasmith, 32 Mich. 231; 1 Whart. § 639; 1 Greenl. § 483. See also, The Maria das Dorias, 32 L. J. Pr. M. & P. 163; N. Y. Code Civ. Pro. § 944, and pp. 97, 98, of this vol.

[14] Paddock v. Franklin Ins. Co. (above); Rosc. N. P. 417.

[15] Id.

wreck.[1] In respect to the length of time from which this presumption is to arise, each case is to depend upon its own circumstances.[2] In the absence of anything to indicate a special peril, the usual and not the utmost period of the voyage is to be considered.[3] Evidence that when last seen the ship parted from convoy in a storm, will sustain an inference that she perished in that storm.[4] Evidence that after the time which plaintiff now assigns as the time of loss, he procured further insurance[5] or assumed to assign his interest in the ship,[6] is not conclusive against him. The protest of a mariner, even though not competent to prove loss, may be admissible to fix the time.[7] If loss of freight or passage money is in issue, the burden is on plaintiff to give some evidence that it would have been earned but for the casualty,[8] and could not be earned because of the casualty.[9]

Protest, survey,[10] and log-book are not competent in favor of the insured,[11] unless authenticated by the testimony,[12] or called for by the adverse party.[13] Certificates under seal, by United States consuls, of copies of their official documents, are competent in the courts of the United States.[14]

Experienced navigators, as well as shipwrights, are competent to express opinion on questions involving nautical skill, as to the nature and ordinary effects of the perils to which a marine loss is attributed.[15]

40. *Barratry.*]—To establish barratry mere negligence is not enough, but proof of a wrongful act willfully done by the master, with knowledge of its wrongfulness and constituting a breach of his duty, injurious to the freighters and ship-owners, is sufficient, although the master derived no benefit therefrom.[16]

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[1] Koster v. Reed, 6 B. & C. 19.

[2] Gordon v. Bowne, 2 Johns. 150; Oppenheim v. De Wolf, 3 Sandf. Ch. 571. On this subject, see p. 74 of this vol.

[3] Brown v. Neilson, 1 Cai. 525.

[4] Watson v. King, 4 Camp. 272.

[5] Brown v. Neilson, 1 Cai. 525.

[6] Bunten v. Orient Ins. Co. 1 Abb. Ct. App. Dec. 257.

[7] Ruan v. Gardner, 1 Wash. C. Ct. 145. Compare Miller v. South Carolina Ins. Co. 2 M'Cord, 336.

[8] Ogden v. N. Y. Mut. Ins. Co. 4 Bosw. 447.

[9] Id.; Kinsman v. N. Y. Mutual Ins. Co. 5 Bosw. 460.

[10] The survey is not essential. Bentaloe v. Pratt, Wall. C. Ct. 58; Robinson v. Clifford, 2 Wash. C. Ct. 1.

[11] Except to show the fact that they were made. Watson v. Ins. Co. of N. A. 2 Wash. C. Ct. 152. Compare Hathaway v. Sun Mut. Ins. Co. 8 Bosw. 33.

[12] 2 Pars. Mar. Ins. 520; Howard v. Orient Mut. Ins. Co. 2 Robt. 539.

[13] Saltus v. Com. Ins. Co. 10 Johns. 487.

[14] U. S. R. S. §§ 896, 1707.

[15] Walsh v. Washington Ins. Co. 32 N. Y. 427, affi'g 3 Robt. 202. Compare Cincinnati Ins. Co. v. May, 20 Ohio, 211, 223.

[16] Atkinson v. G. Western Ins. Co. 65 N. Y. 531; 4 Daly, 1.

III. Rules peculiarly applicable to Life and Accident Insurance.

41. *Disease; Death.*]—Death cannot be proved by the letters testamentary or of administration.[1] It may be presumed from absence without being heard from.[2] It may be proved by the official books of the boards of public officers having cognizance of deaths and casualties, kept pursuant to a requirement of law;[3] and their production, with evidence that they come from the proper official custody, is enough without the oath of the officer keeping them.[4] That the death was by a peril within the policy may be inferred from circumstances.[5]

Any observer of ordinary understanding is competent to testify whether one appeared sick or well.[6] Witnesses who had known the subject of insurance intimately down to the period when the policy was obtained, are competent to testify to his health and constitution.[7]

Under the New York statute,[8] by which communications to physicians, clergymen and attorneys are to a certain extent privil-edged, a medical attendant of the insured is not competent against objection to testify to information acquired as necessary to enable him to prescribe, whether it be received from the patient himself, from observation or from the statement of other attendants. And affirmative evidence that it was acquired for the purpose of prescribing is not necessary, if the relationship raise a presumption.[9]

42. *Suicide and insanity.*]—On the question of suicide, the surrounding circumstances, and the declarations of deceased made shortly before death and indicating intent, are competent;[10] but not the mere fact that he was an atheist.[11] On doubtful facts, the presumption is against suicide.[12]

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[1] Page 100 of this vol.; Thompson v. Donaldson, 3 Esp. 63.

[2] Page 73, &c. of this vol.

[3] Wallace v. Cook, 5 Esp. 117.

[4] 1 Whart. Ev. § 639.

[5] See Rosc. N. P. 437; Tisdale v. Conn. Mut. Life Ins. Co. 26 Iowa, 170, 176.

[6] Higbie v. Guardian Mut. Life Ins. Co. 53 N. Y. 603; Milton v. Rowland, 11 Ala. 732. Where the agent's certificate that the applicant was a first-class risk, was appended to the application and declaration, and the latter papers were referred to as part of the plea,—*held* that the certificate was competent against the insurers. Ins. Co. v. Mahone, 21 Wall. 152, 155.

[7] Rawls v. Am. Mut. Life Ins. Co. 27 N. Y. 282, affi'g 36 Barb. 357.

[8] 2 N. Y. R. S. 406; Code Civ. Pro. § 834.

[9] Edington v. Mut. Life Ins. Co. 67 N. Y. 185, rev'g 5 Hun, 1. In this case evidence as to the health or disease of an applicant in June was held incompetent on the question of his condition in August following, but this is a questionable ruling, unless justified by the pleadings. Mode of proving disease of insured not disclosed to company. Mulliner v. Guardian Mut. Life Ins. Co. 1 Supm. Ct. (T. & C.) 448.

[10] Continental Ins. Co. v. Delpeuch, 82 Pa. St. 225. See also Newton v. Mutual Benefit Life Ins. Co. 2 Dill. 154, and cases cited.

[11] Gibson v. Am. Mut. Life Ins. Co. 37 N. Y. 580.

[12] Mallory v. Traveler's Ins. Co. 47 N. Y. 52. Evidence that the deceased retired

Self-destruction being shown, there is no presumption of law that it was caused by insanity.[1] The burden is on plaintiff to show that the act was in consequence of insanity, and that the mind of the deceased was so far deranged as to have made him incapable of using a rational judgment in regard to the act which he was committing.[2]

The testimony of persons not experts, as to the conduct, manner and appearance of the subject, and the impressions thereby made on them, as to the soundness of his mind, is competent to go to the jury on the question of his insanity.[3] Although a skilled witness cannot be asked for his inference whether a suicide was caused by insanity, he may be asked to state, from his experience and reading and acquaintance with the mental condition of the deceased, what effect, if any, a specified disease would have upon the deceased as to his power to control his actions or resist any impulse with which he might be seized.[4]

43. *Declarations and admissions of the subject.*]—In the case of a policy issued to one person on the life of another, evidence of the declarations and admissions of the latter are competent against the former, when offered in connection with evidence of facts showing the state of health, and if made concurrently with the fact, and at or prior to the application, and not too remote in point of time from it, and shown to be a part of the *res gestæ* of the fact exhibiting the condition of health which they ultimately tend to explain.[5] And whenever the bodily or mental feelings are relevant, declarations of the person himself, as to his then present condition, ills, pains and symptoms, to whomsoever made (as distinguished from narratives of past condition), are competent as part of the *res gestæ*.[6] Except within these limits, such admissions and declarations are incompetent as evidence of the fact declared; unless there be something to show agency, or other ordinary ground for admitting the declarations of third persons. Declarations of the person on whose life the policy issued made after its issue, are not competent against the insured,[7]

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at bed time, and at midnight the report of a pistol being heard, was found shot in the mouth, and the pistol lying near, is not sufficient as matter of law to prove that he died by his own hand, and prevent a verdict for plaintiff. Phillips v. Louisiana Equitable Life Ins. Co. 26 La. Ann. 404, s. c. 21 Am. R. 549.

[1] Terry v. Life Ins. Co. 1 Dill. C. Ct. 403; 15 Wall. 580.

[2] Id.; Insurance Co. v. Bodel, 95 U. S. (5 Otto), 232, 240.

[3] Insurance Co. v. Rodel, 95 U. S. (5 Otto), 232, 238.

[4] Koenig v. Globe Mut. Life Ins. Co. 10 Hun, 558. Whether the suicide of a person hypothetically regarded as subject to melancholia, might be attributed to the disease, is not a question for an expert witness, but for the jury. Van Zandt v. Mut. Benefit Life Ins. Co. 55 N. Y. 169. As to the mode of proving insanity generally, see p. 115, &c. of this vol.

[5] Edington v. Mut. Life Ins. Co. 67 N. Y. 185, and cases cited, rev'g 5 Hun, 1.

[6] Insurance Co. v. Mosley, 8 Wall. 397; Ashbury Life Ins. Co. v. Warren, 66 Me. 523, s. c. 22 Am. R. 590.

[7] Swift v. Mass. Mut. Life Ins. Co. 63 N. Y. 186, 193, rev'g 3 Hun, 551; Edington v. Mut. Life Ins. Co. 67 N. Y. 185, 193, rev'g 5 Hun, 1.

nor are they competent against his assignee of the policy;[1] but if there be other evidence of the fact, they are admissible (just as are the declarations of strangers communicated to the person whose life was insured),[2] for the purpose of showing his knowledge of the fact, if knowledge is relevant.[3]

44. *Accident insurance.*]—The accident itself, and the manner of it, occurring without the presence of witnesses, may be proved by testimony to the declarations of the deceased, made when found in suffering, that he had immediately previous been injured in a specified way.[4] There is a presumption against suicide; and evidence that death must have been caused either by a cause within the policy or by the suicidal act of the deceased, makes a *prima facie* case against the insurers.[5]

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[1] Edington v. Mut. Life Ins. Co. 67 N. Y. 185, rev'g 5 Hun, 1. The reason is that after the contract of insurance has been effected, the subject of insurance has no such relation to the holder of the policy as gives him power to destroy or affect it by unsworn statements. An offer of evidence of such declarations should show that they were made before the contract of insurance was effected. Edington v. Ætna Life Ins. Co. 13 Hun, 543, 548.

[2] McNair v. National Life Ins. Co. 13 Hun, 144.

[3] Dilleber v. Home Life Ins. Co. 69 N. Y. 256.

[4] Ins. Co. v. Mosley, 8 Wall. 405.

[5] Mallory v. Travellers' Ins. Co. 47 N. Y. 52.

CHAPTER XXVII.

ACTIONS ON BONDS, COVENANTS, AND OTHER SEALED INSTRUMENTS.

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I. General Rules.

1. *The making of the contract.*]—Execution and delivery by the party to be charged, if not admitted, must be proved, before the instrument can be put in evidence. If the contract is several or joint and several, proof of execution by those who are parties to the action is enough, without proof of the signature of the others.[1] Under the new procedure, evidence to charge one only, even jointly liable, may be available against him.[2] Plaintiff may prove that a name written at the left hand, in the place proper for a subscribing witness, was the signature of a party.[3]

2. *Execution.*]—The signer, though competent and available as a witness, need not be called. Proof of signature of the party

[1] Sandford v. Handy, 23 Wend. 269; Conard v. The Atlantic Insurance Co. 1 Pet. 386, 451.

[2] Pages 186, 187, of this vol.

[3] Richardson v. Boynton, 12 Allen, 138.

sought to be charged is *prima facie* sufficient to show execution by him, without other proof of genuineness,[1] unless there are alterations not noted in an attestation clause, such as under rules already stated[2] require explanation.

Execution may be proved by official certificate of acknowledgment or proof,[3] though made since the action was brought.[4]

A defective certificate of acknowledgment or proof does not preclude common law evidence of execution.[5]

But if there is no sufficient acknowledgment or proof certified, and there is a subscribing witness,[6] he must be called,[7] or his absence must be accounted for. The law recognizes the attestation clause, signed by a witness, as a legitimate auxiliary, aiding what would otherwise be fatal defect of memory. If the witness does not affirmatively impeach the execution or delivery, his testimony to the genuineness of the signature and of his own attestation of it, is sufficient to go to the jury.[8] If he leaves the question in doubt, other evidence of execution becomes admissible.[9]

The absence of the subscribing witness may be accounted for by showing that he is not living, or not competent to testify, or not within the jurisdiction of the court, or not to be found with due diligence;[10] thereupon his handwriting must be proved.[11] The fact that the execution was abroad raises a presumption that the witness is beyond jurisdiction.[12] If there were several subscribing witnesses, it is enough to produce either who can prove the instrument;[13] but the absence of all must be accounted for before it can be proved by handwriting,[14] and then it may be proved by

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[1] Wing v. Cooper, 37 Vt. 169, 176.

[2] Page 406 of this vol.

[3] Morris v. Wadsworth, 17 Wend. 103, affi'd in 10 Paige, 109; Bowen v. Irish Presb. Ch. 6 Bosw. 245. And see United States v. Wilkinson, 12 How. U. S. 246.

[4] Page 6 of this vol.

[5] Borst v. Empie, 5 N. Y. (1 Seld.) 33.

[6] Who signed as such at time of execution or delivery, Henry v. Bishop, 2 Wend. 575; Hollenback v. Fleming, 6 Hill, 303; (*Contra*, Jackson v. Phillips, 9 Cow. 94.) or attested on the present request of the parties, Munns v. Dupont, 3 Wash. C. Ct. 31. It may be shown that a name written at the right hand, as if that of a party, was in fact that of a witness (Richardson v. Boynton [above], and p. 419 of this vol. n. 10); or fictitious or unauthorized (p. 391, n. 12).

There is no legal presumption that the obligor and one of the subscribing witnesses are the same from identity of name. Jackson v. Christman, 4 Wend. 277.

[7] Story v. Lovett, 1 E. D. Smith, 153; Willoughby v. Carleton, 9 Johns. 136; notwithstanding parties are now competent as witnesses. Jones v. Underwood, 28 Barb. 481; Hodnett v. Smith, 10 Abb. Pr. N. S. 86, s. c. 2 Sweeny, 401; 41 How. Pr. 190.

[8] 2 Greenl. Ev. p. 277, § 295; Hall v. Luther, 13 Wend. 491, and cases cited; Hemphill v. Dixon, Hempst. 235.

[9] Page 391 of this vol. n. 13.

[10] Jackson v. Waldron, 13 Wend. 178; Story v. Lovett (above).

[11] Id.; Clarke v. Courtney, 5 Pet 319.

[12] Page 391 of this vol. n. 11.

[13] 3 Abb. N. Y. Dig. new ed. 134, 135.

[14] Id.; Jackson v. Christman, 4 Wend. 277.

the handwriting of either.[1] Under these rules, due proof of the handwriting of all the witnesses is *prima facie* evidence of execution,[2] without proof of the handwriting of the party.[3] If the witness' handwriting cannot be proved, then, after preliminary evidence of diligent and fruitless exertions to prove his handwriting, proof of the handwriting of the party may be given.[4]

Evidence of the handwriting of the party, though not competent as a substitute for proof by testimony or handwriting of subscribing witness, is competent in corroboration of it.[5]

The mode of proving handwriting has already been fully stated.[6]

3. *Seal.*]—In addition to the rules as to proof of seal already stated,[7] it should be observed, that the record or a certified copy of the record of an instrument which has been recorded, if evidence under the statute, is competent, for the purpose of showing whether the instrument had a seal or not at the date of record.[8] An expert may express an opinion whether the original instrument shown him bears marks of having had a seal.[9]

4. *Sealed authority.*]—Where foundation has been laid for secondary evidence, proof of an oral acknowledgment by the defendant that the agent or attorney acted under sealed authority, is competent, and an acknowledgment of having given authority, may, with other circumstances, sustain an inference that the acknowledgment related to sealed authority.[10]

5. *Statutory conditions.*]—The fact that defendant executed and delivered an obligation required or permitted by statute to be given under certain conditions—whether of jurisdiction[11] or procedure[12]—amounts to an admission that those conditions existed, and throws upon him the burden of proving the contrary.[13]

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[1] Van Rensselaer v. Jones, 2 Barb. 643.

[2] Murdock v. Hunter, 1 Brock. Marsh. 135; Clark v. Courtney (above). Whether, to impair the effect of proof of witness' handwriting, evidence of his declarations that he had never attested the instrument is competent,—Compare Neely v. Neely, 17 Penn. St. 227, and p. 112 of this vol. note 8, and 1 Whart. Ev. § 731, citing Hobart v. Dryden, 1 Mees. & W. 615.

[3] Unless, perhaps, when there are very suspicious circumstances, when proof of the identity of the grantor may be also necessary. Brown v. Kimball, 25 Wend. 259, rev'g Kimball v. Davis, 19 Id. 437. *Contra*, Northrop v. Wright, 7 Hill, 476, 493.

[4] Jackson v. Waldron, 13 Wend. 178; Clarke v. Courtney, 5 Pet. 319; Morgan v. Curtenius, 4 McLean, 366, and cases cited.

[5] Clarke v. Courtney, 5 Pet. 319.

[6] Pages 392–398.

[7] Page 392; and as to corporate seal, page 35.

[8] Follett v. Rose, 3 McLean, 332; Gillespie v. Reed, Id. 377.

[9] Follett v. Rose (above); and see p. 397 of this vol.

[10] Blood v. Goodrich, 12 Wend. 525, and cases cited.

[11] See, for instance, People v. Falconer, 2 Sandf. 81, and cases cited.

[12] Whiley v. Sherman, 3 Den. 185; Dormday v. Kanouse, 2 N. Y. Leg. Obs. 330. See, for instance, Onderdonk v. Voorhis, 36 N. Y. 358; Delaney v. Brett, 1 Abb. Pr. N. S. 421.

[13] Onderdonk v. Voorhis (above); Coleman v. Bean, 1 Abb. Ct. App. Dec. 394.

6. *Delivery.*[1]—Delivery may be inferred from circumstances.[2] Possession is *prima facie* evidence of it,[3] as to those who have signed it, even though others named in the instrument have not.

7. *Qualified delivery.*]—If a written instrument is executed by part only of those named in it as parties, the question whether those who have executed it are bound, depends upon the circumstances under which it was delivered. The burden is on the defendant to show that they were not.[4] The circumstances of delivery may be proved by parol. If it appears by what was said at the time of the delivery, or by the nature of the transaction or the attendant circumstances, that any party whose signature is affixed did not agree to be bound unless the other parties also signed, the delivery will be considered as not absolute but *in escrow* merely.[5] But such an understanding had prior to the execution and delivery, and in no other way connected with that act, cannot be shown.[6] If the instrument is on its face complete by the signatures affixed before delivery, the stipulation that others should sign cannot be shown by parol,[7] unless notice of it is brought home to the obligee.[8]

8. *Escrow.*]—A statement in a receipt given by a third person for a deed, that it was delivered to him *in escrow*, is not necessarily controlling. The grantor's intention is to be gathered from the whole evidence.[9]

Evidence that an obligation was placed in the hands of a stranger to be delivered in a future contingency, and was delivered by him without it and without authority, is competent,[10] and proves that the obligation never had inception.[11]

9. *Acceptance.*]—Acceptance, whether by plaintiff[12] or by defendant,[13] may be presumed from the apparently beneficial char-

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[1] An averment or admission of execution may be a sufficient allegation of execution and delivery. Roberts v. Good, 36 N. Y. 408.

[2] Gardner v. Collins, 3 Mass. 398.

[3] Sicard v. Davis, 6 Pet. 124; Games v. Dunn, 14 Id. 322, affi'g 1 McLean, 321; Grim v. School Directors, &c. 51 Penn. 219; Dillon v. Anderson, 43 N. Y. 231. As to proof of delivery, see also Brackett v. Barney, 28 N. Y. 333; People v. Bostwick, 32 Id. 443; Fisher v. Hall, 41 Id. 416.

[4] Dillon v. Anderson, 43 N. Y. 231.

[5] Chouteau v. Suydam, 21 N. Y. 179; People v. Bostwick, 32 N. Y. 445, affi'g 43 Barb. 9; Black v. Lamb, 1 Beasley (N. J.), 108. *Contra*, Pope v. Latham, 1 Pike (Ark.), 66.

[6] Philadelphia, &c. R. R. Co. v. Howard, 13 How. (U. S.) 307. This seems the sound principle which should guide where the conflict in authorities permits. Compare Dair v. U. S. 16 Wall. 1, citing conflicting cases; Miller v. Fletcher, 27 Gratt. 403, s. c. 21 Am. R. 356; People v. Bostwick (above); Pawling v. United States, 4 Cranch, 219.

[7] State v. Potter, 63 Mo. 212, s. c. 21 Am. R. 440; reviewing conflicting cases.

[8] State *ex rel.* Barnes v. Lewis, 73 N. C. 138, s. c. 21 Am. R. 461.

[9] Brown v. Austen, 35 Barb. 341, s. c. 22 How. Pr. 394, and cases cited.

[10] Lovett v. Adams, 3 Wend. 380.

[11] Chipman v. Tucker, 38 Wis. 43, s. c. 20 Am. R. 1.

[12] Bank of United States v. Dandridge, 12 Wheat. 64.

[13] Kingsbury v. Burnside, 58 Ill. 310, s. c. 11 Am. R. 67.

acter of the contract, and evidence even of slight acts indicating assent. Non-acceptance is not shown by mere proof that the instrument was returned for the purpose of having an additional surety.[1]

10. *Date.*]—The date stated in the instrument is usually *prima facie*,[2] but not conclusive,[3] evidence of the date of execution and delivery. When blank, the party who seeks to enforce the instrument has the burden of showing the true date,[4] if material.

11. *Consideration.*]—The seal affixed to the writing sued on[5] is presumptive,[6] but not conclusive,[7] evidence of a consideration; but it is not evidence that the consideration was adequate, where the law requires adequacy to be shown.[8] Hence even partial failure of consideration is available.[9] Under the statute the consideration is open to inquiry, to the same extent as if the contract were unsealed.[10] The statute applies to foreign contracts,[11] and to previous as well as to subsequent contracts, so far as it affects the remedy only.[12] Beyond this, it cannot apply to previous contracts, because it would impair their obligation.

Notwithstanding the statute, the rule excluding parol evidence which would vary the writing, remains unaffected.[13]

A nominal consideration inserted in the writing does not necessarily preclude evidence of the actual consideration agreed on.[14]

12. *Oral evidence to vary the obligation.*]—The rule excluding oral evidence to vary the terms of a writing has a more strict application to formal instruments, such as bonds and covenants, than to commercial contracts made in the ordinary course of mercantile business.[15] In the former case there is much more ground for presuming that the parties put all the terms of their contract into the writing, than in the latter. Hence evidence of any prior

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[1] Postmaster General v. Norvell, Gilp. 106.

[2] Pages 14 and 409 of this vol. Seymour v. Van Slyck, 8 Wend. 403.

[3] Mayburry v. Brien, 15 Pet. 21.

[4] See Graves v. Lebanon Nat. Bank, 10 Bush. 23, s. c. 19 Am. R. 50.

[5] It is only when the writing is set up as a cause of action, or a set-off or counterclaim, that its conclusive effect is taken away by the N. Y. R. S. Calkins v. Long, 22 Barb. 97. A sealed release is conclusive. Gray v. Barton, 55 N. Y. 68; Torry v. Black, 58 Id. 185. Otherwise of a composition deed. Russell v. Rogers, 15 Wend. 351.

[6] Home Ins. Co. v. Watson, 59 N. Y. 390, rev'g 4 Supm. Ct. (T. & C.) 226, s. c. 1 Hun, 643.

[7] 2 N. Y. R. S. 406, § 77. "There is no longer any magic in a wafer." Johnson v. Miln, 14 Wend. 195. At common law, it is conclusive. Storm v. U. S. 94 U. S. (4 Otto), 84.

[8] As in case of a contract in restraint of trade. Ross v. Sagdbeer, 21 Wend. 166. Compare Tallmadge v. Wallis, 25 Wend. 107.

[9] Van Epps v. Harrison, 5 Hill, 63; Tallmadge v. Wallis, 25 Wend. 107.

[10] Wilson v. Baptist Educational Society, 10 Barb. 308.

[11] Williams v. Haynes, 27 Iowa, 251, s. c. 1 Am. R. 268.

[12] Mann v. Eckford, 15 Wend. 502; Case v. Boughton, 11 Id. 106.

[13] McCurtie v. Stevens, 13 Wend. 527.

[14] Barker v. Bradley, 42 N. Y. 316. Compare Halliday v. Hart, 32 N. Y.

[15] See pages 294, 409 and 412 of this vol.

or contemporaneous oral understanding is generally incompetent; but prior or contemporaneous contracts to which the instrument in question was subsidiary or auxiliary may be shown. Thus an instrument expressed to be an absolute obligation for payment of money may be shown, by parol, to have been delivered under an agreement that it should be held by the obligee as collateral security for a debt of a third person, and be cancelled on payment thereof. Such evidence is not regarded as contradictory to the written undertaking, but as tending to show that it has been discharged.[1]

In the case of a sealed agreement parol evidence is not admissible, as in other cases,[2] to show that the one signing was only an agent, for the purpose of enabling his principal to enforce it, unless it appears on the face of the contract that it was intended to be the contract of such principal;[3] nor is such evidence admissible for the purpose of holding such alleged principal liable on it, unless a seal was unnecessary, and the interest of the defendant appears on its face, and he has received its benefit, and ratified it.[4] So oral evidence is not admissible to enable him to enforce it, nor to exonerate from personal liability trustees, directors or the like, who, in their individual names, have entered into a sealed obligation not indicating their representative capacity.[5]

The general rule that unambiguous language in a contract must control, does not exclude extrinsic evidence of the subject-matter and other surrounding circumstances to enable the court to consider what the parties saw and knew, in order to ascertain their meaning.[6]

When the terms of an agreement have been intended in a different sense by the different parties to it, that sense is to prevail, against either party, in which he supposed the other understood it.

13. *Practical construction.*]—The acts and admissions of a party to an ambiguous instrument, subsequent to its execution,[7] and particularly a long-continued course of acts under it, giving it a practical construction,[8] are competent against him. But if the language is clear and unambiguous, such a practical construction cannot vary it,[9] unless there is evidence to sustain a waiver or estoppel.

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[1] Chester v. Bank of Kingston, 16 N. Y. 336. And see Huntington v. Adams, 12 Ala. 834.

[2] Pages 298, 302 of this vol.

[3] City of Providence v. Miller, 11 R. I. 272, s. c. 23 Am. R. 453, and cases cited. See also, Stowell v. Eldred, 39 Wis. 614.

[4] Briggs v. Partridge, 64 N. Y. 364, and cases cited. And see Squier v. Norris, 1 Lans. 285.

[5] Lincoln v. Crandell, 21 Wend. 101. The Pennsylvania rule seems to allow oral qualification more freely. Lippincott v. Whitman, 83 Pa. St. 244, and cases cited; Greenwalt v. Kohne, 85 Pa. St. 369.

[6] Clark v. United States Life Ins. & T. Co. 64 N. Y. 33, rev'g 7 Lans. 322; and see Reynolds v. Commercial Fire Ins. Co. 47 N. Y. 597.

[7] Goodyear v. Cary, 4 Blatchf. 271.

[8] Forbes v. Watt, L. R. 2 S. & D. App. 214, s. c. 2 Moak's Eng. 512.

[9] Railroad Co. v. Trimble, 10 Wall. 367.

14. *Lost instrument.*]—Loss need not be alleged in pleading.[1] If the instrument is shown to have been filed pursuant to statute, its loss may be shown by official certificate of search, if authorized by statute;[2] or by testimony of a witness who has searched, unless the statute makes an official certificate the exclusive evidence.[3] If the lost instrument is otherwise proven, slight evidence that it had a seal is enough to go to the jury.[4]

An agreement of the parties dispensing with production of the original instrument, does not necessarily dispense with the ordinary proof of due execution of the original.[5]

15. *Subsequent modification.*]—A sealed agreement cannot, before breach,[6] be modified by a simple executory contract.[7] It may (subject, however, to the requirements of the statute of frauds) be modified by an executed contract, either oral or written, founded on new consideration.[8] And the right of a party under it may be impaired by a waiver or estoppel founded on his acts, his words or even his silence. A discharge or modification of any liability upon such an instrument, after breach, may be shown by parol.[9]

16. *Breach.*]—On a contract merely to pay money, although plaintiff usually alleges non-payment, only very slight if any evidence of breach is required.[10] In other contracts plaintiff should allege a breach, and should prove it, unless it is admitted, or performance is affirmatively alleged by defendant.[11] Where indemnity alone is expressed, there must be evidence that damage has been sustained; but where there is a positive agreement that the act which is to prevent damage to the plaintiff shall be done, it is enough that such act is unperformed.[12] Where the covenant is both to do the act and to indemnify, it becomes a question of the intention of the parties.[13]

Under an allegation of breach of agreement, and a total failure to prove the agreement, the action is not sustained by evi-

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[1] Livingston v. White, 30 Barb. 72.
[2] 2 N. Y. R. S. 3 ed. 639, § 13; Code Civ. Pro. § 921.
[3] Teall v. Van Wyck, 10 Barb. 376.
[4] Livingston v. White, 30 Barb. 72.
[5] Clark v. Courtney, 5 Pet. 319.
[6] See Kuhn v. Stevens, 7 Robt. 544, s. c. 36 How. Pr. 275.
[7] Allen v. Jaquish, 21 Wend. 628; Eddy v. Graves, 23 Wend. 81.
[8] Moses v. Bierling, 31 N. Y. 462; Fleming v. Gilbert, 3 Johns. 528; Pierrepont v. Barnard, 6 N. Y. 279, rev'g 5 Barb. 364.
[9] Delacroix v. Bulkley, 13 Wend. 71; Townsend v. Empire Stone Dressing Co. 6 Duer, 208; Dodge v. Crandall, 30 N. Y. 294. See further as to this subject, p. 314 of this vol.
[10] The same has been held of a covenant to do an act or pay a certain sum. McGregory v. Prescott, 5 Cush. (Mass.) 67.
[11] This I understand to be the general rule and commonly applied in practice, although the decisions are not harmonious.
[12] Matter of Negus, 7 Wend. 498, and cases cited.
[13] Rector, &c. of Trinity Ch. v. Higgins, 48 N. Y. 532, rev'g 4 Robt. 1; Gilbert v. Wiman, 1 N. Y. 550, 554; Rubens v. Prindle, 44 Barb. 336.

dence of a tort, although such as would have been a breach had there been such an agreement.[1]

Where performance is in issue, evidence of non-performance with an excuse therefor, is, in general, inadmissible.[2]

17. *Damages.*]—Plaintiff is not entitled to prove a breach not alleged,[3] unless there is a general allegation;[4] but he is not bound to prove a breach to the full extent alleged; nor is he confined to the precise number or value alleged.[5] But he cannot recover more than alleged, and he cannot prove any damages of a kind not necessarily resulting from the breach alleged and proved, unless they are specially stated in the complaint. To recover damages more than nominal, they must be shown with reasonable certainty at the trial, and not left to speculation and conjecture;[6] but every reasonable presumption may be made as to the benefit which the other parties might have obtained by the *bona fide* performance of the agreement.[7] The allegation of amount of unliquidated damages is not, for this purpose, to be taken as true, by an omission to deny it.[8] An award as to the amount of damages, may avail as conclusive, although the action be necessary to establish liability.[9]

If the contract specifies the amount to be paid in case of a breach, and the settled rules of construction[10] do not conclusively determine whether it is liquidated damages or a penalty, the instrument may be aided and the real intention ascertained by proof of extrinsic facts.[11] A sum duly fixed as liquidated damages, and not as a penalty, is recoverable without proof of actual damage.[12]

The general principles as to proof of value, injury, &c., by the opinions of witnesses, have been already stated.[13] The opinion or conclusion of a witness as to the amount of damage sustained, as distinguished from his knowledge of value, and of the difference in value caused by breach, is not admissible.[14]

18. *Fraud; Failure of consideration.*]—Fraud in the execution is always admissible under proper allegation.[15] Fraud in the

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[1] Beard v. Yates, 2 Hun, 466.
[2] Oakley v. Morton, 11 N. Y. 25; Warren v. Bean, 6 Wis. 120.
[3] Briggs v. Vanderbilt, 19 Barb. 222.
[4] Trimble v. Stilwell, 4 E. D. Smith, 512.
[5] 2 Greenl. Ev. 243, § 260.
[6] Neary v. Bostwick, 2 Hilt. 514.
[7] Wilson v. Northampton & Banbury Junction Ry. Co. L. R. 9 Chan. App. 279, s. c. 8 Moak's Eng. R. 866, per Ld. Selborne.
[8] Stuart v. Binsse, 10 Bosw. 436.
[9] Whitehead v. Tattersall, 1 Ad. & E. 491.
[10] Bagley v. Peddie, 16 N. Y. 469, and cases cited; 2 Greenl. Ev. 241, § 258.
[11] See Shute v. Hamilton, 3 Daly, 462, 472.
[12] Smith v. Coe, 33 Super. Ct. (1 J. & S.) 480, 483.
[13] Pages 310, 348, 368, &c., of this vol.
[14] Morehouse v. Mathews, 2 N. Y. 514; Wetherbee v. Bennett, 2 Allen, 428, 430.
[15] Hartshorn v. Day, 19 How. U. S. 211.

consideration, or a failure of consideration, though not usually admitted at common law,[1] is equally available under the new procedure if it amount to an equitable defense. Evidence that the signer was illiterate, and that the instrument was not read to him or only read to him by the other party, does not avoid it, but shifts the burden to the other to show that it was explained to him in substance, and there was no suppression, concealment, or misrepresentation of any of its obligations.[2] To avoid a surety's signature for fraudulent concealment by the creditor, it must be shown that the creditor misled him, or induced him to become surety in ignorance, or at least was present when another did so.[3] A failure of consideration cannot be proved under a general denial.[4]

19. *Reformation.*]—Under the new procedure, either the plaintiff[5] or defendant,[6] if appearing and claiming in one and the same capacity,[7] may, under proper allegations show fraud or mistake in the instrument sued on, entitling him to a reformation and judgment accordingly, without bringing a separate action.

For this purpose,[8] it is necessary to show either mutual mistake, or mistake of one party to the instrument, known to the other, and fraudulently taken advantage of, by him. The mistake must be as to a fact shown to be material and to have animated and controlled the conduct of the party in assenting,[9] or as to the preparation and contents of the instrument, so that it does not express the actual agreement made.[10] In the case of an error in the instrument, the fact that the other party knew of the mistake, and inequitably suffered it to pass, is practically equivalent to fraud.[11] Within these limits, even though the contract be within the statute of frauds,[12] parol evidence of the agreement or the intent of the parties is admissible, to prove that by mistake something material has been omitted; or that the instrument contains more than was intended; or that it varies from their intent by expressing something different in substance from the truth of

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[1] Hartshorn v. Day, 19 How. U. S. 211.

[2] Ellis v. McCormick, 1 Hilt. 313; Harris v. Story, 2 E. D. Smith, 363; Suffern v. Butler, 19 N. J. Eq. 202.

[3] Atlas Bank v. Brownell, 9 R. I. 168, s. c. 11 Am. R. 231; Magee v. Manhattan Life Ins. Co. 92 U. S. (2 Otto), 93, 99.

[4] Dubois v. Hermance, 56 N. Y. 673, affi'g 1 Supm. Ct. (T. & C.) 293.

[5] Laub v. Buckmiller, 17 N. Y. 620; Bartlett v. Judd, 21 N. Y. 200, affi'g 23 Barb. 262.

[6] Haire v. Baker, 5 N. Y. 357.

[7] Cady v. Potter, 55 Barb. 463. Compare Haddow v. Lundy, 59 N. Y. 320, and Rathbone v. Hooney, 58 N. Y. 463.

[8] As distinguished from a claim to rescind. Smith v. Mackin, 4 Lans. 41.

[9] Grymes v. Sanders, 93 U. S. (3 Otto), 55, 60, and cases cited.

[10] Leavitt v. Palmer, 3 N. Y. 19; O'Donnell v. Harmon, 3 Daly, 424; Pitcher v. Hennessy, 48 N. Y. 415,

[11] Botsford v. McLean, 45 Barb. 478, correcting 42 Id. 445.

[12] Rider v. Powell, 4 Abb. Ct. App. Dec. 63, s. c. less fully, 28 N. Y. 310.

that intent.[1] The mistake must be clearly made out by the most satisfactory proof;[2] and the actual agreement must also be shown with clearness.[3]

20. *Declarations and admissions of principal.*]—In an action against principal and surety jointly, the admissions and declarations of the former are competent not only against himself, but also against the surety, if made as part of the *res gestæ* of an act properly in evidence against the former,[4] otherwise not.[5] But when admissible, such declarations and admissions of the principal, and even his formal official reports made during the period in respect of which the surety is liable, are not conclusive against the surety.[6]

Entries made by the principal against his interest, though in a private book, are, after his death, competent primary evidence against his surety, although a witness to the transaction might have been called.

II. Bonds.

21. *Estoppel by recital.*]—In an official bond the recital of official character or appointment is conclusive evidence of the appointment as against the obligors, sureties as well as principal.[7] A mere recital cannot operate, by way of estoppel, so far as to preclude the obligees from showing the instrument absolutely void;[8] but it may estop as to any particular matter of fact recited.[9] Even sureties are bound by the recital of preliminaries not affecting the jurisdiction.[10] A recital estops as to the fact re-

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[1] Pennell v. Wilson, 2 Abb. Pr. N. S. 466, s. c. less fully, 2 Robt. 505; Nevins v. Dunlap, 33 N. Y. 676.

[2] Same cases (Lyman v. United Ins. Co. 17 Johns. 373): "Beyond all reasonable doubt," says the chancellor in Coles v. Bowne, 10 Paige, 526. But compare p. 495 of this vol.

[3] Kent v. Manchester, 29 Barb. 595.

[4] Bank of Brighton v. Smith, 12 Allen, 243, 249; Union Savings Assoc. v. Edwards, 47 Mo. 445; Snell v. Allen, 1 Swan (Tenn.), 208; Dobbs v. Justices, &c. 17 Ga. 624, 630; 2 Whart. Ev. § 1212. (For a broader rule, see Atlas Bank v. Brownell, 9 R. I. 168, s. c. 11 Am. R. 231. But compare p. 188 of this vol.) Unless there is evidence of combination between the plaintiff and the principal. Commonwealth v. Kendig, 2 Pa. St., 448, 452; United States v. Cutter, 2 Curt. C. Ct. 617.

[5] Stetson v. City Bank, 2 Ohio St. 167, 177; Blair v. Perpetual Ins. Co. 10 Mo. 559, 567; Smith v. Whippingham, 6 C. & P. 78. Compare Amherst Bank v. Root, 2 Metc. (Mass.) 522, 541; Parker v. State, 8 Black. 292.

[6] Bissel v. Saxton, 66 N. Y. 55.

[7] Fake v. Whipple, 39 N. Y. 394, affi'g 39 Barb. 339, and cases cited; Bruce v. United States, 17 How. U. S. 437.

[8] Caldwell v. Colgate, 7 Barb. 253. Avoiding the deed avoids also the estoppel. Id. As, for instance, where the case was without jurisdiction. Caffrey v. Dudgeon, 38 Ind. 512, s. c. 10 Am. R. 126; Germond v. People, 1 Hill, 343.

[9] See Decker v. Judson, 16 N. Y. 439.

[10] Coleman v. Bean, 1 Abb. Ct. App. Dec. 394.

cited,[1] but does not necessarily exclude evidence of another independent fact which avoids the effect of the former.[2]

A bond to an officer is at least *prima facie* evidence, against the obligors, of his appointment.[3] In a bond of indemnity against the non-performance of a contract, the recital of the execution of the contract is conclusive evidence of its due execution,[4] and its validity so far as that is matter of fact.[5] Recitals are evidence, though the facts recited be not alleged otherwise than by setting forth the instrument in which they appear.[6]

22. *Breach.*]—In an action on a bond for payment of money only, it is for defendant to prove payment.[7] In an action for breach of any other condition, plaintiff should allege non-performance of the condition,[8] and give some evidence of non-performance,[9] unless it is admitted expressly or impliedly.[10] It is for plaintiff to show the state of facts called for to prevent the condition taking effect.[11] If the bond is conditioned for performance of another contract, and it appears that there were conditions precedent in that contract requiring something from plaintiff, he must show performance of those conditions.[12] But if there is a proviso or defeasance contained in a condition, the facts necessary to invoke it must be set up by defendant in order to avail him.[13] Satisfaction by parol, of money due by the condition of a bond, before forfeiture, may be proved by parol.[14]

23. *Administration bonds.*]—Actual appointment, letters and oath, may be proved by the record; but, without its production, may be proved by a recital in the bond, of intent to apply for letters, with evidence that the principal acted as if appointed and qualified.[15] The surrogate's decree, shown to have been made in a proper proceeding,[16] and directing the administrator to make a payment, is conclusive on the sureties, unless fraud or collusion is shown.[17] Plaintiff must also show disobedience; and proof of

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[1] Cocks v. Barker, 49 N. Y. 107.
[2] Reed v. McCourt, 41 N. Y. 435.
[3] Scott v. Duncombe, 49 Barb. 73.
[4] Lee v. Clark, 1 Hill, 56.
[5] Jarvis v. Sewall, 40 Barb. 449.
[6] Slack v. Heath, 4 E. D. Smith, 95, s. c. 1 Abb. Pr. 331.
[7] Mann v. Eckford, 15 Wend. 519. Compare Jolley v. Plant, 1 MacArthur, 93.
[8] Thomas v. Allen, 1 Hill, 145; Lipe v. Becker, 1 Den. 568; 2 N. Y. R. S. 378, § 5.
[9] United States v. Bell, Gilp. 41.
[10] Cotheal v. Talmadge, 1 E. D. Smith, 573, 576.
[11] Ferris v. Purdy, 10 Johns. 358.
[12] Water Commissioners of Detroit v. Burr, 56 N. Y. 665, affi'g 35 N. Y. Super. Ct. (3 J. & S.) 522.
[13] Jarvis v. Sewall, 40 Barb. 449.
[14] Keeler v. Salisbury, 33 N. Y. 648.
[15] Dayton v. Johnson, 69 N. Y. 419. Compare Lent v. Hascall, 22 N. Y. 188.
[16] Behrle v. Sherman, 10 Bosw. 292.
[17] Thayer v. Clark, 4 Abb. Ct. App. Dec. 391, affi'g 48 Barb. 243; Casoni v. Jerome, 53 N. Y. 315. See also 1 Wms. Exrs. 6th Am. ed. 596, n.

leave to sue is not enough for this purpose.[1] But if plaintiff show disobedience or failure to comply at a given time, the burden is on defendant to show subsequent compliance if he rely on that.[2] Plaintiff should be prepared to prove the surrogate's leave to sue.[3] His leave to sue is conclusive.[4] Neither notice of these proceedings to the surety, nor a demand on the surety, is necessary.[5]

The defendant may show[6] either that the bond was not made, or that the decree was not made; or, if made, was collusive,[7] or that there was no failure by the administrator to comply; or that there was no order for the prosecution. But not that he was misled in signing the bond, by one with whose deception plaintiff was not connected;[8] nor that the surrogate erred in making the decree, nor that he wrongly adjudged the claim established; nor that there were in fact no assets, although the surrogate decided that there were assets to be applied.[9]

24. *Bottomry bonds.*]—The bond duly proved raises a presumption that the amount was furnished to the vessel.[10] But if executed by the master, plaintiff must show that he acted within the scope of his authority,—that is to say, there must be evidence of actual necessity for repairs and supplies; or at least of due inquiry and of reasonable grounds of belief that the necessity was real and exigent.[11] Necessity for repairs and supplies raises a presumption of necessity for credit,[12] especially if the vessel was in a foreign port;[13] and throws on the owner the burden of showing that the money could have been obtained otherwise than by bottomry.[14]

25. *Indemnity bonds.*]—Possession by the principal is evidence of authority to deliver; and parol qualifications not made known to the obligee cannot be proved against him.[15] The seal raises a presumption of consideration, even for a bond of indemnity against the consequences of performing a legal obligation; and defendant must overcome this by proof that there were no facts

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[1] People v. Barnes, 12 Wend. 492.
[2] Dayton v. Johnson, 69 N. Y. 419.
[3] People v. Falconer, 2 Sandf. 81; Beall v. New Mexico, 16 Wall. 543; and see Matter of Van Eps, 56 N. Y. 599.
[4] People v. Downing, 4 Sandf. 189.
[5] Wood v. Barstow, 10 Pick. 368.
[6] People v. Laws, 3 Abb. Pr. 450.
[7] Annett v. Terry, 35 N. Y. 256, affi'g 2 Robt. 556, s. c. 28 How. Pr. 324; People v. Townsend, 37 Barb. 520.
[8] Casoni v. Jerome, 58 N. Y. 315.
[9] People v. Laws (above).
[10] Cohen v. The Amanda, Crabbe, 277.
[11] The Grapeshot, 9 Wall. 129; The Bridgewater, Olc. 35.
[12] The Grapeshot (above).
[13] The Washington Irving, 2 Ben. 318, 323.
[14] The Kathleen, 2 Ben. 458; The Virgin v. Vyfhius, 8 Pet. 538.
[15] Belloni v. Freeborne, 63 N. Y. 383.

throwing doubt on the obligation.[1] On an indemnity against damage, by reason of any fact, as distinguished from an indemnity against liability or an obligation to do a specific act, actual loss or injury must be shown, except in the case of some statutory bonds.[2] The competency and effect of a judgment against the plaintiff has already been stated.[3]

26. *Official bonds.*[4]]—The general rules applicable in actions by and against public officers have already been stated.[5] It may be further added that a fiscal officer may sometimes be presumed to have received the whole amount collectible upon his warrant, and that he retains in his own hands the balance unaccounted for; and, in such case, the burden of proof is on him to show that the failure to pay arose from his inability to collect the sum, except by compulsory measures against the taxpayers;[6] but a public officer is not generally presumed to have applied funds to his private purposes; and hence his pecuniary embarrassments are not generally competent; yet where it has been shown that those having the right to control his acts, have permitted him to use such funds, his pecuniary embarrassments may be competent in favor of his sureties.[7] A balance shown to have been due from the officer, when re-appointed, is presumed, but not conclusively, to have been then still in his hands; but his sureties may show that he was in fact already a defaulter when they became such.[8]

Peculiarities in the mode of keeping public accounts should be explained by the testimony of those charged with the duty of keeping them, rather than by the calling of a witness who may happen to be acquainted with the matter, to state his opinion of the effect.[9]

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[1] Home Ins. Co. v. Watson, 59 N. Y. 390, rev'g 4 Supm. Ct. (T. & C.) 226, s. c. 1 Hun, 643; and see Coventry v. Barton, 17 Johns. 142.

[2] Churchill v. Hunt, 3 Den. 321; Gilbert v. Wiman, 1 N. Y. 550; Wright v. Whiting, 40 Barb. 235; Weller v. Eames, 15 Minn. 461, s. c. 2 Am. R. 150.

[3] Page 261 of this vol.; and see Bridgeport Ins. Co. v. Wilson, 34 N. Y. 275, rev'g 7 Bosw. 427; Taylor v. Barnes, 69 N. Y. 430; Thomas v. Hubbell, 15 N. Y. 405 rev'g 18 Barb. 9; Fay v. Ames, 44 Barb. 327.

[4] As to the nature and limits of the liability of fiscal officers, see Cent. L. J. 1877, p. 478; 16 Alb. L. J. 129; Perley v. County of Muskegon, 32 Mich. 132, s. c. 20 Am. R. 637.

[5] Pages 169–202 of this vol.

[6] Fake v. Whipple, 39 N. Y. 394, aff'g 39 Barb. 339. But compare, *contra*, Bryan v. United States, 1 Black. 140.

[7] Nolley v. Calloway County Court, 11 Mo. 447, 468.

[8] Bruce v. United States, 17 How. U. S. 437; United States v. Eckford, 17 Pet. 251.

[9] United States v. Willard, 1 Paine, 539, 545. For the peculiar rules facilitating proof in actions against defaulting officers of the United States, see United States v. Eckford, 17 Pet. 251, s. c. 1 How. U. S. 250; United States v. Hodge, 13 How. U. S. 478; Watkins v. United States, 9 Wall. 759; United States v. Eggleston, 23 Int. Rev. Rec. 113; United States v. Jones, 8 Pet. 375; Bruce v. United States, 17 How. U. S. 437; United States v. Gaussen, 19 Wall. 198; Smith v. United States, 5 Pet. 292, 299; Bleecker v. Bond, 3 Wash. C. Ct. 529; Lawrence v. United States, 2 McLean, 581.

If a cause of action matured on a breach of the bond, no demand need be proved.[1]

III. Charter-parties.

27. *General rule as to Oral evidence to vary.*]—The rule that oral evidence is generally inadmissible to enlarge or vary the terms of a contract is applied to charter-parties.[2] But if the language be indefinite or ambiguous, the situation of the parties may be shown as in other cases for the purpose of ascertaining their intent.[3] Being under seal, the rule excludes evidence to show that another than the person named as party, was the principal for the purpose of enabling him to sue on it.[4] Though the signer be described as agent in the body of the instrument, yet if he signs personally, without qualification, he may be held liable, unless it appears from the other portions of the instrument that he did not intend to bind himself as principal.[5] But evidence of a usage of trade that if the principal's name is not disclosed within a reasonable time after signing of the charter-party, in such case the broker shall be personably liable, is admissible.[6] If the charter-party appears to have been executed as covering the whole subject-matter of a previous memorandum, a clause in the memorandum, omitted from the charter-party is merged;[7] otherwise if executed only in part performance of the memorandum.[8] A subsequent agreement by parol for the use of the ship at a period before the charter-party attaches, may be proved.[9]

28. *Usage.*[10]]—Where local usage of the port is competent, it is no objection that it was not known to a party who contracted in such form as to be subject to it.[11]

29. *Terms; Measurements; Cargo; Capacity.*]—A usage as to terms, &c., may be proved if the charter-party contemplates it,—as where it stipulates for "the usual and customary terms,"[12] or "regular terms of loading;"[13]—but not otherwise to vary

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[1] Albany City Fire Ins. Co. v. Devendorf, 43 Barb. 444; School District No. 1 v. Lyford, 27 Wisc. 506.

[2] The Eli Whitney, 1 Blatch. C. Ct. 360; The Hermitage, 4 Id. 474, and see pages 296 and 483 of this vol.

[3] See Almgren v. Dutilh, 5 N. Y. 28.

[4] Humble v. Hunter, 12 Ad. & El. N. S. (Q. B.) 310, and see page 298 of this vol.

[5] Haugh v. Manzanos, 27 Weekly R. 536; compare Hayn v. Clifford, Id. 541.

[6] Hutchinson v. Tatham, L. R. 8 C. P. 482.

[7] Renard v. Sampson, 12 N. Y. 561, affi'g 2 Duer, 285.

[8] Id.

[9] White v. Parkin, 12 East, 578. So, of other matters of agreement, express or implied, extrinsic to the contract. Rosc. N. P. 443; citing Fletcher v. Gillespie, 3 Bing. 635.

[10] As to the mode of proof, see pages 296 and 485 of this vol.

[11] Robertson v. Jackson, 2 C. B. 412.

[12] Robertson v. Wait, 8 Exch. 299, and see Rosc. N. P. 445.

[13] Leidemann v. Schultz, 14 C. B. 38; 23 L. J. C. P. 17.

clear and unambiguous language.[1] But even ordinary language, —such as "bale,"[2] or "full and complete cargo,"[3]—may be explained by evidence that in the shipping usage it has a peculiar or technical meaning. To admit evidence of technical meaning the phrase need not be on the face of it ambiguous.[4] So if the charter-party is indeterminate as to the place of measurement of goods, evidence of usage is competent.[5]

The testimony of experts is competent on the question whether a ship has on board a "full cargo."[6]

The defendant may show a fraudulent misrepresentation of capacity, made by plaintiff at the time of hiring, as a ground of reducing the recovery,[7] unless inconsistent with the terms of the instrument.[8]

30. *Performance.*]—Performance or waiver must be affirmatively established by the plaintiff.[9]

31. *Damages.*]—The fact that a party to a charter-party paid an additional price for goods because of delay consequent on its violation, is *prima facie* evidence of damage to that extent without proof of the value at the place of intended sale, and entitles him, in the absence of evidence to the contrary, to go to the jury.[10] Breach in not furnishing a cargo being shown, the burden is thrown on defendant to show, in mitigation of damages, that another cargo might have been procured by the use of ordinary means and proper opportunities on the part of the master or owners.[11]

32. *Demurrage, or damages for detention.*[12]]—Where lay days are to commence running "on arrival," parol evidence is competent to show what is commonly understood to be the port; and this evidence may extend to the fact that in the case of a particular class of ships like that in question, the lay days commence only from the mooring at the quay, where by the regula-

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[1] Phillipps v Briard, 1 H. & N. 21, s. c. 25 L. J. Exch. 233. Compare Brown v. Byrne, 3 El. & Bl. 703, s. c. L. J. 23 Q. B. 313; Rosc. N. P. 24.

[2] Taylor v. Briggs, 2 C. & P. 525.

[3] Cuthbert v. Cumming, 11 Exch. 405, and see page 484 of this vol.

[4] Page 484 of this vol. Myers v. Sarl, 3 E. & E. 319 (per BLACKBURN, J.)

[5] Bottomley v. Forbes, 5 Bing. N. C. 121.

[6] Ogden v. Parsons, 23 How. U. S. 167, 169.

[7] Johnson v. Miln, 14 Wend. 195.

[8] Baker v. Ward, 3 Ben. 499.

[9] Roberts v. Opdyke, 40 N. Y. 259, affi'g 1 Robt. 287; Rosc. N. P. 443. Compare Bowley v. U. S. 8 Ct. of Cl. 187. As to sea-worthiness, compare The Vincennes, 3 Ware, 171; Werk v. Leathers, 1 Woods, 271; Rosc. N. P. 443; Belham v. Benson, 1 Gow. 45; and page 498 of this vol.

[10] Featherston v. Wilkinson, L. R. 8 Ex. 122, s. c. 4 Moak's Eng. 493.

[11] Murrell v. Whiting, 32 Ala. 54, 67.

[12] Although no provision be made in the contract for demurrage, damages in the nature of demurrage may be recovered for detention. Morse v. Pesant, 3 Abb. Ct. App. Dec. 321.

tions of the port she only could discharge.[1] But if the written obligation is to land the cargo at a specified dock, evidence of usage is not necessarily competent to show that the allowance for demurrage does not begin till after obtaining a berth.[2] Parol evidence is held not admissible to show usage that such an expression as "to be discharged in fourteen days," means working days, and excludes Sundays and custom-house holidays.[3]

IV. Covenants for title.

33. *Implied covenants.*]—By statute in New York[4] and some other States, no covenant is implied in any conveyance of real estate. But leases for not more than three years[5] and conveyances of incorporeal hereditaments[6] are not within this rule.

34. *Covenant of Warranty.*]—An actual eviction or ouster from the possession of the whole or part of the premises conveyed, by force of a paramount title, must be shown.[7] Actual sale under judicial process is sufficient evidence of the eviction.[8] The judgment is in any case competent evidence of the fact of its recovery; but the paramount character of the title is not proved by the judgment,[9] unless defendant was a party or privy to the judgment. If the covenantor was not a party on the record in the evicting judgment, the judgment will still be conclusive on him, if distinct and unequivocal notice was given him expressly requiring him to appear and defend the adverse suit, and giving him reasonable opportunity to do so.[10] If such notice appear upon the record of that suit, the court may instruct the jury that the recovery in that suit is conclusive on the present defendant, as if he had been a party on the record in the former suit. If the notice do not thus appear on the record, the question of the conclusiveness of the judgment will depend upon the belief of the jury as to the reception of the notice.[11]

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[1] Norden Steamship Co. v. Dempsey, L. R. 1 C. P. Div. 654, s. c. 18 Moak's Eng. 252.

[2] Phil. &c. R. R. Co. v. Northam, 2 Ben. 1.

[3] See Cochran v. Retberg, 3 Esp. N. P. 121. *Contra*, pages 297 and 366 of this vol. Lying days mean working days. Commercial Steamship Co. v. Boulton, L. R. 10 Q. B. 346, s. c. 13 Moak's Eng. 288.

[4] 1 N. Y. R. S. 738, § 140 (2 Id. 6th ed. 1119). So, to some extent, by the American doctrine of the common law. Frost v. Raymond, 2 Cai. 188; Van Rensselaer v. Kearney, 11 How. U. S. 297, 322. For the rule as to implied covenants, in case of a conveyance made in one State, of land in another,—see Bethell v. Bethell, 54 Ind. 428, s. c. 23 Am. R. 650.

[5] Moffet v. Strong, 9 Bosw. 57; Lynch v. Onondaga Salt Co. 64 Barb. 558.

[6] Mayor, &c. of N. Y. v. Mabie, 13 N. Y. 151, rev'g 2 Duer, 401.

[7] Blydenburgh v. Cotheal, 1 Duer, 176, 195, and cases cited.

[8] Cowdrey v. Coit, 44 N. Y. 382, rev'g 3 Robt. 210. Compare Furnas v. Durgin, 119 Mass. 500, s. c. 20 Am. R. 341.

[9] On this subject, see also page 261 of this vol.

[10] Rawle on Cov. 232. The requirement of an express request is not sanctioned by many of the authorities, see Somers v. Schmidt, 24 Wisc. 417, and page 261 of this vol.

[11] Id.

If the record of the former action does not exhibit on its face the title under which the recovery was had, the plaintiff in the present action must, notwithstanding proper notice has been given, prove that such title did not accrue subsequently to the deed to himself.[1]

If plaintiff does not rely on the judgment as evidence of the adverse title, he need not prove that defendant had notice of the suit.

35. — *of Seizin and Right to Convey.*]—Unless plaintiff avers a particular defect, in a form entitling defendant to rely on his proving it, the burden is on defendant to prove the seizin denied by the plaintiff; for defendant rather than plaintiff is presumed acquainted with the state of the title.[2] The true consideration, and its non-payment, may be shown by parol, notwithstanding the receipt for a different consideration in the deed.[3]

36. — *against Incumbrances.*]—The burden is on plaintiff to prove the incumbrance.[4] The injury sustained must be indicated in the pleading to admit evidence of special damage.[5] Extrinsic evidence that the parties did not intend the covenant to extend to a particular incumbrance not specified, or did intend it to extend to one which is excepted, is not competent.[6] But on the question of what is an incumbrance, within the meaning of the covenant, evidence of the surrounding circumstances, of the relation of the parties to the subject of the conveyance, of notice to the purchaser, and of local usage, if any, is competent.[7] Evidence of declarations of a former owner, made during his ownership and tending to prove existence of a right of way admitted, is competent against the present owner; but such declarations, tending to disprove the existence of the right of way are incompetent in favor of the present owner.[8] If the breach consists in an incumbrance of record,—such as a judgment [9] or a tax sale,[10]—the record, or the material part of it, must be produced or accounted for.

37. — *for Quiet Possession or Enjoyment.*]—The burden is on plaintiff to show eviction, actual or constructive,[11] unless defendant has assumed the burden of proof by affirmative allegations in his answer. A purchaser is presumed to know what the

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[1] Rawle on Cov. 232.
[2] Potter v. Kitchen, 5 Bosw. 572, and cases cited; Rawle on Cov. 84, 87.
[3] Bingham v. Weiderwax, 1 N. Y. 509.
[4] Rawle on Cov. 114.
[5] Id. 116.
[6] Harlow v. Thomas, 15 Pick. 66; Rawle on Cov. 119, 120, n.; 12 Moak's Eng. R. 243, n.
[7] Rawle on Cov. 118.
[8] Blake v. Everett, 1 Allen, 248.
[9] Waldo v. Long, 7 Johns. 173; Cooper v. Watson, 10 Wend. 202.
[10] Kennedy v. Newman, 1 Sandf. 187.
[11] Rawle on Cov. 194.

property is which he buys, unless deception is practiced upon him.[1] Plaintiff need not show that the paramount title was established by judgment.[2] The judgment against the plaintiff is competent evidence against defendant;[3] but if he relies on his surrender without judgment, he must show that the title was paramount, and could not justly have avoided yielding.[4] It is not enough to show that the defendants had notice of the claim against him.[5]

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[1] Spoor v. Green, L. R. 9 Ex. 99, s. c. 8 Moak's Eng. 540.
[2] McGary v. Hastings, 39 Cal. 360, s. c. 2 Am. R. 456.
[3] Rickert v. Snyder, 9 Wend. 416; and see preceding paragraphs.
[4] Rawle on Cov. 150.
[5] Kelly v. Dutch Church, 2 Hill, 105

CHAPTER XXVIII

ACTIONS ON LEASES.

1. Allegation of lease.
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15. Adverse title.
16. Forfeiture.
17. Assignment.
18. Demand.
19. Repairs.
20. Surrender.
21. Apportionment.
22. Payment.
23. Eviction.
24. Waste.

1. *Allegation of lease.*]—Under the new procedure a written contract is admissible in evidence under a general allegation that the party contracted, without indicating how,[1] and conversely if the allegation is of a written contract, evidence of an oral contract, if valid, is admissible by an amendment,[2] unless the adverse party is surprised. At common law, a parol contract is not admissible under an allegation of a specialty;[3] but the variance may be cured by amendment,[4] if defendant has not been misled to his prejudice. Even if the action is for use and occupation, the court may allow a lease to be proved under amendment, and a recovery thereon had;[5] and conversely, if the action is on a deed, recovery for use and occupation may be had by amendment.[6] Under an allegation describing the lease as for the original term, the lease may be admitted in evidence, though extended by virtue of a covenant therein contained, for an additional period and at a different rent.[7]

Compliance with the statute of frauds need not be alleged, but if the contract is denied or the statute of frauds pleaded, compliance must be proved.[8]

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[1] Note 8 below, and see Tuttle v. Flannegan, 54 N. Y. 686, affi'g 4 Daly, 92.

[2] Thomas v. Nelson, 4 Law & Eq. Rep. 40; Houghton v. Koenig, 18 C. B. 235.

[3] Phillips & Colby Construction Co. v. Seymour, 91 U. S. (1 Otto), 646. Compare Rosc. N. P. 343; Dougherty v. Matthews, 35 Mo. 520, 528.

[4] Houghton v. Koenig, 18 C. B. 238.

[5] Bedford v. Terhune, 30 N. Y. 453, affi'g 1 Daly, 371; and see page 352 of this vol.

[6] Houghton v. Koenig (above).

[7] Phelps v. Van Dusen, 3 Abb. Ct. App. Dec. 604.

[8] Marston v. Sweet, 66 N. Y. 206, rev'g 4 Hun, 156. The mode of proving a memorandum which satisfies the statute has already been indicated, p. 292 of this vol. And see Baumann v. James, L. R. 3 Ch. App. 508; Hand v. Hall, 25 Weekly R. 734, s. c. L. R. 2 Exch. D. 355; Chretien v. Donney, 1 N. Y. 419; Western Trans. Co. v. Lansing, 49 N. Y. 499.

2. *Mode of proving the contract.*]—Where a lease may be proved by parol, the fact and terms of tenancy may be shown by evidence that plaintiff informed defendant what they would be if he occupied, and that he thereafter did so without dissent.[1] A memorandum of terms, read over at the time of contract, and assented to, may be put in evidence, or may be used to refresh the memory of a witness.[2] But such an unsigned paper, though read or delivered as a description of the premises, or a statement of terms of letting, is not necessarily such a contract in writing as to be the primary evidence, and exclude oral proof.[3]

The fact of tenancy is conclusively proved by an adjudication in summary proceedings between the same parties, to recover possession for non-payment of rent.[4]

If a written contract is to be proved, the mode of proof is governed by rules already stated.[5]

If the instrument be in *duplicates*, each containing the whole contract, each is primary evidence against the one who signed it;[6] and the production of the one signed by defendant, is enough, without producing or accounting for the other duplicate.[7] If one party produces one of the duplicates signed by the other party, the presumption is, that the other part, signed by himself, is in the hands of the other party.[8]

If the lease is in *counterparts*, one containing the stipulations on the part of the lessor only, the other those on the part of the lessee, both must be produced or accounted for if required,[9] whenever the whole contract is material. If the action is on the covenant of the defendant only, the production and proof of the part signed by him containing it, is enough, without the counterpart signed by the covenantee,[10] unless the terms of the counterpart become material. The existence of the other may be presumed in the first instance;[11] and this presumption excludes oral

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[1] Despard v. Walbridge, 15 N. Y. 374.

[2] Bolton v. Tomlin, 5 Ad. & El. 856.

[3] Ramsbottom v. Tunbridge, 2 M. & S. 434; Trewhitt v. Lambert, 10 Ad. & El. 470. And see Bolton v. Tomlin, 5 Ad. & El. 856.

[4] Jarvis v. Driggs, 69 N. Y. 143. *Contra*, Boller v. Mayor, &c. of N. Y. 40 Super. Ct. (J. & S.) 523. In Evans v. Post, 5 Hun, 338, it was held that the adjudication was not legal evidence of the tenancy.

[5] For handwriting, see pp. 391–401 of this vol.; for rules applicable to sealed and witnessed instruments, see p. 498; for rules applicable to corporate contracts, see p. 34, &c. Under the statute of frauds an agent's authority must be in writing. Post v. Martens, 2 Robt. 437. But may be proved by admission. Blood v. Goodrich, 12 Wend. 525.

[6] See Lewis v. Payn, 8 Cow. 71.

[7] Hallett v. Collins, 10 How. U. S. 174, 184; page 288 of this vol.; and 1 Greenl. Ev. 13 ed. 120.

[8] Hallett v. Collins (above).

[9] Dobbin v. Watkin, Col. & C. Cas. 89, s. c. 3 Johns. Cas. 2 ed. 415. *Contra*, Houghton v. Koenig, 18 C. B. 238; *Doe d.* West v. Davis, 7 East, 363.

[10] Gates v. Graham, 12 Wend. 55; Houghton v. Koenig, 18 C. B. 235; Woodf. 85, 676. And see Pearse v. Morris, 3 B. & Ad. 366. Compare p. 288 of this vol.

[11] Cleves v. Willoughby, 7 Hill, 83; Mayer v. Moller, 1 Hilt. 491.

evidence in substitution for it, unless its absence is accounted for; and equally excludes oral evidence in variance of it.[1] Defendant may show that no counterpart was executed.[2]

A discrepancy between duplicates may be explained by parol evidence, showing a mistake in one.[3] But an essential discrepancy between two counterparts, one of which is the consideration for the other, so that the contract cannot be proven without both, is fatal, if the writing is essential under the statute of frauds.[4] The rules as to proving modifications of such contracts, have been already stated.[5]

3. *Conditional delivery.*]—If the contract was in writing, evidence of an oral agreement that it was to have no effect, or none except on a condition which has never happened,[6] is admissible; but evidence of an oral agreement that it was to have only a partial effect, is not.[7]

4. *General rule as to oral evidence to vary.*]—Oral evidence is not competent (in the absence of fraud or mistake) to show that the parties stipulated, at or before[8] the execution of the writing, for something contrary to what is there expressed, or to what is legally implied.[9] But a collateral agreement may be made in consideration of one of the parties executing the lease although under seal, and may be proved by parol if it is not contradictory to the terms of the deed itself.[10] So an oral agree-

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[1] Cleves v. Willoughby, 7 Hill, 83; Mayer v. Moller, 1 Hilt. 491.

[2] Woodf. 676.

[3] McNulty v. Prentice, 25 Barb. 204.

[4] Compare Burchell v. Clark, 2 C. P. Div. 602, s. c. 18 Moak's Eng. 232.

[5] See pp. 314 and 503 of this vol.

[6] For instance, the approval of a third person. 6 El. & B. 370, 374; Wallis v. Littell, 11 C. B. N. S. 369.

[7] For instance, that it was made only for the purpose of securing a license, and was to determine as soon as the premises could be sold. 2 Fost. & F. 86.

[8] Brigham v. Rogers, 17 Mass. 571; D'Aquin v. Barbour, 4 La. Ann. 441.

[9] See this subject on p. 295 of this vol. As for instance, that certain repairs were to be made by the plaintiff, (Mayor, &c. of N. Y. v. Price, 5 Sandf. 542; Brigham v. Rogers [above]; Mayor v. Moller, 1 Hilt. 491; *contra*, Munn v. Munn, L. J. 43 C. P. 241); or that lights were not to be obstructed, (Johnson v. Oppenheim, 55 N. Y. 280, aff'g 35 Super. Ct. [3 J. & S.] 440); or that a covenant in restraint of occupation, should not be enforced so long as occupation should be orderly, (Dodge v. Lambert, 2 Bosw. 570, 579). So where a mining lease fixes a price for the coal mined, it is inadmissible to prove by parol, that when the lease was preparing, the quantity of coal to be mined under the lease was omitted at the request of the defendant (the lessee), and that he, the lessee, then agreed to mine all that he could dispose of, the lease containing no such provision. Lyon v. Miller, 24 Penn. St. 392.

[10] Erskine v. Adeane, L. R. 8 Ch. App. 756, s. c. 6 Moak's Eng. 594. Thus, where to induce a tenant to sign a lease which, like other leases on the estate, reserved all game, etc., and the right to preserve and shoot, the lessor promised, that after a certain letting should shortly expire, all game should be killed down, etc.—*Held*, that parol evidence of this was admissible. Id. s. p. Remmington v. Palmer, 62 N. Y. 31, rev'g 1 Hun, 619, s. c. 4 Supm. Ct. (T. & C.) 696. Compare Dubois v. Kelly, 10 Barb. 496; Morgan v. Griffith, L. R. 6 Exch. 70; Angell v. Duke, 32 L. T. N. S. 320, Q. B.; Steph. Ev. 90. A part of the apparent conflict in the decisions may be explained, if we observe that it is one question, whether such a collateral agreement

ment to which the instrument was subsidiary, being given in part execution of it may be proved.[1] So evidence of possession under an oral agreement, prior to the term fixed in the written agreement, is competent, for the one does not contradict the other, although they were made simultaneously.[2] Nor does the rule exclude parol evidence of the representations made as a part of the negotiation, if adduced, not for the purpose of varying the terms of the writing, but of showing deceit,[3] or the effect those terms would have had if the representations had been true.[4] Evidence of the surrounding circumstances is competent, as in the case of other contracts.[5]

5. *Parties.*]—If the lease was made by plaintiffs, in their individual names, a recital that they were acting as a committee by authority of a corporate body, does not prevent them from recovering. The principle that the lessee cannot dispute his lessor's title applies.[6] The fact that the landlord has taken summary proceedings under the statute, against a third person, to recover possession of the premises, does not preclude him from showing that the defendant was, in fact, his lessee, or liable to him under an agreement creating a tenancy.[7] The landlord may recover if his action is on an express covenant to pay rent, though prior to the accruing of the rent sued for, a renewal of the lease was assigned to third persons, and the plaintiff accepted subsequent rent from them.[8]

6. *Usage.*]—In respect to matters on which the written agreement is silent,[9] as well as in ascertaining the proper interpretation of language not having a fixed legal meaning,[10] every demise is open to explanation by the general usage and custom of the country, or of the district where the land lies. Every person, under such circumstances, is supposed to be conversant of the custom, and to contract with a tacit reference to it.[11]

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may be proved for the purpose of sustaining an action for its breach; and a different question, whether it may be proved for the purpose of defeating an action on the written lease.

[1] Hope v. Balen, 58 N. Y. 380, affi'g 35 Super. Ct. (J. & S.) 458.

[2] Hubbell v. Clark, 1 Hilt. 67.

[3] Allaire v. Whitney, 1 Hill, 484; Whitney v. Allaire, 1 N. Y. 305, affi'g 4 Den. 554.

[4] Sharp v. Mayor, &c. of N. Y. 40 Barb. 256, s. c. 25 How. Pr. 389.

[5] See, for instance, Ayer v. Kobbe, 59 N. Y. 454, affi'g 36 Super. Ct. (J. & S.) 158.

[6] Stott v. Rutherford, 93 U. S. (2 Otto), 107. And see Dolby v. Iles, 11 Ad. & El. 335; Churchward v. Ford, 2 H. & N. 446; L. J. 26 Ex. 354. The rules as to oral evidence to show the real party in interest in agreements under seal, and not under seal respectively, are stated at pp. 298–301 and 498 of this vol. See, also, Mason v. Breslin, 2 Sweeny, 386, 395; Jackson v. Foster, 12 Johns. 488.

[7] La Farge v. Park, 1 Edm. 223.

[8] Phelps v. Van Dusen, 3 Abb. Ct. App. Dec. 604.

[9] Van Ness v. Packard, 2 Pet. 137, 148; Mangum v. Farrington, 1 Daly, 236, 238; and see pp. 296, 365 and 501 of this vol.

[10] See, for instance, Clayton v. Gregson, 4 Nev. & M. 602; Wilcox v. Wood, 9 Wend. 346; and see p. 486 of this vol.

[11] So held of a usage allowing a tenant to remove his building. Van Ness v. Packard (above).

7. *Practical construction.*]—An agreement additional to the stipulations of the lease, may be inferred from the repeated demand of one party and compliance therewith by the other, on a point on which the lease is silent,—for instance, the time when rent is payable,[1]—but if the lease expresses the obligation, the conduct of the parties in departure from it, is not evidence of a contrary agreement.[2] An unambiguous instrument cannot be varied by evidence of the adverse party's declarations of his understanding of its terms, nor of his practical concessions during a former quarter,[3] unless the evidence establishes an estoppel.

8. *Implied covenants.*]—A covenant for quiet enjoyment is implied in every mutual contract for the leasing and demise of land by whatever form of words the agreement is made,[4] unless it contains an express covenant on the subject.[5] This covenant means only that tenant shall not be evicted by paramount title.[6]

There is usually, also, an implied warranty of title or power to demise, in leases containing no express covenant[7] (except, by statute, leases exceeding three years[8]); and the existence and extent of the covenant depend on the words of demise.[9]

In a lease of real property only, the common law raises no implied warranty of tenantableness or fitness for use,[10] (although it may be otherwise of a lease of a furnished house,[11] or of chattels); nor is there any implied covenant to repair[12] or to maintain.[13] Where the contract of hiring contains no warranty, express or implied, that the premises are fit for the purpose for which they are hired, the declarations of the lessor to that effect, made at the time of the hiring, do not prove a contract.[14]

A covenant on the part of the lessee to use the premises in a proper manner, is implied in absence of any express covenant.[15]

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[1] Long Island R. R. Co. v. Marquand, 6 N. Y. Leg. Obs. 160.

[2] Giles v. Comstock, 4 N. Y. 270. But their conduct may be evidence of their understanding of ambiguous terms. See Pease v. Christ, 31 N. Y. 141.

[3] Bigelow v. Collamore, 5 Cush. 226.

[4] Mack v. Patchin, 42 N. Y. 167 (and cases cited), affi'g 29 How. Pr. 20.

[5] Burr v. Stenton, 43 N. Y. 462.

[6] Howard v. Doolittle, 3 Duer, 464.

[7] Vandekarr v. Vandekarr, 11 Johns. 122; Rawle on Cov. 462–8.

[8] Moffat v. Strong, 9 Bosw. 57, and see page 519 of this vol.

[9] Grannis v. Clark, 8 Cow. 36.

[10] McGlashan v. Tallmadge, 37 Barb. 313, and cases cited; Mayer v. Moller, 1 Hilt. 491; Erskine v. Adeane, L. R. 8 Ch. 756, 761.

[11] Compare Cæsar v. Karutz, 60 N. Y. 229; Wallace v. Lent, 1 Daly, 481; Wilson v. Finch-Hatton, L. R. 2 Ex. D. 336, and cases cited in 16 Alb. L. J. 195; 17 Id. 208; Dutton v. Gerrish, 9 Cush. (Mass.) 94.

[12] Howard v. Doolittle, 3 Duer, 464.

[13] Erskine v. Adeane, L. R. 8 Ch. 756, 762; and see Gallup v. Albany Railw. Co. 65 N. Y. 1.

[14] Dutton v. Gerrish, 9 Cush. (Mass.) 89, 94; Schermerhorn v. Gouge, 13 Abb. Pr. 315. Compare paragraph 4, n. 4.

[15] Woodf. 123.

9. *Identifying the premises.*]—If the designation of the premises is ambiguous,—as, for instance, where a street number only is used in the lease of a house, without indicating whether it was intended to include a yard or an alley,[1] or where a building is leased as a "Hotel," without indicating whether shops on the ground floor were included or not,[2]—oral evidence of the declarations of the parties at and before the execution of the writing, and of the usage of language, &c., is admissible. A variance in the location[3] or quantity[4] of land held by an assignee of part of the premises, is not necessarily fatal.

10. *The Date and Term.*]—Parol evidence is admissible to show the date of delivery of a lease, though the effect be to fix a different time than that expressed in the lease;[5] and a mistake in a date may be corrected by parol. In the absence of any evidence to the contrary, if a lease is expressed to take effect *in presenti*, and possession under it is averred, the *prima facie* presumption is that the lease and possession of the premises were delivered on the day of the date of the lease.[6]

In tenancies under agreements mentioning no time, and not reserving an annual rent, the period fixed for payment of rent, as monthly or weekly, &c., implies that the tenancy is of the same duration,[7] unless otherwise regulated by statute, as in the city of New York.[8] The fact that a notice to quit on a day specified was served personally on the tenant, and that he made no objection to the time, is *prima facie* evidence which sustains a finding that the tenancy commenced and ended at that period.[9]

Where a lease is from a day named, proof of a local custom that the term commences at noon of that day, and terminates at noon, is admissible; for custom is good to authorize taking possession under a lease.[10] A lessee sued for rent, upon his covenant, is not estopped by the covenant from showing that the lessor's estate ended before the rent accrued.[11]

11. *Rate of Rent.*]—If the rent is not fixed by writing, it is

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[1] Cary v. Thompson, 1 Daly, 35; People ex rel. Murphy v. Gedney, 10 Hun, 151.

[2] Sargent v. Adams, 3 Gray, 72, 77. So where the agreement was that "the present lessee and occupant of the first floor," &c., might "continue to use" the same, it being conceded that he did not have a literally exclusive possession of the whole first floor, parol evidence was admitted to show what he actually used and occupied before the agreement was executed. Steffens v. Collins, 6 Bosw. 223; and see Corbett v. Costello, 8 La. Ann. 427.

[3] Rosc. N. P. 342.

[4] Van Rensselaer v. Jones, 2 Barb. 643, 654.

[5] Steele v. Mart, 4 B. & C. 272.

[6] Rhone v. Gale, 12 Minn. 54.

[7] Steffens v. Earl, 40 N. J. L. (Vroom), 128.

[8] 1 N. Y. R. S. 744, § 1.

[9] Doe v. Forster, 13 East, 405; Doe v. Briggs, 2 Taunt. 109.

[10] Wilcox v. Wood, 9 Wend. 346.

[11] Lamson v. Clarkson, 113 Mass. 348, s. c. 18 Am. R. 498.

to be ascertained on principles stated in respect to actions for use and occupation. If the agreement was in writing, oral evidence that the rent, even for a particular season, was fixed by the parties at a different rate from that stated in the writing, is inadmissible.[1] The fact that rent was due,[2] but not the amount,[3] may be proved by an adjudication in summary proceedings between the same parties, to recover possession for non-payment. The amount may be proved by a judgment between the same parties, for the rent of the same premises for a previous quarter.[4]

12. *Plaintiff's title.*]—Where the lessor sues, the lease,[5] or the fact of possession under an agreement of tenancy,[6] or even the payment of rent[7] under it, is sufficient evidence of his title. In an action against the tenant, by one claiming the reversion, plaintiff should prove his derivative title;[8] and if the lessor had only a particular estate, must show its commencement, and the authority to grant the lease.[9]

13. *Possession not essential.*]—If an express covenant is proved, an action for the rent does not require from plaintiff proof of the fact of occupation or enjoyment, but the action may be maintained though the tenant abandoned possession.[10]

14. *Tenant's estoppel.*]—A tenant who has entered into possession,[11] or who, without actual possession, has had a permissive potential possession,[12] whether under a written[13] or an oral lease,[14]

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[1] Patterson v. O'Hara, 2 E. D. Smith, 28. Compare Preston v. Mercereau, 2 W. Bl. 1249; Remmington v. Palmer, 62 N. Y. 31, rev'g 1 Hun, 619, s. c. 4 Supm. Ct. (T. & C.) 696.

[2] Jarvis v. Driggs, 69 N. Y. 143.

[3] Id. *Contra*, Brown v. Mayor, &c. of N. Y. 5 Daly, 481.

[4] Kelsey v. Ward, 38 N. Y. 83.

[5] Lush v. Druse, 4 Wend. 313; Rosc. N. P. 343.

[6] Id.

[7] Chapman v. Beard, 3 Anstr. 942.

[8] Schott v. Burton, 13 Barb. 173; Tayl. L. & T. 482.

[9] Woodf. 687.

[10] Gilhooley v. Washington, 4 N. Y. 217, affi'g 3 Sandf. 330. Otherwise, in an action for use and occupation. Id.

[11] Otherwise, if he merely attorned by mistake. Rosc. N. P. 335. And see 2 Abb. N. Y. Dig. new ed. 809.

[12] 6 Am. Law Reg. 19.

[13] Blight v. Rochester, 7 Wheat. 535.

[14] The main, if not the only foundation of the rule (as to oral leases) is in the injustice of allowing one who obtained possession by admitting the title of another, to deny that title, and in case of failure of proof of it, to hold the premises himself. Hilbourn v. Fogg, 99 Mass. 12; Moffat v. Strong, 9 Bosw. 57; Art. in 6 Am. Law Rev. 1. In the case of a written lease, there is the additional sanction of his formal covenant, without violating which he cannot set up the title of another. Blight v. Rochester, 7 Wheat. 535. For the history of the technical origin of these estoppels, see 6 Am. L. Rev. 1. In the case of an indenture, as distinguished from a deed poll, whatever force, if any, remains in the old doctrine of estoppel by deed, may be invoked. See Averill v. Wilson, 4 Barb. 180; Champlain, &c. R. R. Co. v. Valentine, 19 Id. 484. The estoppel, if it arise from an indenture alone, must be mutual, if it exist at all; and if the lessor is not capable of being estopped, the tenant is not estopped. Rowe v. Scarrot, 4 H. & N. 723; L. J. 28 Ex. 325. But in case of a

or who holds over without any new agreement or claim,[1] is estopped in respect of the period during which the term[2] or the possession, as the case may be, continued, to deny that the lessor had title. The estoppel, when founded on possession (as distinguished from an estoppel by deed), is conclusive in respect to the period of possession under the relation, after as well as during the term expressly agreed for, being simply concurrent with the possession.[3] But neither possession, without the conventional relation of landlord and tenant,[4] nor the conventional relation without the possibility of possession,[5] will raise this equitable estoppel. If there be any estoppel without at least potential possession, it must rest on the ancient technical estoppel by indenture, duly pleaded.

But the tenant is not estopped to deny that, since his own entry, his lessor's title has ceased; and he may do this by showing either that it has expired by its own limitation, or has ended by the act of the lessor, or by eviction by title paramount.[6] To show a change in the title once admitted is no denial, and therefore not precluded by the estoppel.[7] If the expiration of the term is relied on as having ended the estoppel, it must be shown either that the lessee surrendered possession, or attorned,[8] or at least that he held in hostility,[9] and gave notice to his landlord that he thereafter claimed under another title, the validity of which he must be prepared to prove,[10] unless, by lapse of time, it has become the foundation of an adverse possession which will bar the landlord's claim.[11] When the estoppel is set up by the assignee of the lessor, the tenant is not estopped from impeaching the assignment;[12] and for this purpose he may show that the lessor's title at the time of demise was a limited one.[13]

An equitable estoppel of the tenant need not be pleaded; but is conclusive when the undisturbed possession appears in evidence under a denial.[14] It applies to every form of action in which the lessor, or those claiming under him, seek to assert against the

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purely equitable estoppel arising from possession, mutuality is not always essential. At least the party entitled to set it up may have an election. See Conway v. Starkweather, 1 Den. 113. *Contra*, Welland Canal Co. v. Hathaway, 8 Wend. 480.

[1] Osgood v. Dewey, 13 Johns. 240.

[2] See Child v. Chappell, 9 N. Y. 246.

[3] 6 Am. Law Rev. 21.

[4] Sands v. Hughes, 53 N. Y. 287; Buell v. Cook, 4 Conn. 238, 245.

[5] Andriot v. Lawrence, 33 Barb. 142.

[6] Heitzel v. Barber, 69 N. Y. 1; Hilbourn v. Fogg (above). Compare Rosc. N. P. 343.

[7] Despard v. Walbridge, 15 N. Y. 374; 6 Am. Law Rev. 21.

[8] Miller v. Lang, 99 Mass. 13.

[9] Conway v. Starkweather, 1 Den. 113.

[10] Miller v. Lang (above).

[11] Willison v. Watkins, 3 Pet. 48. Compare Tompkins v. Snow, 63 Barb. 525.

[12] Despard v. Walbridge; Hilbourn v. Fogg (above).

[13] *Doe d.* Strode v. Seaton, 2 Carr. M. & R. (Exch.) 728, and cases cited.

[14] Prevot v. Lawrence, 51 N. Y. 219; s. p. 6 Am. Law Rev. 10, 12.

lessee, and those holding under him, the rights reserved or possessed in the lease.[1] And it not only precludes the tenant from proving want of title, but equally from availing himself of want of title brought out by plaintiff's own evidence.[2] Eviction need not be shown, if actual cessation of title is proven, and the tenant has made a valid attornment,[3] or upon a valid claim by a third person, under title paramount, has yielded up or abandoned possession.[4] An attornment, made under proper circumstances,[5] to one having paramount title, is equivalent to proof of going out of possession and coming in again under the new landlord.[6] If the eviction was not by judgment of law, the burden is on the tenant to prove the paramount title, and that he yielded in good faith to compulsion.[7] If there was eviction by judgment of law, evidence that the landlord was privy to the action, or had due notice and adequate opportunity to assume charge of the litigation, renders the judgment conclusive on him as evidence of eviction.

A mere acknowledgment or attornment by one already in possession, though evidence of a tenancy, does not raise a conclusive estoppel; but the tenant may show in such case that the party claiming the estoppel was a stranger to the land until the acknowledgment or attornment, or did not legally succeed to the original lessor, and that the tenant himself has a paramount title, and the acknowledgment or attornment was made under mistake or induced by fraud.[8]

15. *Adverse title.*]—Where title in a third person is competent, it should be shown by the usual muniments of title, or by evidence of possession for such a period as raises a presumption of title,[9] or by a former adjudication between the same parties, or their privies, establishing it.[10]

16. *Forfeiture.*]—Where the occurrence of a ground of forfeiture has been shown, the acceptance of subsequent rent is presumptive, but not conclusive, evidence of intent to waive the forfeiture.[11] Lapse of time, and any other circumstance rendering it inequitable to enforce the forfeiture, strengthens the evi-

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[1] Tayl. L. & T. 485; Hilbourn v. Fogg (above).

[2] Dolby v. Isles, 11 Ad. & E. 335; but compare 1 Greenl. Ev. 18th ed. 249, § 211.

[3] Jackson v. Harper, 6 Wend. 666, 670; and see Den v. Ashmore, 2 Zab. 261.

[4] Whalin v. White, 25 N. Y. 465.

[5] See 1 N. Y. R. S. 743, § 3; Lawrence v. Brown, 5 N. Y. 394.

[6] Austin v. Ahearne, 61 N. Y. 19, per DWIGHT, C.

[7] Moffat v. Strong (above); 6 Am. Law Reg. 34, 35.

[8] Ingraham v. Baldwin, 9 N. Y. 47, and cases cited; 6 Am. Law Reg. 27, and cases cited. Compare Austin v. Ahearne (above) and Hardy v. Akerly, 57 Barb. 148.

[9] Treadwell v. Bruder, 3 E. D. Smith, 596.

[10] See, for instance, Yonkers & N. Y. Fire Ins. Co. v. Bishop, 1 Daly, 449.

[11] Manice v. Millen, 26 Barb. 41; Dumpor's Case, 1 Smith's L. Cas. 93, 100.

dence of waiver.[1] In strictness, the question is whether the lessor has manifested an election either way, or none.[2]

If defendant relies on the lessor's consent to the act claimed to be ground of forfeiture, the burden of proof is on the defendant to prove consent.[3]

17. *Assignment.*]—Under an allegation that defendant is in as assignee, his title as heir,[4] or liability on other equitable grounds,[5] may, under the new procedure, be proved if amendment be allowed. So, under an allegation that he was assignee of the whole premises, proof that he was assignee of part only is admissible.[6] The burden of proof is upon the plaintiff to prove the assignment.[7] An assignment by writing, though not under seal, is good.[8] But direct evidence is not required. To charge an assignee with rent, evidence that he held himself forth as such is enough.[9] It is competent to prove his acts and admissions without any express assignment.[10] Having proved the lease, it is *prima facie* sufficient to show any facts from which an assignment may be inferred.[11]

Defendant may prove that he is *not* assignee,—as by showing that the estate created by the lease declared on ceased before his entry,[12] or that he claimed to hold under an adverse title.[13] To entitle him to show eviction from part, as a ground of apportionment, the eviction should be pleaded accordingly.[14] If the defendant relies on the fact that his assignors have paid the rent, the burden is on him to show it.[15] If he relies on the fact that he assigned to another, that assignment may be shown by indirect evidence,[16] as already stated. It is not necessary for him to

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[1] Dumpor's Case, 1 Smith's L. Cas. 93, 97.

[2] Clough v. London & Northwestern Railway Co. L. R. 7 Exch. 26, 34, s. c. 1 Moak's Eng. 148, 157.

[3] Lawrence v. Williams, 1 Duer, 585.

[4] Derisley v. Custance, 4 T. R. 75.

[5] See Mason v. Breslin, 2 Sweeny, 386, 395.

[6] Van Rensselaer v. Gallup, 5 Den. 454; Main v. Davis, 32 Barb. 461. *Contra*, Hare v. Cator, Cowp. 766.

[7] Lansing v. Van Alstyne, 2 Wend. 561.

[8] Holliday v. Marshall, 7 Johns. 211, 213. For other rules as to proving assignment, see Chap. I of this vol.

[9] Carter v. Hammett, 12 Barb. 253; again, 18 Id. 608.

[10] Adams v. French, 2 N. H. 387.

[11] Such, for instance, as that he occupied, and either acknowledged that he held under the lease, (Main v. Davis, 32 Barb. 461, and cases cited; Van Rensselaer v. Secor, Id. 469); or, that he paid rent upon the lease, (Bedford v. Terhune, 30 N. Y. 453, affi'g 1 Daly, 371); or, that he has claimed to be assignee of the term, (Lush v. Druse, 4 Wend. 313); or has rented out the premises as his own, (Armstrong v. Wheeler, 9 Cow. 88); or even that he is in possession, (Williams v. Woodard, 2 Wend. 487; Lansing v. Van Alstyne, Id. 561, 563; Armstrong v. Wheeler, 9 Cow. 88).

[12] Williams v. Woodard, 2 Wend. 487.

[13] City of Boston v. Binney, 11 Pick. 1.

[14] Lansing v. Van Alstyne, 2 Wend. 561.

[15] Jones v. Hausmann, 10 Bosw. 168.

[16] Carter v. Hammett, 12 Barb. 253; again, 18 Id. 608.

show that he has divested himself of a paper title and a legal right.[1]

Defendant is not liable on parol evidence merely that he took a general assignment of all the lessee's property *in trust*.[2] If the lease is not specified in the assignment, the assignee in trust is not liable without evidence manifesting an intent to accept the lease;[3] and he may rebut the presumption arising from his temporary occupation, and prove that he did not accept the lease under the assignment.[4]

18. *Demand.*]—In an action for rent, as distinguished from a proceeding to forfeit the term for non-payment, a demand need not be proved.[5] At common law, where a right of re-entry is claimed on the ground of forfeiture for the non-payment of rent, there must be proof of a demand of the precise sum due, at a convenient time before sunset upon the day when the rent is due upon the land, at the most notorious place on it, though there be no person on the land to pay.[6]

Where demand is made by agent, oral evidence of authority is enough,[7] unless it appear that the authority was in writing and some question is made as to its terms.[8]

19. *Repairs.*]—In an action for rent plaintiff need not, in the first instance, prove performance of his covenant to put in repair.[9] A plaintiff, alleging a breach of a covenant to make repairs, must give some evidence that they were not made, if it be in issue.[10] If he allege that he made repairs, for which he is entitled to recover, he must prove the affirmative, if in issue.[11]

20. *Surrender: Destruction of premises.*]—Under the statute of frauds,[12] which forbids any estate in lands for more than one year, to be created or surrendered, "unless by act or operation of law, or by a deed or conveyance in writing, subscribed by the party" or his agent authorized, in writing,—a surrender by act or operation of law may be inferred from circumstances,[13] and may be proved by evidence that the parties, without express surrender, did some act which implies that they both agreed to con-

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[1] Astor v. L'Amoureux, 4 Sandf, 524; Carter v. Hammett, 18 Barb. 608.
[2] Carter v. Hammett, 12 Barb. 253.
[3] Lewis v. Burr, 8 Bosw. 140.
[4] Bagley v. Freeman, 1 Hilt. 196; *In re* Ten Eyck & Choate, 7 Nat. Bankr. R. 26.
[5] Livingston v. Miller, 11 N. Y. 80.
[6] Prout v. Roby, 15 Wall. 471, and cases cited.
[7] Sheets v. Selden's Lessee, 2 Wall. 178.
[8] See pp. 241 and 480 of this vol.
[9] Harger v. Edmonds, 4 Barb. 256.
[10] Belcher v. M'Intosh, 8 C. & P. 720, 721.
[11] See Levy v. Bond, 1 E. D. Smith, 169.
[12] 2 N. Y. R. S. 134, § 6.
[13] Bailey v. Delaplaine, 1 Sandf. 5.

sider the surrender as made;[1]—for instance, by evidence that with the assent of the parties, a new and valid lease, wholly inconsistent with the continuance of the former, was made, and possession taken under it.[2] If the unexpired term was not more than one year, a parol surrender may be proved.[3] But abrogation of a written lease cannot be shown by evidence of a mere oral disclaimer,[4] or an oral promise to release from further liability.[5]

Evidence of surrender by act of the parties, should bring the fact home to all of them.[6] It will not be implied against the intent of the parties, as manifested by their acts.[7]

A parol relinquishment of part of the premises in consideration of a reduction of the rent, may be proved, notwithstanding the statute of frauds, as a lease from year to year.[8]

If defendant relies on the fact that money has been or might have been realized, by letting the premises to others when defendant refused to occupy, the burden is on him to show it.[9]

A written stipulation cancelling a lease, does not merge the previous oral agreement fixing the terms of the surrender, so as to exclude parol proof of that agreement.[10]

The fact that the tenant or sub-tenant continues to occupy part of the premises after a fire, is not of itself conclusive evidence that the premises are tenantable. Evidence of the circumstances which induced remaining is proper.[11]

21. *Apportionment.*]—One of two joint lessees may prove by parol an apportionment of the premises and rent.[12]

22. *Payment.*]—Evidence of payment and acceptance of rent, for one quarter or period, raises a legal but not conclusive presumption that previous rent had been paid.[13] This presumption is one which requires strong evidence to rebut it.[14] Production

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[1] Beall v. White, 94 U. S. (4 Otto), 382, 389; Walker v. Richardson, 2 M. & W. 882, 892.

[2] Coe v. Hobby, 72 N. Y. 141, affi'g 7 Hun, 159, and cases cited; Amory v. Kannoffsky, 117 Mass. 351, s. c. 19 Am. R. 416.

[3] For instance, by the substitution of another tenant, and receipt of rent from him. Wilson v. Lester, 64 Barb. 433, and cases cited. But this is only a presumption which cannot be indulged against the apparent intent of the parties. Van Rensselaer v. Penniman, 6 Wend. 569.

[4] Jackson v. Kisselbrack, 10 Johns. 336; and see Pugsley v. Aiken, 11 N. Y. 494, rev'g 14 Barb. 114.

[5] Goelet v. Ross, 15 Abb. Pr. 251.

[6] Beall v. White, 94 U. S. (4 Otto), 382; s. p. Bedford v. Terhune, 30 N. Y. 453, affi'g 1 Daly, 371.

[7] Coe v. Hobby (above).

[8] Lounsberry v. Snyder, 31 N. Y. 514.

[9] Greene v. Waggoner, 2 Hilt. 297.

[10] Hope v. Balen, 58 N. Y. 380.

[11] Kip v. Merwin, 52 N. Y. 542; compare Johnson v. Oppenheim, 55 Id. 280.

[12] Van Rensselaer v. Gifford, 24 Barb. 349.

[13] Brewer v. Knapp, 1 Pick. 332, 336.

[14] Pow. on Ev. 97.

of receipts for the former periods, not expressed to be in full, does not suffice to rebut it.[1]

Rent, even though reserved by parol, is not merged by taking a sealed security.[2] If reserved by deed, payment is not necessarily presumed from lapse of time.[3]

23. *Eviction.*]—Under an allegation of wrongful eviction by the landlord, as a defense to claim for rent, a constructive eviction may be proved.[4] A mere trespass is not enough;[5] nor is a failure to give possession.[6] But an eviction from part is enough,[7] and so is an obstruction to the beneficial enjoyment of the whole property, and a diminution of the consideration of the contract, by the landlord's acts,[8] unless the tenant remained in possession of the entire premises until the rent fell due.[9]

24. *Acts of waste.*]—The intent is not essential; and under an allegation that the waste was wrongfully committed, plaintiff may prove that it was negligently committed.[10] The opinion of a qualified witness is competent as to the amount of waste committed,—for instance, the number of acres from which timber has been cut, and the like;[11] but not whether the cutting of timber was a benefit or injury to the estate,[12] nor, if an injury, how much.[13] Evidence of the value of timber cut may be received, and of what part of it was suitable for timber.[14]

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[1] Patterson v. O'Hara, 2 E. D. Smith, 58.
[2] Cornell v. Lamb, 20 Johns. 407.
[3] Lyon v. Adde, 63 Barb. 89.
[4] Dyett v. Pendleton, 7 Cow. 727.
[5] Lounsbery v. Snyder, 31 N. Y. 514, and cases cited.
[6] Vanderpool v. Smith, 4 Abb. Ct. App. Dec. 461.
[7] Christopher v. Austin, 11 N. Y. 216, affi'g 2 E. D. Smith, 203, 209, note; Peck v. Hiler, 24 Barb. 178, s. c. 14 How. Pr. 155; compare a further decision, in 31 Barb. 116; Colburn v. Morrill, 117 Mass. 262, s. c. 19 Am. R. 415.
[8] Dyett v. Pendleton, 8 Cow. 727, rev'g 4 Id. 581; and see 106 Mass. 201.
[9] Edgerton v. Page, 10 Abb. Pr. 119, s. c. 20 N. Y. 281; 18 How. Pr. 359, affi'g 1 Hilt. 320; 5 Abb. Pr. 1; 14 How. Pr. 116; Academy of Music v. Hackett, 2 Hilt. 217, and cases cited; De Witt v. Pierson, 112 Mass. 8, s. c. 17 Am. R. 58.
[10] Robinson v. Wheeler, 25 N. Y. 252.
[11] Woodward v. Gates, 38 Geo. 205.
[12] McGregor v. Brown, 10 N. Y. 114.
[13] Van Deusen v. Young, 29 N. Y. 9, rev'g 29 Barb. 9; Robertson v. Knapp, 35 N. Y. 91, s. c. 33 How. Pr. 309.
[14] Rutherford v. Aiken, 3 Supm. Ct. (T. & C.) 60; compare Harder v. Harder, 26 Barb. 409.

CHAPTER XXIX.

ACTIONS ON JUDGMENTS.

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I. General Principles.

1. *The several modes of proof.*]—There are four methods of proving a judgment; viz.: by producing 1, a certified copy; 2, a sworn copy; 3, an exemplification; and, 4, the original record.[1] Oral evidence,[2] the transcript filed and docketed in another county,[3] or the production of process issued on the judgment,[4] is not competent except as secondary evidence after proper foundation has been laid for it.

2. *Certified copies.*]—Proof by certified copy, permitted at common law in case of domestic judgments of courts of general

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[1] Lansing v. Russell, 3 Barb. Ch. 325; Baker v. Kingsland, 10 Paige, 366; Handly v. Greene, 15 Barb. 601. Statutes prescribing formalities for certified copies, do not by implication affect the common law modes of proof in other ways. Peck v. Farrington, 9 Wend. 94; N. Y. Code Civ. Pro. § 962.

[2] Gass v. Stinson, 2 Sumn. 605.

[3] Handly v. Greene, 15 Barb. 601.

[4] Smallwood v. Violet, 1 Cranch C. Ct. 516.

jurisdiction,[1] is now generally, expressly sanctioned by statute, requiring the whole record to be certified; and is usually the most convenient. Proof of the official character of the authenticating officer, his signature, and that it was made within his jurisdiction, is not necessary, except so far as made so by the statute.[2] The certificate must be under the seal of the court, if any,[3] unless produced in the same court or a branch thereof.[4]

The clerk's certificate of the existence of a judgment is not evidence of it unless made so by statute;[5] and statute authority to certify a copy for specific purposes, does not authorize to make certified copies which shall be generally admissible in evidence.[6]

3. *Exemplifications.*]—An exemplification may be said to be a duplicate of the record, authenticated under the great seal of the State, or the seal of the court, with a certificate from the authorities appearing to have official custody of the record, that they have caused it to be exemplified. It is admissible without a certificate that it has been compared and contains the whole of the record, &c., as in case of a certified copy.[7]

4. *Sworn copies.*]—Notwithstanding the statute, a copy may be proved by producing it, with a witness to testify that he compared it with the original record, in the proper court. But it is essential to show, by evidence extrinsic to the paper, that the record was found in the proper place of deposit, or in the hands of the officer in whose custody the records of the court are kept; this cannot be shown by any light reflected from the record itself.[8] If a certified copy or exemplification is rejected for defect of authentication, counsel may fall back on this mode of proof.[9]

5. *Imperfect records, &c.*]—Where the law does not require a formal record to be made up, the entries which are permitted to stand in its place are admissible;[10] but in such case, if the judgment be not one of the same State or of the United States, there should be evidence of the law sanctioning such entries as sufficient.[11] Otherwise they are not competent[12] except as second-

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[1] Fort v. Burch, 6 Barb. 60, 76; and see Bergen v. Bradley, 36 N. Y. 316; U. S. v. Percheman, 7 Pet. 85; but compare Errickson v. Smith, 2 Abb. Ct. App. Dec. 70.

[2] Thurman v. Cameron, 24 Wend. 87; Hatcher v. Rocheleau, 8 N. Y. 94; Merritt v. Lyon, 3 Barb. 110.

[3] N. Y. Code Civ. Pro. § 958.

[4] Id. § 959. In New York and some other States the seal may be impressed on paper, without wax. Id. § 960.

[5] Lansing v. Russell, 3 Barb. Ch. 325.

[6] Coolidge v. N. Y. Firem. Ins. Co. 14 Johns. 314.

[7] Merritt v. Lyon, 3 Barb. 110; Lazier v. Westcott, 26 N. Y. 146; Vandevoort v. Smith, 2 Cai. 155. In the case even of an inferior domestic court, an exemplification is sufficient. Vail v. Smith, 4 Cow. 71; Robert v. Good, 36 N. Y. 411.

[8] Hutchins v. Gerrish, 52 N. H. 205, s. c. 13 Am. R. 19.

[9] See p. 23 of this vol.

[10] Rosc. N. P. 135; Philadelphia, &c. R. R. Co. v. Howard, 13 How. U. S. 307; Washington, &c. Steam Packet Co. v. Sickles, 24 Id. 333.

[11] Taylor v. Runyan, 3 Iowa, 474; 9 Id. 522.

[12] Levering v. Dayton, 4 Wash. C. Ct. 698. Enrollment is not necessary to make

ary evidence. In proving a judgment had under the new proceedure, for the purpose of an action thereon, whatever is made by law a part of the record or judgment roll should be proved; and this is enough in the first instance.[1] At common law it is enough alike in case of a domestic judgment or one of a sister State, to prove the record of judgment alone, without the writ or other proceedings before or after judgment,[2] and defendant may prove these if he wish. Signature of an original record by the clerk is not essential, unless made so by statute.[3] The omission, if a defect, is amendable.[4] To prove a judgment by confession, the warrant or consent should also be proved.[5]

The question whether the document is only an extract or a copy of the whole record, is determined not by its appearance, but by the attestation.[6] And, for this purpose, a certificate substantially importing that it is a faithful and complete copy is enough, though it do not use the most appropriate words.[7] Otherwise, if the writing certified does not purport to be a record;[8] or if the form of the certificate is prescribed by the statute.[9]

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the bill, answer, and original decree, evidence (Winans v. Dunham, 5 Wend. 47; and see Bates v. Delavan, 5 Paige, 299; Fort v. Burch, 6 Barb. 60), unless required by law. But that which has been enrolled cannot be contradicted or set aside by what is not enrolled (Crosswell v. Byrnes, 9 Johns. 287; McKnight v. Dunlop, 4 Barb. 36; Waldron v. Green, 4 Wend. 409).

[1] Clark v. Depew, 25 Penn. St. 509; Knapp v. Abell, 10 Allen, 485; Barringer v. King, 5 Gray, 9.

[2] Rathbone v. Rathbone, 10 Pick. 1; Miller v. White, 10 Abb. Pr. N. S. 385, s. c. 59 Barb. 434. Compare, *contra*, Irvine v. Lumberman's Bank, 2 Watts & S. 190; Edmiston v. Schwartz, 13 Serg. & R. 135; Ashley v. Laird, 14 Ind. 222. At common law a duly authenticated copy of parts of a record is properly admissible in evidence. The whole is not necessary. It is sufficient that extracts are furnished to show *prima facie* the facts sought to be proved. Gardere v. Col. Ins. Co. 7 Johns. 518; Packard v. Hill, 7 Cow. 434; 5 Wend. 375; see 8 N. Y. 92, and Code of Civ. Pro. § 958. If the decree or judgment shows jurisdiction and contains all the facts required, the proceedings on which it was founded are not essential to its competency; but if the particular issue raised is material, the pleadings, and whatever else is relevant, should appear. Rose. N. P. 128.

[3] Goelet v. Spofford, 55 N. Y. 647; Secombe v. Steele, 20 How. U. S. 94; compare Morris v. Patchin, 24 N. Y. 394.

[4] Van Alstyne v. Cook, 25 N. Y. 489; Artisans' Bank v. Treadwell, 34 Barb. 553.

[5] Rathbone v. Rathbone, 10 Pick. 1; Hill v. Tiernan, 4 Mo. 316; Rape v. Heaton, 9 Wisc. 328.

[6] Voris v. Smith, 13 Serg. & R. 334.

[7] Thus, "a true copy;" or, "a copy of the record;" or, a "true transcript of the record and proceedings" * * "as fully as they now exist among the records of my office;" or, "that the foregoing is truly taken from the record of proceedings" of the court; or, "a copy of records truly taken and correctly copied from records"; —imports a complete copy, unless the contrary appears from the face of the papers. Edmiston v. Schwartz, 13 Serg. & R. 135; Voris v. Smith, Id. 334.; McCormick v. Deaver, 22 Md. 187; Ferguson v. Harwood, 7 Cranch, 408; Reber v. Wright, 68 Penn. St. 471; Case v. McGill, 8 Md. 10; Caulfield v. Bullock, 18 B. Monr. 494.

[8] Ferguson v. Harwood (above).

[9] The New York statute (Code Civ. Pro. §§ 957, reproducing 3 R. S. 6th ed. 668), requires that the person authorized to certify, must state, in his certificate, that it has been compared by him with the original, and that it is a correct transcript therefrom, and of the whole of the original.

The fact that the judgment roll or exemplification contains alterations or interlineations marked and verified as such by the initials of the clerk,[1] or that the roll contains no summons, nor the order of reference on which the judgment was obtained, does not render it wholly incompetent,[2] if jurisdiction appears.[3] Amendments duly authenticated may be relied on to support the judgment.[4] The mere fact that a paper was found on file amongst the papers in a cause is not evidence that it is part of the record.[5]

6. *Lost judgment.*]—Proof that the judgment roll is not found in the office of the clerk whose duty it is to keep it[6] admits secondary evidence of its former existence and contents.[7] A copy of a duly authenticated copy, not apparently within the power of the party to produce, may be received as secondary evidence.[8] The destruction, or loss from the files, of the papers by which the court acquired jurisdiction, does not divest the jurisdiction; for having been once there, that court is presumed to know their contents, and may act on that knowledge, and may resort to parol proof to aid its memory.[9]

7. *Date.*]—The record ought to indicate the time and place of the recovery of the judgment.[10] The text of the record is evidence of the time of rendition, and cannot strictly be corrected by the date of the signing, except on amendment in the court where the judgment was had;[11] but the error may be shown and cured by the clerk's certificate.[12] If the date be blank, it may be supplied by extrinsic evidence in aid of the record.[13] In the absence of proof of the hour, the judgment may, for reasons of public policy, be presumed to have been entered at the beginning of the day.[14]

8. *Identity of parties.*]—In addition to the principle already

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[1] Lazier v. Westcott, 26 N. Y. 146.
[2] Calkins v. Packer, 21 Barb. 275. *Contra*, James v. Stookey, 1 Wash. C. Ct. 330.
[3] See the statute of jeofails, N. Y. Code of Civ. Pro. § 721.
[4] Wetherill v. Stillman, 65 Penn. St. 105.
[5] Sargeant v. State Bank of Indiana, 12 How. U. S. 371, affi'g 4 McLean, 339. Compare Bosworth v. Vanderwalker, 53 N. Y. 597.
[6] N. Y. Code Civ. Pro. § 921.
[7] Mandeville v. Reynolds, 68 N. Y. 528, 533, affi'g 5 Hun, 338.
[8] Cornett v. Williams, 20 Wall. 226.
[9] Railw. Co. v. Ramsey, 22 Wall. 322; and see 6 Cent. L. J. 100.
[10] Phelps v. Tilton, 17 Ind. 427.
[11] Vail v. Smith, 4 Cow. 71. As to effect of a date apparently on a *dies non*, see Moore v. Tracy, 7 Wend. 229; and *Re* Worthington, 16 Alb. L. J. 63.
[12] Jackson v. Davis, 18 Johns. 7.
[13] See McKnight v. Devlin, 52 N. Y. 399. The fiction of law, that a term consists of but one day, cannot be invoked to antedate the judicial rejection of a claim, so as to render operative a grant which would otherwise be without effect. Newhall v. Sanger, 92 U. S. (2 Otto), 761.
[14] Boyer's Estate, 51 Penn. St. 432, STRONG, J., dissented.

stated,[1] it may be observed that, if the names are different, extrinsic evidence of identity is competent[2] and necessary.[3]

9. *Docketing.*]—Docketing may be proved by evidence that a transcript of judgment was received by the county clerk, and that he furnished a transcript thereof, which is produced.[4]

10. *Impeaching.*]—In any action, on any judgment recovered in any court, jurisdiction may always be impeached,[5] unless the party is estopped.[6] At common law a judgment of a court having jurisdiction (except judgments by cognovit or warrant of attorney) could be impeached by a party, only by error, new trial or bill in equity.[7] Under the new procedure, any ground which would sustain a bill in equity for relief,[8] may be proved under a proper answer, in defense of an action on the judgment.[9] A denial of the existence of the judgment does not admit evidence in contradiction of the record, that it was without jurisdiction,[10] but an answer putting in issue its legality will.[11]

11. *Reversal.*]—Reversal may be proved under a general denial;[12] vacatur, it is held, should be specially pleaded,[13] but amendment should be allowed if defendant is not misled. If the judgment is proved by record, an order or minute, not of record, is not competent primary evidence of reversal.[14]

12. *Satisfaction.*]—Although accord and satisfaction is not enough,[15] payment may be proved by parol. The issue of execution is not presumptive evidence of payment,[16] but may be with further evidence of levy and of circumstances from which to infer satisfaction.[17] A satisfaction piece is evidence of payment,[18] but not conclusive.[19]

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[1] Page 101 of this vol.

[2] Evans v. Patterson, 4 Wall. 231; Stevellé v. Read, 2 Wash. C. Ct. 274.

[3] Berber v. Kerzinger, 23 Ill. 346; Williams v. Bankhead, 19 Wall. 570.

[4] Lewis v. Ryder, 13 Abb. Pr 1.

[5] Thompson v. Whitman, 18 Wall. 457. Including fraud in inducing the exercise of jurisdiction. Stanton v. Crosby, 9 Hun, 370. *Contra*, see Luckenbach v. Anderson, 47 Penn. St. 123; Adams v. Saratoga & Washington R. R. Co. 10 N. Y. 328.

[6] Dyckman v. Mayor, &c. of N. Y., 5 N. Y. 434, affi'g, 7 Barb. 498; Sheldon v. Wright, 5 N. Y. 497.

[7] See Christmas v. Russell, 5 Wall. 305.

[8] See Crim v. Handley, 94 U. S. (4 Otto), 652; Stilwell v. Carpenter, 2 Abb. New Cas. 238; and see 7 Am. R. 136, n.

[9] Mandeville v. Reynolds, 68 N. Y. 528, 542, affi'g 5 Hun. 338; Dobson v. Pearce, 12 N. Y. 165; Rogers v. Gwinn, 21 Iowa, 58. Compare Stanton v. Crosby, 9 Hun, 370. The defendant is not necessarily entitled to read the testimony contained in the record in support of impeachment. Tappan v. Beardsley, 10 Wall. 427.

[10] Hill v. Mendenhall, 21 Wall. 455.

[11] Kinsey v. Ford, 38 Barb. 195.

[12] Briggs v. Bowen, 60 N. Y. 454.

[13] Carpenter v. Goodwin, 4 Daly, 89. *Contra*, Kinsey v. Ford, 38 Barb. 195.

[14] McKnight v. Dunlop, 4 Barb. 36; Niles v. Totman, 3 Id. 594.

[15] Mitchell v. Hawley, 4 Den. 414, and cases cited.

[16] Runyan v. Weir, 8 N. J. L. (Halst.) 286.

[17] Miller v. Smith, 16 Wend. 425, 445, rev'g 14 Id. 188.

[18] Booth v. Farmers' & Mechanics' Bank, 50 N. Y. 396, rev'g 4 Lans. 301.

[19] Lownds v. Remsen, 7 Wend. 35.

II. Judgments of Courts within the State.

13. *The New York practice.*]—The most convenient way, in case of courts of record, is to produce a copy of the judgment roll, certified as already stated.[1] The jurisdiction of the superior city courts is now presumed by force of the statute.[2] The judicial presumptions of jurisdiction, which are stated below, respecting judgments of sister States,[3] are in their nature equally applicable in favor of domestic judgments.

14. *Justice's judgment.*]—A judgment of a justice of the peace in New York, is proved in a court of the same State, by a transcript from his docket, subscribed by him, and authenticated by a sealed certificate of the county clerk, to the effect that the person subscribing the transcript was, at the date of the judgment therein mentioned, a justice of the peace of that county, and that the clerk is acquainted with his handwriting, and verily believes that the signature to the transcript is genuine,[4] provided the transcript shows upon its face that he had jurisdiction both of the person and the subject-matter.[5] The transcript is conclusive evidence of all but the jurisdictional facts.[6]

Or it may be proved by producing the docket, and proving it by his oath;[7] or, in case of his death or absence, producing the original minutes, with proof of his handwriting, or a copy of the minutes sworn to by a witness as having been compared with the original minutes, with proof that they were in his handwriting.[8]

It may be proved by the parol testimony of the justice only by consent.[9] In a second action before the same justice, his docket, or a transcript certified by him, is evidence, *per se*, of the former judgment.[10]

The justice's acquiring jurisdiction of the person may be proved in a collateral proceeding, by either 1. The constable's return; 2. An entry on the justice's docket, made at the time; 3. Direct evidence of the service; or 4. The testimony of the justice, showing positively that the service was proved before him.[11]

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[1] Paragraph 2; Code Civ. Pro. §§ 933, 962.
[2] Code Civ. Pro. § 266.
[3] Paragraphs 22 to 25.
[4] N. Y. Code Civ. Pro. § 939.
[5] Benn v. Borst, 5 Wend. 292.
[6] Hard v. Shipman, 6 Barb. 621; and see Brintnall v. Foster, 7 Wend. 103; Smith v. Compton, 20 Barb. 262.
[7] N. Y. Code Civ. Pro. § 940; Boomer v. Laine, 10 Wend. 525. Notwithstanding that on removing from the town he failed to deposit his docket-book with the town clerk. Carshore v. Huyck, 6 Barb. 583.
[8] N. Y. Code Civ. Pro. § 939; Baldwin v. Prouty, 13 Johns. 430; Pratt v. Peckham, 25 Barb. 195.
[9] Lawrence v. Houghton, 5 Johns. 129; Webb v. Alexander, 7 Wend. 281.
[10] Smith v. Frost, 5 Hill, 431; Groff v. Griswold, 1 Den. 432; N. Y. Code Civ. Pro. § 938.
[11] Reno v. Pinder, 20 N. Y. 298, rev'g, 24 Barb. 423.

A judgment of a district court of the city of New York, is proved by producing the summons, with entry of judgment indorsed.[1]

III. Rules peculiar to Judgments of Courts of Sister States, &c.

15. *Different methods of proof.*]—Judicial proceedings of any other State in the Union, are entitled to full faith and credit under the constitution,[2] but to secure the constitutional effect for a judgment of a sister State, it must be proved in conformity with the act of Congress,[3] if it is within the act.[4] The act of Congress passed to give effect to this provision,[5] does not enable us to prove all judgments of sister States, but only those of courts having a record and a clerk; but, on the other hand, the mode of proof it gives extends to judgments of courts of territories, including the District of Columbia,[6] and those of any country under the jurisdiction of the United States. The act does not exclude other modes of authentication.[7]

The other modes are, 1. That prescribed by the law of the forum;[8] 2. Those sanctioned by the common law,[9] viz., exemplification under the great seal of the State;[10] original record, proved by witness;[11] and, examined copy proved by a witness who compared it.[12]

16. *What judgments may be proved under the act.*]—A judgment of any court of record[13] (or a court of chancery though not

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[1] Carpentier v. Willett, 6 Bosw. 25, s. c. 18 How. Pr. 400.

[2] Const. of U. S. art. 4, § 1.

[3] Act of May 26, 1790; same stat. R. S. U. S. § 905.

[4] Davis, J., Caperton v. Ballard, 14 Wall. 242; Homer v. Spellman, 78 Ill. 206. And to secure a review in the U. S. Supreme Court of a refusal of the right, the record must show that the provision of the constitution and the claim thereon were brought to the notice of the State court. Hoyt v. Shelden, 1 Black, 518.

[5] U. S. R. S. § 905.

[6] Hughes v. Davis, 8 Md. 27.

[7] Kingman v. Cowles, 103 Mass. 283; Snyder v. Wise, 10 Penn. St. 157; Ellmore v. Mills, 1 Haywood N. C. 359; Baker v. Fields, 2 Yeates, 532. *Contra*, State v. Twitty, 2 Hawks N. C. 441; Tarleton v. Briscoe, 1 Marsh. (Ky.) 66.

[8] Latterett v. Cook, 1 Iowa, 1; English v. Smith, 26 Ind. 445; Phelps v. Tilton, 14 Id. 222; Ault v. Zehring, 38 Id. 429; Dragoo v. Graham, 17 Id. 427; Gatling v. Robbins, 8 Id. 184; Snyder v. Wise, 10 Penn. St. 157; Coffee v. Nealy, 2 Heisk. (Tenn.) 304; Capen v. Emery, 5 Metc. (Mass.) 436; Simons v. Cook, 29 Iowa, 324; Railroad Bank v. Evans, 32 Id. 202; Caulfield v. Bullock, 18 B. Monr. (Ky.) 494; Mangun v. Webster, 7 Gill. (Md.) 178.

[9] Goodwyn v. Goodwyn, 25 Geo. 203; Hutchins v. Gerrish, 52 N. H. 205, s. c. 13 Am. R. 19; Mahony v. Gunther, 10 Abb. Pr. 435; Peck v. Farrington, 9 Wend. 44.

[10] Price v. Higgins, 1 Litt. (Ky.) 273; Haggin v. Squires, 2 Bibb, 334.

[11] Kean v. Price, 12 Serg. & R. 203.

[12] Hutchins v. Gerrish (above). Some courts also allow proof by a certificate conforming to the law of the State where the judgment was rendered. Belton v. Fisher, 44 Ill. 32; and see Williams v. Wilkes, 14 Penn. St. 228; Bissell v. Edwards, 5 Day, 263.

[13] Thurber v. Blackbourne, 1 N. H. 242; Judkins v. Union Mut. Fire Ins. Co. 37 Id. 470. According to the language of some authorities the record is not admissible

technically a court of record[1]), within the United States,[2] or docketed in the office of a clerk of such a court, under a statute declaring that so docketed it shall be considered a judgment of that court,[3] may be proved under the act.

17. *Requisites of proof under the act.*]—Four things constitute this proof, 1. "A copy of the record or judicial proceeding at length.[4]

2. "The attestation of the clerk; and

3. "The seal of the court annexed, if there be a seal, together with;

4. "A certificate of the judge, chief justice, or presiding magistrate, as the case may be, that the said attestation is in due form."[5]

18. *Certifying officers.*]—Where a judge is *ex officio* clerk, either by express statute or by implication—as may be the case with a surrogate, or a justice of the peace whose court is a court of record,—he may[6] and must[7] certify in each capacity. The attestation and certificate must make the identity of the certifying officers clear.[8] If there has been a substitution of courts and transfer of record, the clerk and judge of the succeeding court may certify;[9] and a statement in the certificate of the clerk[10] or

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unless founded on personal service or appearance. The better view is that this goes to the effect of the judgment, not to the admissibility of the document in evidence. Even if the rule be to some extent sound, it is too broadly stated, for a judgment on an award of arbitrators under the statute is admissible. Steeve v. Tenney, 50 N. H. 461. But a replevin bond declared by statute to have the effect of a judgment, is not within the act. Foote v. Newell, 29 Mo. 400.

There is no presumption as to whether a justice's court is or is not a court of record within this rule. The State statute should be proved to show the fact. Pelton v. Platner, 13 Ohio, 209.

A new record made by order of court, of a lost or destroyed judgment, may be authenticated under the act of Congress. Robinson v. Simmons, 7 Phila. 127. A judgment of a proper court, though rendered by a temporary judge, is within the act (Walker v. Sleight, 30 Iowa, 310); but a judgment of special commissioners is not (Taylor v. Barron, 30 N. H. 78); unless by reason of its record being by law part of the records of a court. Taylor v. Barron, 35 Id. 484.

[1] McKim v. Odorn, 12 Me. 94; Low v. Mussey, 41 Vt. 393; Evans v. Tatem, 9 Serg. & R. 852; Moore v. Adie, 18 Ohio, 430.

[2] Or a country subject to its jurisdiction. U. S. R. S. § 905. Including courts of the United States. Buford v. Hickman, Hempst. 232. A judgment of a State court may be thus proved although at the time the judgment was rendered the State was in secession. Steeve v. Tenney, 50 N. H. 461. But the effect of such judgment is another question. Pennywit v. Kellogg, 1 Cin. Super. Ct. 17; Pennywit v. Foote, 27 Ohio St. 600. The question of full faith and credit is another matter.

[3] Upham v. Damon, 12 Allen, 98; s. p. Clemmer v. Cooper, 24 Iowa, 185. Compare Aldrich v. Chubb, 35 Mich. 350.

[4] A copy from the minutes is not admissible under the act. Pepin v. Lachenmeyer, 45 N. Y. 27; Ferguson v. Narwood, 7 Cranch, 408.

[5] U. S. R. S. § 905.

[6] Van Storch v. Griffin, 71 Penn. St. 240; Bissell v. Edwards, 5 Day Conn. 363; Martin v. Wells, 43 Vt. 428.

[7] Duvall v. Ellis, 13 Mo. 203; Catlin v. Underhill, 4 McLean, 199.

[8] Kirkland v. Smith, 2 Mart. La. N. S. 497; Harper v. Nichol, 13 Tex. 151; Phelps v. Tilton, 14 Ind. 222; Geron v. Felder, 15 Ala. 304.

[9] Thomas v. Tanner, 6 Monr. 52; Capen v. Emery, 5 Metc. (Mass.) 436; Manning v. Hogan, 26 Mo. 570.

[10] Darrah v. Wilson, 36 Iowa, 116; Gatling v. Robbins, 8 Ind. 184.

judge[1] showing the transfer of jurisdiction and change of name and seal, is sufficient *prima facie*, on those points, without other proof of the law.[2] But this is not essential. The court may even presume a change in the legislative apportionment of districts, in order to render the record and the certificate consistent.[3]

19. *Clerk's attestation.*]—The clerk's attestation is to be in a form sanctioned by the local law under which he acts; but the judge's certificate is conclusive evidence that it is so. The use of the word "record" is not essential.[4] It need not certify to the official character of the judge who authenticates the clerk's attestation;[5] but so doing does not prejudice.[6] An attestation signed by a deputy clerk is not sufficient, although the deputy clerk be authorized by the law of the State to certify,[7] and the judge's certificate states that he is.[8]

20. *Seal.*]—The seal should be affixed to the clerk's attestation or to the record itself; rather than to the judge's certificate attached.[9] If there be no seal that fact should be stated in the certificate of the clerk or judge.[10] A statement in an attestation expressed to be by the clerk of the court, that it is the seal of his office as such, sufficiently imports that it is the seal of the court.[11]

21. *Judge's certificate.*]—The certificate of the judge is indispensable;[12] and should be annexed to the copy record.[13] The record or certificate must indicate that the certifying officer was *the* judge, chief justice or presiding magistrate.[14] His description as such appearing either upon the record or the certificate, is enough.[15] If it appear either by the certificate or the record that there was more than one judge, it must also appear that the certifying judge was the chief justice or presiding magistrate[16] of the court,[17] or was a legally equivalent officer,[18] or that there was no such of-

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[1] Capen v. Emery (above).
[2] Gatling v. Robbins (above).
[3] Hatcher v. Rocheleau, 18 N. Y. 86.
[4] Grover v. Grover, 30 Mo. 400.
[5] Gavit v. Snowhill, 2 Dutch. 76.
[6] Young v. Chandler, 13 B. Mon. 252.
[7] Lathrop v. Blake, 3 Penn. St. 383. *Contra*, Greasons v. Davis, 9 Iowa, 219.
[8] Morris v. Patchin, 24 N. Y. 394.
[9] See Turner v. Waddington, 3 Wash. C. Ct. 126.
[10] Kirkland v. Smith, 2 Mart. La. N. S. 497; Alston v. Taylor, 1 Hayw. (Tenn.) 385.
[11] Clark v. Depew, 25 Penn. St. 509; Coffee v. Nealy, 2 Heisk. (Tenn.) 304.
[12] Hutchins v. Gerrish, 52 N. H. 205, s. c. Am. R. 19, and cases cited; Barbour v. Watts, 2 Marsh. (Ky.) 290; Craig v. Brown, Pet. C. Ct. 352.
[13] Norwood v. Cobb, 20 Tex. 588.
[14] Kirkland v. Smith, 2 Mart. La. N. S. 497; Settle v. Alison, 8 Geo. 201.
[15] Mudd v. Beauchamp, Litt. Sel. Cas. 142.
[16] Stephenson v. Bannister, 3 Bibb (Ky.) 369.
[17] Settle v. Alison, 8 Geo. 201; Allen v. Allen, Min. (Ala.) 240.
[18] A description that imports merely the fact of having presided (Stephenson v. Bannister, 3 Bibb [Ky.], 369); or of seniority (Id.); or of being the presiding magistrate of the county, not of the court (Settle v. Alison, 8 Geo. 201). is not enough. But a description which is apparently a legal title of the head of the court, such as

ficer.[1] If there is nothing in the record or certificate to indicate that there was more than one judge of the court, it will not be presumed that there was another; but a certificate by the judge, whether stating that he is sole judge[2] or not,[3] is admissible; and the law of the State may be produced to show whether there was more than one,[4] and whether there was a chief justice or presiding magistrate.[5]

It is essential that the certificate state that the attestation of the clerk is in due form.[6] On this point it is conclusive.[7]

The certificate itself is presumptive proof of the official character of the certifying magistrate.[8] It need not certify to the clerk's official character,[9] nor to his signature, nor to the seal.[10] The fact that its date is later than that of the clerk's attestation is held not an objection, even though it state that the clerk *is* clerk, not that he *was*.[11]

22. *Presumption in favor of jurisdiction.*[12]]—The whole rec-

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"President" of the court, is (Gavit v. Snowhill, 2 Dutch. 76. *Contra*, Hudson v. Daily, 13 Ala. 722). So if the court is chancery, the chancellor's certificate is enough (Scott v. Blanchard, 8 Mart. La. N. S. 303).

[1] Slaughter v. Cunningham, 24 Ala. 261.

[2] Van Storh v. Griffin, 71 Penn. 240; Pearl v. Wellmann, 3 Gilm. 311.

[3] Central Bank v. Veasey, 14 Ark. 672; Butler v. Owen, 2 Eng. (Ark.) 369.

[4] Bennett v. Bennett, Deady, 299.

[5] Foster v. Taylor, 2 Overt. (Tenn.) 191, and see Huff v. Campbell, 1 Stew. & P. (Ala.) 543.

[6] Smith v. Blagge, 1 Johns. Cas. 238; Trigg v. Conway, Hempst. 538; Craig v. Brown, Pet. C. Ct. 352; Duvall v. Ellis, 13 Mo. 203; Snyder v. Wise, 10 Penn. St. 157. It is not necessary to say "in due form *of law*." Blair v. Caldwell, 3 Mo. 353 [249]; Grover v. Grover, 30 Mo. 400.

[7] Hatcher v. Rocheleau, 18 N. Y. 86, and cases cited.

[8] Hatcher v. Rocheleau, 18 N. Y. 86.

[9] Ducommon v. Hysinger, 14 Ill. 249; McQueen v. Farron, 4 Mo. 212; Linch v. McLemore, 15 Ala. 632.

[10] Cases in note (above).

[11] Lothrop v. Blake, 3 Penn. St. 483.

[12] The great conflict of opinion presented in the books, on this point, and on the connected question of the effect of a judgment, prevents the reader from reaching a firm conclusion as to how far he may rely on this presumption, unless he takes care to appreciate the change in the interpretation of common law rules which a century of experience under the American judicial organization and practice has wrought. Anciently, tribunals of special statutory origin and powers were not favored with this presumption by the great courts which represented the king and derived their authority from the royal writ; but by far the greater number of American courts of general jurisdiction, although proceeding by personal service and hearing, according to the methods of the great common law and equity courts, have a statutory origin, and rely upon the statute for the definition of their powers. Moreover, the universality of written records has confused the line of distinction between courts of record and not of record. Again, a judgment, once considered to be the voice of the court, and therefore the most solemn of utterances, importing absolute verity, is recognized, under the new procedure, as the act of the attorney, done under the supervision or sanction of the court or its clerk; and hence is open to inquiry on almost every point except the merits of the adjudication and the formality of proceeding and sufficiency of evidence by which that adjudication was reached. Lastly, great advance has recently been made in the application of the constitutional rule of "full faith and

ord of the proceedings on which the judgment depends should be produced, in order to show how far it may be conclusive. The transcript must show that the proceedings are clothed with the forms necessary to the validity of a judgment in the State from which it comes.[1] Subject to this general rule, which, of course, involves a consideration of the requisites of a judgment by the law of the sister State, the following presumptions apply. Recitals of jurisdictional facts in the judgment are presumptive, but not conclusive evidence of those facts.[2] To render the judgment presumptively valid, it is enough, in the first instance, if it appear either from averment or proof in the record, that the court had jurisdiction of the subject, and of the parties,[3] and that the judgment was actually rendered. The courts may take judicial notice as to whether the court of the other State is by its law a court of general jurisdiction;[4] or whether it had jurisdiction of a special and statutory proceeding;[5] and it is its duty to do so if the record is proved under the act of Congress.

If the court be one of general jurisdiction in respect of subjects,[6] and proceeding within the general scope of its power, although it be a local court,[7] the law presumes that it had jurisdiction of the subject-matter,[8] and that it acquired jurisdiction of the person,[9] unless something to indicate the contrary appears in the record.[10] The same principle applies, even though the proceeding be under a special statute, or in the exercise of probate or admiralty jurisdiction,[11] if only it be by service of process personally or *in rem*, in substantial accord with common law or equity principles as to acquiring jurisdiction by personal service

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credit." The rules of presumption stated in the text are in consonance with the latest decisions of our courts having highest authority on these questions, but numerous earlier cases, contrary to these conclusions, which space does not allow us to cite, may be found in the reports.

[1] McLaren v. Kehler, 23 La. Ann. 80, s. c. 8 Am. R. 591.

[2] Porter v. Bronson, 19 Abb. Pr. 236, s. c. 29 How. Pr. 292.

[3] Maxwell v. Stewart, 22 Wall. 77; Sweeny v. Lomme, Id. 213.

[4] Rae v. Hulbert, 17 Ill. 572; Butcher v. Bank of Brownsville, 2 Kans. 70; Munn v. Sturges, 22 Ark. 389; Buffum v. Stimpson, 5 Allen, 591; Clarke's Adm'r v. Day, 2 Leigh (Va.), 172; Kemp v. Mundell, 9 Id. 12; Coffee v. Nealy, 2 Heisk. (Tenn.) 304.

[5] Folger v. Columbian Ins. Co. 99 Mass. 267; s. p. Mills v. McCabe, 44 Ill. 194.

[6] For the distinction between the territorial and the subject limits of jurisdiction, see Landers v. The Staten Island Ferry Co. 13 Abb. Pr. N. S. 338.

[7] Such as the usual American circuit courts, courts of common pleas (Harvey v. Tyler, 2 Wall. 328); and although it be subject to appeal (Id.). *Contra*, McLaughlin v. Nichols, 13 Abb. Pr. 244.

[8] Unless it be of a nature not cognizable without statute authority, such as divorce. Commonwealth v. Blood, 97 Mass. 538.

[9] Voorhees v. Bank of U. S. 10 Pet. 449; Harvey v. Tyler, 2 Wall. 342; Galpin v. Page, 18 Id. 350; Reber v. Wright, 68 Penn. St. 471; Dunbar v. Hallowell, 34 Ill. 168; Wilcox v. Kassick, 2 Mich. 165. Compare City Bank v. Dearborn, 20 N. Y. 244. This presumption avails even against infant defendants. Bosworth v. Vandewalker, 53 N. Y. 597.

[10] Galpin v. Page, 18 Wall. 350.

[11] Harvey v. Tyler, 2 Wall. 322.

and opportunity of hearing;[1] but if the statute forbids a judgment except on certain conditions, the record should show the existence of the conditions.[2]

If the court be an inferior court of special and limited jurisdiction, neither jurisdiction,[3] nor the want of it,[4] is presumed. Recitals of the jurisdictional facts, if contained in the record, are (under the rule of full faith and credit),[5] usually presumptive, but never conclusive,[6] evidence of such facts. If the recitals are lacking, the fact may be supplied by extrinsic evidence,[7] unless the proceeding is a special statutory one in derogation of the common law, and exercised in a summary manner. In that case, whatever the court, these presumptions cannot be relied on.[8]

In respect to all the classes of courts and proceedings I have mentioned, if jurisdiction is once thus established, a conclusive presumption arises that it was exercised regularly and without error,[9] except in the case of a judgment by confession, respecting which the presumption is not conclusive as to legality.

The ordinary presumption that a public officer has done his duty cannot supply the absence of evidence of a vital jurisdictional fact in any judgment.[10] But where the substantial fact is shown, the presumption may supply details of time, place, and manner, although these be necessary to the validity of the act.[11]

23. *Service.*]—When the record sets forth the manner of the service, courts of another State will examine it to see if it gave jurisdiction.[12] The record is not unavailing because the only proof of service is by an informal return,[13] nor because defendant's first name is stated by initial only.[14] If an official return of service is signed by deputy, it is presumed that he was authorized.[15] A general indication of service without saying on all, implies service in all;[16] but a statement of service on a part, implies non-service of the others.[17] A general statement of service implies that serv-

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[1] Harvey v. Tyler, 2 Wall. 342; Galpin v. Page, 18 Wall. 350; Potter v. Merchants' Bank, 28 N. Y. 641.

[2] Allen v. Blunt, 1 Blatchf. 480; Harvey v. Tyler (above).

[3] People v. Van Alstyne, 32 Barb. 131.

[4] Reno v. Pinder, 20 N. Y. 298, and cases cited, rev'g 24 Barb. 423.

[5] Paragraph 15.

[6] Bolton v. Jacks, 6 Robt. 166, 200.

[7] Van Deusen v. Sweet, 51 N. Y. 378; and see Bolton v. Jacks (above). *Contra*, Simmons v. De Barre, 4 Bosw. 548, s. c. 8 Abb. Pr. 269, affi'g 6 Id. 188; Powers v. People, 4 Johns. 292.

[8] Harvey v. Tyler (above).

[9] Comstock v. Crawford, 3 Wall. 396; Lynch v. Bernal, 9 Id. 315.

[10] See Improvement Co. v. Munson, 14 Wall. 550; and p. 119, n. of this vol.

[11] Sheldon v. Wright, 7 Barb. 39; and see p. 202 of this vol.

[12] Ewer v. Coffin, 1 Cush. (Mass.) 23.

[13] Such as "served" (Latterett v. Cook, 1 Iowa, 1); or "executed" (Welson v. Jackson, 10 Mo. 329; Blackburn v. Jackson, 22 Id. 308).

[14] Martin v. Barron, 37 Mo. 301.

[15] State v. Williamson, 57 Mo. 192. Compare Bosworth v. Vandewalker, 53 N. Y. 597.

[16] Bosworth v. Vandewalker, 53 N. Y. 597; Secrist v. Green, 3 Wall. 751.

[17] Galpin v. Page, 18 Wall. 351; Rape v. Heaton, 9 Wisc. 328.

ice was made at a proper place,[1] and in a proper manner;[2] but a statement of service at a place without the jurisdiction, implies that no service of the same defendant was made within the jurisdiction.[3]

24. *Constructive service.*[4]—Neither constructive service on a non-resident[5] (whether by publication,[6] attachment of property,[7] leaving at abode,[8] or by personal service on defendant's joint obligor),[9] nor actual notice to any defendant without service,[10] nor actual service without the State,[11] (though it be sufficient to give jurisdiction *in rem*),[12] is sufficient to make the judgment evidence of a debt against defendant.[13] Evidence in the record, or extrinsic to it, that the defendant was, at the time of the alleged service upon him, beyond the reach of the process of the court, raises a presumption of want of jurisdiction for this purpose.[14]

If regular constructive service is shown, it not appearing whether the person so served was a resident or not, jurisdiction is presumed, if residence, domicil or citizenship could give it, and the burden is on defendant to show the contrary.[15] No substantial element of constructive service will be presumed in aid of the jurisdiction;[16] but if substantial service, by publication or otherwise, appears,[17] and the court rendering judgment declared the proof of regularity sufficient, the existence of incidental facts may be presumed in aid of its jurisdiction.[18]

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[1] State v. Williamson, 57 Mo. 192; Knowles v. Gas-light Co. 19 Wall. 61.

[2] Lackland v. Pritchett, 12 Mo. 484.

[3] Galpin v. Page, 18 Wall. 350. For the mode of proving territorial boundaries, see United States v. Jackalow, 1 Black. 484, 487.

[4] For cases on constructive service, see Earle v. McVeigh, 91 U. S. (1 Otto), 503.

[5] Knowles v. Gas-light Co. 19 Wall. 61. As to constructive service on residents, see Henderson v. Staniford, 105 Mass. 504; Stockwell v. McCraken, 109 Mass. 84; Holt v. Alloway, 2 Blackf. 108; Buford v. Kirkpatrick, 13 Ark. 33.

[6] Pennoyer v. Neff, 95 U. S. (5 Otto), 714.

[7] Bicknell v. Field, 8 Paige, 440; Rice v. Hickok, 39 Vt. 292; Thompson v. Emmert, 4 McLean, 96. *Contra*, see Arndt v. Arndt, 15 Ohio, 33.

[8] Compare Jardine v. Reichert, 10 Vroom, 165; Barney v. White, 46 Mo. 137.

[9] D'Arcy v. Ketchum, 11 How. U. S. 165; Phelps v. Brewer, 9 Cush. (Mass.) 390; Board of Public Works v. Columbia College, 17 Wall. 521; Hall v. Lanning, 91 U. S. (1 Otto), 160.

[10] Woodward v. Tremere, 6 Pick. 354.

[11] Ewer v. Coffin, 1 Cush. 23; Price v. Hickok, 39 Vt. 292.

[12] Cooper v. Reynolds, 10 Wall. 318.

[13] Eastman v. Wadleigh, 65 Me. 251, s. c. 20 Am. R. 695; Pennoyer v. Neff, 95 U. S. (5 Otto), 714, affi'g 3 Sawy. 274. But jurisdiction of the original action being shown, constructive notice of appeal will sustain a judgment on appeal. Nations v. Johnson, 24 How. U. S. 195.

[14] Gray v. Larrimore, 2 Abb. U. S. 542; Galpin v. Page, 18 Wall. 350.

[15] Bissell v. Wheelock, 11 Cush. (Mass.) 279; Stockwell v. McCraken, 109 Mass. 84; Barney v. White, 46 Mo. 137; Jones v. Warner, 81 Ill. 343; Holt v. Alloway, 2 Blackf. (Ind.) 108; and see Munn v. Sturges, 22 Ark. 389. Otherwise of judgments of divorce and the like.

[16] Galpin v. Page, 18 Wall. 350.

[17] Smith v. Pomeroy, 2 Dill. C. Ct. 420.

[18] Such as the proximity of the paper (Secrist v. Green, 3 Wall. 751); the use of the complaint, on file, as an affidavit (Neff v. Pennoyer, 3 Sawyer, 274); the residence of the notary verifying it (Mosher v. Heydrick, 45 Barb. 549), and the like.

25. *Appearance.*]—Apparently regular appearance is presumptively equivalent to process and service.[1] A record which shows that the party appeared by attorney,[2] though without proof of the attorney's authority, is *prima facie* sufficient;[3] even though the action was commenced by publication, &c., and the summons and proof of publication do not appear on the record.[4]

Where the jurisdiction depends upon appearance, defendant may prove, under proper allegation, that he was never served with process, did not know of the action, did not authorize any one to appear, and he had a good defense upon the merits.[5] Retainer by partner is not enough.[6]

26. *Effect of judgment.*]—A judgment of a sister State, if thus authenticated, or if duly proved in another mode because the court has not a clerk and record,[7] is entitled to such faith and credit[8] as it has by law or usage in the courts of the State from whence the record is taken;[9] except that neither the recitals nor the proof, contained in the record, of any jurisdictional fact, are conclusive.[10] Unless so brought within the constitutional clause, the judgment of a sister State is merely *prima facie* evidence.[11] The faith and credit thus secured, extends not only to the form of the record, but to its effect as an adjudication;[12] not, however, to

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[1] Moore v. Spackman, 12 Serg. & R. 287. An admission or evidence that there was no personal service does not necessarily impugn an appearance. Eldred v. Bank, 17 Wall. 552; and see Whittaker v. Murray, 15 Ill. 293.

[2] For example, by the usual formal recital, "and now at this day come the parties aforesaid, by their attorneys," &c. (Landes v. Brant, 10 How. U. S. 348; and see Atkins v. Disintegrating Co. 18 Wall. 272); or by the entry of the attorney's name upon the record of the judgment in the mode usual (Bank of Middletown v. Huntington, 13 Abb. Pr. 402); or by filing a plea (Eldred v. Bank, 17 Wall. 551).

[3] Hill v. Mendenhall, 21 Wall. 454; Rogers v. Burns, 27 Penn. St. 535.

[4] Maxwell v. Stewart, 22 Wall. 77. For withdrawal of appearance and its effect, see Creighton v. Kerr, 20 Wall. 18, and cases cited; Eldred v. Bank, 17 Id. 551.

[5] Marx v. Fore, 51 Mo. 69, s. c. 11 Am. R. 432, and note; Hill v. Mendenhall, 21 Wall. 454.

[6] Phelps v. Brewer, 9 Cush. 390; Boylan v. Whitney, 3 Ind. 140; Eager v. Stover, 59 Mo. 87. *Contra*, Marks v. Fordyce, 2 Am. L. Rev.; Dennison v. Hyde, 6 Conn. 508.

[7] Silver Lake Bank v. Harding, 5 Ohio, 545; Tyler's Exr. v. Winslow, 15 Ohio St. 364; Stockwell v. Coleman, 10 Id. 33; Kuhn v. Miller's Adm., 1 Wright (Ohio), 127; Dragoo v. Graham, 9 Ind. 212.

[8] No greater. Public Works v. Columbia College, 17 Wall. 529.

[9] U. S. R. S. § 905, last clause; Mills v. Duryee, 7 Cranch, 484; any statutes of the State where it is set up, notwithstanding. Christmas v. Russell, 5 Wall. 302.

[10] Thompson v. Whitman, 18 Wall. 468. *Contra*, Burtners v. Keran, 24 Gratt. 42. The English rule adopted in some of the States, that the judgment imports absolute verity even as to jurisdictional statements, can have no extra territorial force, even under the full faith and credit clause of the constitution. Id. *Contra*, Logansport Gas-light Co. 2 Dill. C. Ct 421. Some authorities concede conclusive effect to an express adjudication of a jurisdictional fact, or to proof embodied in the record, which they deny to recitals. See Watson v. New England Bank, 4 Metc. (Mass.) 343; Hall v. Williams, 6 Pick. 232; Aldrich v. Kenney, 4 Conn. 570.

[11] Taylor v. Brown, 30 N. H. 78, 97; Kean v. Rice, 12 Serg. & R. 203; Ellsworth v. Barstow, 7 Watts (Penn.), 314. Compare Gleason v. Dodd, 4 Metc. (Mass.) 333; Roberts v. Hodges, 16 N. J. Eq. 299.

[12] Crapo v. Kelly, 16 Wall. 610.

entitle the party to the remedies of enforcement given only by the law of the State where it was recovered.[1]

27. *Justice's judgments.*]—Common law proof may be resorted to;[2] and in such case plaintiff should prove the statute under which the court was held, and that the justice had jurisdiction of the subject and of defendant's person.[3] A mode of proving justice's judgments of a sister State, is provided by the statute in New York[4] and some other States. If there is a record, and a clerk, or the justice is, by law, clerk,[5] they may be proved with better effect under the act of Congress.

28. *Former adjudication.*]—A decision of the court of the sister State, against the grounds alleged in impeachment of a judgment, is available as *res adjudicata.*[6]

29. *Appeal pending.*]—Proof that an appeal is pending does not bar the action, without proof that, by the law of the other State, such appeal stays proceedings.[7] The court may take judicial notice of the law,[8] or it may be proved.[9]

30. *Limitations.*]—The statute of limitations of the State in whose court the action is brought, applies.[10] But the presumption of payment by the law of the State where the judgment was recovered, avails.[11]

IV. United States Courts and their Judgments.

31. *Judgments of those courts proved elsewhere.*]—The act of Congress[12] permits,[13] but does not require[14] such a judgment to be authenticated as there prescribed. It may be received in any State court, when authenticated in the ordinary method practiced in the courts of the State within whose limits it was recovered.[15]

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[1] Brengle v. McClellan, 7 Gill & J. 434.

[2] McElfatrick v. Taft, 10 Bush (Ky.), 160; Graham v. Grigg, 3 Harr. (Del.) 408; Bissell v. Edwards. 5 Day (Conn.), 363.

[3] Thomas v. Robinson, 3 Wend. 267; Cole v. Stone, Hill & D. Supp. 360; Betts v. Bagley, 12 Pick. 572.

[4] N. Y. Code Civ. Pro. §§ 948, 951. See paragraphs 2, 15, &c.

[5] Hutchins v. Gerrish, 52 N. H. 205, s. c. 13 Am. R. 19; Carpenter v. Pier, 30 Vt. 81.

[6] Dobson v. Pearce, 12 N. Y. 156; McLaren v. Kehler, 23 La. Ann. 80, s. c. 8 Am R. 591.

[7] Faber v. Hovey, 117 Mass. 107, s. c. 19 Am. R. 398; Taylor v. Shew, 39 Cal. 536, s. c. 2 Am. R. 478.

[8] Paine v. Schenectady, 11 R. I. 411, s. c. 5 Centr. L. J. 517.

[9] Holton v. Gleason, 26 N. H. 501.

[10] Napier v. Gediere, 1 Speers' Eq. (So. Car.) 215; Estes v. Kyle, Meigs (Tenn.), 34; State v. Virgin, 36 Geo. 388; McArthur v. Goddin, 12 Bush, 274; Longland v. Davidson, 3 Clark Penn. L. J. R. 377.

[11] Baker v. Stonebraker, 36 Mo. 338, 348.

[12] Paragraph 15.

[13] Helen v. Shackelford, 5 J. J. Marsh. (Ky.) 390; Redman v. Gould, 7 Blackf. (Ind.) 361; Buford v. Hickman, Hemp. 232.

[14] Turnbull v. Payson, 95 U. S. (5 Otto), 418

[15] Jenkins v. Kinsley, 3 Johns. Cas. 474, s. c. Col. & C. Cas. 136; Turnbull v. Payson (above).

By the New York statute, any record or proceeding of a court of the United States, may be proved by a copy certified by the clerk or officer in whose custody it is required by law to be.[1] In a State court, the judgment of a United States court is open to inquiry in respect to jurisdiction; but, jurisdiction appearing, is conclusive on the merits.[2]

32. *The practice in the United States' courts.*]—The record or proceeding of any court of the United States may be proved in any other court of the United States by the certificate of the clerk of the court where it was recovered, with the seal of the court, without the certificate of a judge.[3] That of a State court may be proved under the act of Congress,[4] or (perhaps with less effect) in any common law mode. If the United States court is a circuit court sitting in the same State as the court whose judgment is offered, a certificate of the clerk and seal of the court is a sufficient authentication.[5]

V. Foreign Judgments.

33. *Mode of proof.*]—Proceedings of a court of a foreign State or province, cannot be proved by a mere certified copy under seal.[6] They may be proved by sworn copy,[7] by an exemplification,[8] or in any mode prescribed by the law of the forum.[9] If in a foreign language, a translation is competent,[10] if sworn to by a

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[1] N. Y. Code Civ. Pro. § 943. Seal was formerly required.

[2] McCauley v. Hargroves, 48 Geo. 50, s. c. 15 Am. R. 660.

[3] Turnbull v. Payson, 95 U. S. (5 Otto), 424.

[4] Paragraph 16.

[5] Mewster v. Spalding, 6 McLean, 24; Turnbull v. Payson (above).

[6] Delafield v. Hand, 3 Johns. 310. Compare Packard v. Hill, 7 Cow. 434; Alivon v. Furnival, 1 C. M. & R. 277; Alves v. Banbury, 4 Campb. 28.

[7] Lincoln v. Battelle, 6 Wend. 445; but not by a copy of a copy. Id.

[8] Mahurin v. Bickford, 6 N. H. 567; Church v. Hubbart, 2 Cranch, 238; Hutchins v. Gerrish, 52 N. H. 205, s. c. 13 Am. R. 19.

[9] By the New York statute (Code Civ. Pro. § 952), a copy of a record, or other judicial proceeding, of a court of a foreign country (or province; Lazier v. Westcott, 26 N. Y. 146), is admissible when authenticated: 1. By the attestation of the clerk of the court, with the seal of the court affixed, or of the officer in whose custody the record is legally kept, under the seal of his office: with, (2) a certificate of the chief judge or presiding magistrate of the court, to the effect that the person so attesting the record, is the clerk of the court; or that he is the officer in whose custody the record is required by law to be kept; and that his signature to the attestation is genuine: and, (3) the certificate, under the great or principal seal of the government (colonial or national), under whose authority the court is held, of the secretary of State, or other officer having the custody of that seal, to the effect that the court is duly constituted, specifying generally the nature of its jurisdiction; and that the signature of the chief judge or presiding magistrate, to the certificate specified in the last subdivision, is genuine. A copy attested by the seal of the court, in which it remains, is also admissible upon due proof: 1. That it has been compared by the witness with the original, and is an exact transcript of the whole of the original; 2. That the original was, when the copy was made, in the custody of the clerk of the court, or other officer legally having charge of it; and 3. That the attestation is genuine.

[10] Hill v. Packard, 5 Wend. 376.

witness.[1] The court may take judicial notice as to whether a foreign court proceeds according to the course of the common law.[2]

34. *Effect.*]—The admissibility of the document does not determine what effect it has as evidence.[3] The record may be contradicted as to all jurisdictional facts.[4] If jurisdiction depends on even personal service on a non-resident of the foreign state, made without its territorial limits, it is not evidence of debt against him here,[5] even though he gave a personal admission of service.[6]

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[1] Vandervoort v. Smith, 2 Cai. 155.
[2] Lazier v. Westcott, 26 N. Y. 146.
[3] N. Y. Code Civ. Pro. § 954.
[4] Hall v. Lanning, 91 U. S. (1 Otto), 165. Including the attorney's authority to appear. Arnott v. Webb, 1 Dill. C. Ct. 362.
[5] Bischoff v. Wethered, 9 Wall. 814.
[6] Scott v. Noble. 72 Penn. St. (22 P. F. Smith), 115, s. c. 13 Am. R. 663.

CHAPTER XXX.

ACTIONS AGAINST BAILEES, AGENTS, &c.

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I. General Principles.

1. *Grounds of action.*]—The pleadings and evidence involve one or more of three elements: 1. Breach of express contract. 2. Breach of implied duty. 3. Conversion.

If the action is founded on express contract to deliver, evidence of breach is *prima facie* enough (though excuse may be shown by the bailee); and evidence of actual negligence, or of

conversion, is competent, so far as involved in proving the actual breach of contract.

If the action is founded on breach of implied duty, the degree required of proof of negligence or other cause of loss varies with the nature of the bailment and the degree of diligence required. In this class of cases the contract, if any, must be proved in order to define the duty; and evidence of conversion is competent for the same purpose as in cases of express contract.

If the action is founded on conversion, the contract must be proved if necessary to define the duty, otherwise it is not essential; but the action is not sustained by proof of mere breach of contract or implied duty, or of negligence.[1]

An uncertainty on the face of the complaint as to which of these is the gist of the action, is to be determined by the court with reference to the rules affecting variance.[2]

2. *Contract of bailment.*]—If the action is for a wrongful use contrary to express contract, proof of the contract is necessary.[3] A written contract may be proved, under a general allegation not indicating writing.[4] Evidence of the bailee's uniform usage to give a written receipt expressing terms of bailment, may be sufficient to require foundation to be laid before admitting oral evidence of terms.[5] A mere receipt not expressing terms, is not the exclusive primary evidence of the delivery.

3. *Oral evidence to vary writing.*]—The general rule already stated,[6] protects written instructions,[7] and words of contract contained in a receipt,[8] if binding as a contract. A stipulation to return cannot be varied by oral evidence of contemporaneous agreement as to risk;[9] but a mere memorandum of length of time and rate of payment, does not exclude a separate oral agreement as to risk;[10] nor does a written power exclude evidence of a separate and not inconsistent[11] agreement as to the conditions, in respect to time, price, &c., on which it might be executed.[12] A receipt expressed to be for storage, cannot be shown by parol to represent a sale.[13] A mere receipt without indicating the nature of the

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[1] These principles I deem sufficiently settled under the new procedure; although not hitherto universally recognized. The modes of proving negligence and conversion respectively, are stated in other chapters.

[2] See pp. 273, 285 of this vol. and the chapter on actions for DECEIT.

[3] Smith v. Rollins, 11 R. I. 464, s. c. 23 Am. R. 509.

[4] Fiedler v. Smith, 6 Cush. (Mass.) 336, 340.

[5] Ashe v. DeRosset, 8 Jones (N. Car.) L. 240.

[6] Pages 294, 364, of this vol.

[7] Richardson v. Churchill, 5 Cush. 425; Dunlop v. Monroe, 7 Cranch, 242.

[8] Stapleton v. King, 33 Iowa, 28, s. c. 11 Am. R. 109, and cases cited; Wood v. Whiting, 21 Barb. 190.

[9] Brown v. Hitchcock, 28 Vt. 452.

[10] Jeffrey v. Walton, 1 Stark R. 267.

[11] Dykers v. Allen, 7 Hill, 497, affi'g, 3 Id. 593; Vail v. Rice, 5 N. Y. 155; Markham v. Jaudon, 41 N. Y. 235, rev'g, 49 Barb. 462, s. c. 3 Abb. Pr. N. S. 286.

[12] Clarke v. Meigs, 10 Bosw. 337.

[13] Wadsworth v. Allcott, 6 N. Y. 64.

transaction may be explained or contradicted.[1] A warehouse receipt is usually subject to oral explanation unless plaintiff has made advances or incurred responsibility on the faith of it.[2] If the terms of the receipt are ambiguous,[3]—as for instance "received on account of A. [the plaintiff], for B."—evidence of usage is admissible to explain.[4]

4. *Plaintiff's title; Bailee's estoppel.*]—The plaintiff's title is sufficiently proved by the contract. A bailee, or agent, cannot dispute the original title of the bailor or principal from whom he received the thing;[5] even by purchasing an adverse title.[6] But he may show that his bailor parted with his interest in the property subsequent to the bailment.[7]

5. *Eviction.*]—Eviction by title paramount or its equivalent, suffices to terminate the relation of bailee which raises this estoppel; but notice of adverse claim does not.[8] Even where the action is on a contract,[9] the better opinion is that the bailee is excused by showing that without his fault, act or connivance, the thing was seized and taken from his possession, by virtue of regular and valid legal process,[10] out of a court having jurisdiction,[11] either against the bailor,[12] or a third person,[13] and that he gave immediate notice to the bailor.[14] In such case he is not bound to show the merits of the claim, or correctness of the decision on which the process was founded,[15] but only its regularity and validity. The process itself is the primary evidence, and the oral admission of the plaintiff is not a substitute for it.[16]

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[1] Robinson v. Frost, 14 Barb. 536.

[2] Second Bank of Toledo v. Walbridge, 19 Ohio St. 419; Bebee v. Moore, 8 McLean, 387. Compare Peck v. Armstrong, 38 Barb. 215; Hoyt v. Baker, 15 Abb. Pr. N. S. 405; McCombie v. Spader, 1 Hun, 193.

[3] Agawam Bank v. Strever, 18 N. Y. 502; Harris v. Rathbun, 2 Abb. Ct. App. Dec. 326.

[4] Bowman v. Horsey, 2 M. & Rob. 85.

[5] Vosburgh v. Huntington, 15 Abb. Pr. 254; Marvin v. Elwood, 11 Paige, 365 or whose title he has recognized by issuing a receipt, Gosling v. Birnie, 7 Bing. 339 and see p. 528 of this vol. The contrary said of a pledge, in Cheesman v. Exall, 6 Exch. 341.

[6] Nudd v. Montanye, 38 Wis. 511, s. c. 20 Am. R. 25. And this estoppel enures in favor of the bailor's assignee, &c. Marvin v. Smith, 56 Barb. 600; Dixon v. Hammond, 2 Barnw. & A. 310.

[7] See Marvin v. Ellwood, 11 Paige, 365; Bates v. Stanton, 1 Duer, 79, s. c. 10 N. Y. Leg. Obs. 216.

[8] Biddle v. Bond, 6 Best. & S. 225; and see Lund v. Seamen's Bank for Savings, 37 Barb. 129.

[9] As distinguished from conversion. Edwards v. White Line Co. 104 Mass. 159, s. c. 6 Am. R. 213.

[10] Ohio & Miss. Rw. Co. v. Yoke, 51 Ind. 181, s. c. 19 Am. R. 727, and cases cited; 4 Southern Law Rev. N. S. 465.

[11] Barnard v. Kobbe, 54 N. Y. 516.

[12] Edson v. Weston, 7 Cow. 278; Stamford Steamb. Co. v. Gibbons, 9 Wend. 327.

[13] Cook v. Holt, 48 N. Y. 275; 4 South. Law Rev. N. S. 465.

[14] Ohio & Miss. Rw. Co. v. Yoke (above); Cook v. Holt (above).

[15] *Contra*, Mierson v. Hope, 2 Sweeny, 561.

[16] Jenner v. Joliffe, 6 Johns. 9. For the mode of proof, see Chapter XXIX. Further proof of any proceedings upon it is not necessary. Hirschfeldt v. Fanton, Anth. N. P. 361.

If the bailee *voluntarily* surrenders, or fails to give such notice, he assumes the burden of showing that he was evicted by legal title paramount to that of the bailor.[1] If he shows actual delivery on the demand of the true owner, and that the latter had a right to the immediate possession, paramount to that of the bailor, neither legal proceedings nor proof of fraud are necessary.[2]

An allegation of *conversion* is not sustained by evidence that without the bailee's act, fault or connivance, the thing was taken from his possession by virtue of regular and valid legal process; but it is sustained by evidence that while retaining possession he refused proper demand, on the pretext that it was bound in his hands by process against a third person.[3]

6. *Burden of proof as to breach of duty.*]—If the action is founded solely on an express contract to return, the plaintiff must prove the contract and the breach or failure to redeliver, and this is enough;[4] the burden then rests on defendant to show due diligence or a loss for which he is not liable.[5] If the action is founded on negligence or other tort, plaintiff, in addition to the duty, must prove the tort. Slight proof, however, is sufficient to sustain an inference of negligence.[6] Whether evidence of the loss or the non-delivery of the thing throws on a bailee the burden of proving diligence depends on the degree of his duty.[7] In case of bailees for hire generally, such as common carriers, forwarders,[8] warehousemen[9] (including carriers holding possession as warehousemen[10]), collecting bankers,[11] and innkeepers, non-delivery[12] without anything to indicate a cause of loss or injury consistent with due diligence, or return of the thing if in a damaged state without explanation,[13] is sufficient to go to the jury as evidence of

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[1] Welles v. Thornton, 45 Barb. 390.

[2] The Idaho, 93 U. S. (3 Otto), 575, 579; 11 Blatchf. 218. Cases to the contrary may be found in the books. See Barnard v. Kobbe, 3 Daly, 35, affi'd on other grounds in 54 N. Y. 516; Mierson v. Hope, 2 Sweeny, 561.

[3] Rogers v. Weir, 34 N. Y. 463.

[4] Merchants' Bank of Macon v. Rawls, 7 Geo. 191.

[5] Edw. Bailm. § 62; Whart. on Neg. § 422.

[6] Wharton on Neg. § 422.

[7] Story on Bailm. §§ 213, 278, 410. The circumstances that the facts were peculiarly within defendant's knowledge, and that such an injury does not usually occur without negligence, may be controlling. Collins v. Bennett, 46 N. Y. 490.

[8] Especially if there is a total failure to account for the property. Bush v. Miller, 13 Barb. 481.

[9] Schwerin v. McKie, 5 Robt. 404; Arent v. Squire, 1 Daly, 347; Claflin v. Meyer, 43 Super. Ct. (J. & S.) 7, and cases cited. Otherwise, if the compensation is only for place-room, not a reward for care and diligence (see Schmidt v. Blood, 9 Wend. 271); as in the case of a mere wharfinger (Foote v. Storrs, 2 Barb. 236; and see Searle v. Laverick, L. R. 9 Q. B. 122). As to Safe Deposit Company, see 17 Alb. L. J. 198.

[10] Fairfax v. N. Y. Central R. R. Co. 67 N. Y. 11; Cass v. Boston, &c. R. R. Co. 14 Allen, 418. *Contra*, Jackson v. Sacramento, &c. R. R. Co. 23 Cal. 268.

[11] Chicopee Bank v. Philadelphia Bank, 8 Wall. 641.

[12] Especially if without explanation. Boies v. Hartford & New Haven R. R. Co. 37 Conn. 272, s. c. 9 Am. R. 347.

[13] Funkhouser v. Wagner, 62 Ill. 59; Logan v. Mathews, 6 Penn. St. 417; Whart. on Neg. § 422.

negligence.[1] Evidence that the thing had disappeared from the possession of the bailee, without anything to indicate how, is sufficient.[2] As a general rule, plaintiff need not, in the first instance, prove that the thing was free from latent defects when delivered to the bailee.[3]

If plaintiff's evidence goes further, and traces loss or injury to a cause consistent with due diligence on defendant's part,—such as fire,[4]—or if defendant shows such a cause, plaintiff must give evidence of negligence, unless he stands upon a contract which holds defendant without that.[5] Where the duty is ordinary care, the happening of an accident of a kind which ordinary care does not suffice to prevent is no evidence of negligence, even though the apparatus was within defendant's control.[6]

The presumption that legal duty has been discharged does not countervail evidence of injury or diminution of the thing intrusted to a bailee for hire.[7]

Fire, without evidence of its cause, is presumed not "the act of God";[8] but is not presumed to be caused by defendant's negligence.[9] Theft and robbery, in the absence of further evidence, are not *prima facie* proof of negligence.[10] But the bailee's conduct in the hue and cry,[11] and his failure to give prompt notice, is competent.[12] The testimony of the servant in charge of the deposit, that he never delivered it to any one, is not sufficient evidence of theft.[13]

Evidence of independent acts of negligence not connected with the loss is incompetent,[14] except as tending to show the manner in which the business of the bailee was conducted at the time.[15]

7. *Qualified refusal.*]—The statements of the defendant, made at the time of the demand, and excusing and qualifying his

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[1] The language of many authorities to the effect that it throws on the bailee the burden of proving due care is liable to mislead. Plaintiff will be entitled to go to the jury on such evidence, if defendant does not give evidence of the cause of loss (cases above cited); but is not entitled to a ruling, or an instruction to the jury that this evidence shifts the burden of proof respecting negligence. If the complaint is founded on tort, however, plaintiff must give some evidence of the tort. Lamb v. Camden & Amboy, &c. R. R. Co. 49 N. Y. 271, rev'g 2 Daly, 454.

[2] Fairfax v. N. Y. Central, &c. R. R. Co. 67 N. Y. 11, rev'g 40 Super. Ct. (J. & S.) 128, s. c. again 43 Super. Ct. (J. & S.) 18, affi'd in 73 N. Y. 167.

[3] 1 Whart. Ev. 326, § 362.

[4] Lamb v. Camden & Amboy R. R. Co. 46 N. Y. 271, rev'g 2 Daly, 454.

[5] Cass v. Boston & Lowell R. R. Co. 14 Allen, 448.

[6] See French v. Buffalo, &c. R. R. Co. 2 Abb. Ct. App. Dec. 196.

[7] Arent v. Squire, 1 Daly, 347.

[8] Miller v. Steam Nav. Co. 10 N. Y. 431.

[9] Lamb v. Camden & Amb. Transp. Co. 4 N. Y. 271, rev'g 2 Daly, 454; Edw. on B. § 236.

[10] Story on B. § 39; and see L. R. 9 Exch. 93, s. c. 8 Moak's Eng. 535; L. R. 9 Q. B. 468, s. c. 10 Moak's Eng. 118.

[11] Tompkins v. Saltmarsh, 14 Serg. & R. 275.

[12] First National Bank of Carlisle v. Graham, 79 Penn. St 106, s. c. 21 Am. R. 49.

[13] Fairfax v. N. Y. Central, &c. R. R. Co. 67 N. Y. 11, rev'g 40 Super. Ct. (J. & S.) 128.

[14] First Nat. Bank of Lyons v. Ocean Nat. Bank, 60 N. Y. 279.

[15] Dearborn v. The Union Nat. Bk. 61 Me. 369; and see chapter on NEGLIGENCE.

refusal to surrender, thus constituting a part of the refusal, may be proved in his favor as part of the *res gestæ*;[1] but this does not justify the admission of statements of independent facts.[2]

8. *Value and damage.*]—The mode of proving value and damage are the same as in an action on *quantum meruit* for the price of goods sold, or the breach of a warranty.[3]

II. Special classes of Bailees and Agents.

9. *Gratuitous bailments.*]—A delivery to and acceptance by a gratuitous bailee[4] cannot be presumed merely from evidence of the ordinary course of business. Plaintiff must prove a deposit of the goods with defendant, and that he did not restore them, and that the non-restoration was produced by a lack of due diligence on his part. This lack of diligence often may be inferred from the nature of the transaction,[5] but the plaintiff's case must be sufficient to raise some presumption of defendant's fault. Defendant may then show that he was not guilty of gross negligence.[6]

The bailee's declarations at and immediately after the loss are competent in his favor, as part of the *res gestæ*.[7] A presumption of gross negligence is usually repelled by evidence that the bailee took the same care as of things of his own;[8] but recklessness in care of his own does not excuse.[9] The fact that he was known to bailor to be a person of incapacity is relevant.[10]

10. *Attorneys.*]—A general receipt, given by an attorney, for an evidence of debt already due, raises a presumption, not conclusive, that he received it in his capacity of attorney, for the purpose of collection;[11] and a receipt for collection imports an undertaking himself to collect, not merely that he received it for transmission to another for collection, for whose negligence he is not to be responsible.[12] In an action against an attorney, whether for breach of contract, or of legal duty, the burden is upon the plaintiff to prove the breach, and the damages sustained.[13] Ignorance of a recent statute[14] or decision[15] changing the law is some

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[1] Gracie v. Robinson, 14 Ark. 438; Bennett v. Burch, 1 Den. 141; compare Mahone v. Reeves, 11 Ala. 345, 351.
[2] Walrod v. Ball, 9 Barb. 271.
[3] Pages 306–312, 348 of this vol.
[4] Samuels v. McDonald, 11 Abb. Pr. N. S. 344, s. c. 42 How. Pr. 360.
[5] Doorman v. Jenkins, 2 Adolph. & Ell. 256.
[6] Wharton on Neg. §§ 430, 477, citing Perry v. Roberts, 3 Ad. & El. 118; Garside v. Proprietor, 4 T. R. 581, and other cases.
[7] McNabb v. Lockhart, 18 Geo. 496, 508; Lampley v. Scott, 24 Miss. 528.
[8] Story on B. §§ 63, 79; and see 79 Penn. St. 106, s. c. 21 Am. R. 49, 53.
[9] Whart. on Neg. § 462.
[10] Story on B. § 66.
[11] Executors of Smedes v. Elmendorf, 3 Johns. 185.
[12] Bradstreet v. Everson, 72 Penn. St. 124, s. c. 13 Am. R. 665.
[13] Quinn v. Van Pelt, 56 N. Y. 417, rev'g 36 N. Y. Super. Ct. (4 J. & S.) 279.
[14] A. B.'s Estate, 1 Tuck. 247.
[15] Lee v. Walker, L. R. 7 C. P. 121, s. c. 1 Moak's Eng. 371.

evidence of negligence. To prove a defect in his proceedings of record, the record is the appropriate evidence.[1] When negligence has been proved, in consequence of which judgment has gone against the client, it is not incumbent on the client to show that but for the negligence he would have succeeded in the action. Illegality in the transaction whence the money claimed was collected is not available to the attorney.[3]

11. *Brokers.*]—One employed to buy stock, he to make advances therefor, has, in the absence of contrary arrangement, implied authority to take title in his own name.[4] A customer is presumed, but not conclusively, to have known the usages of brokers generally.[5] Evidence of a conversion by brokers, of stock actually purchased, is not admissible under an allegation of fraud in falsely pretending to have purchased.[6] Where the evidence shows that the broker was a pledgee as to the stock, evidence of a usage to sell without notice, contrary to a pledgee's duty, is not competent.[7] Otherwise if the relation of pledgor and pledgee is not established.[8]

12. *Collecting Bankers.*]—The receiving of negotiable paper for collection implies an agreement on the part of the bankers with the one from whom they receive it,[9] to present, &c., and to cause the drawers, indorsers, &c., to be charged;[10] and negligence of their notary,[11] or their correspondent,[12] is competent against them. This liability may be varied by evidence of express contract or general usage, but not by the practice of single banks adopted for their own convenience.[13]

An accidental loss or disappearance, in a bank, of a bill sent to it for collection, resulting from the bank not taking sufficient care of letters brought to it from the mail, raises a presumption of negligence.[14] To recover more than nominal damages for failure to give due notice of non-payment, there must be evidence

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[1] Reilly v. Cavanaugh, 29 Ind. 435.

[2] Rosc. N. P. 484; Wharton on Neg. § 752, citing Purvis v. Landell, 12 Cl. & Fin. 91; Godefroy v. Jay, 7 Bing. 413. See *contra*, Harter v. Morris, 18 Ohio St. 491.

[3] Fogerty v. Jordan, 2 Robt. 319; Merritt v. Millard, 2 Abb. Ct. App. Dec. 391; and see chapter on actions for MONEY RECEIVED.

[4] Horton v. Morgan, 19 N. Y. 170. Compare Merwin v. Hamilton, 6 Duer, 244. As to grounds of action, whether on contract or for conversion, see Read v. Lambert, 10 Abb. Pr. N. S. 428; Stewart v. Drake, 46 N. Y. 449.

[5] Whitehouse v. Moore, 13 Abb. Pr. 142. See p. 296 of this vol.

[6] Salters v. Genin, 7 Abb. Pr. 193, s. c. 3 Bosw. 250.

[7] Taylor v. Ketchum, 5 Robt. 507, s. c. 35 How. Pr. 289; Markham v. Jaudon, 41 N. Y. 235.

[8] Corbett v. Underwood, 83 Ill. 324.

[9] Montgomery Co. Bank v. Albany City Bank, 7 N. Y. 459.

[10] Ayrault v. Pacific Bank, 6 Robt. 337; 47 N. Y. 570. But compare State Bank of Troy v. Bank of the Capitol, 41 Barb. 343, s. c. 17 Abb. Pr. 364; 27 How. Pr. 57.

[11] Ayrault v. Pacific Bank, 47 N. Y. 570, affi'g 6 Robt. 337.

[12] Montgomery Bank v. Albany City Bank (above).

[13] Ayrault v. Pacific Bank (above).

[14] Chicopee Bank v. Philadelphia Bank, 8 Wall. 641.

that if due notice had been given, plaintiff might have collected the amount, or some part of it.[1] Execution against the maker unsatisfied is competent to show his insolvency.[2]

13. *Factors.*]—Plaintiff's letters to defendant, written with the goods consigned, are competent in his favor to show his instructions;[3] and the instructions are strictly binding, if the consignment is accepted.[4] If a voluminous correspondence is offered, the party offering it should point out the parts he relies on as relevant.[5] If the written instructions refer the factor also to a third person for verbal instructions, the latter may be competent, although they vary the former.[6] Evidence of a general consignment without specific instructions as to sale, and of advances made or liabilities incurred on the faith of the goods, raises a legal presumption that the factor has a discretion about selling, for his own protection, which the principal cannot control by subsequent instructions.[7] The letters and declarations of the defendant's agent, to him, are not alone competent to prove his diligence.[8] The factor's agreement may be interpreted by oral evidence of usage,[9] under principles already stated.[10]

Sale by a factor is presumed from lapse of time;[11] and a refusal to account raises a presumption in favor of the strongest construction of the evidence against him as to amount, value, and price.[12] The presumption that an invoice is sent, upon a consignment of merchandise, suffices to require a foundation for secondary evidence of contents.[13] To show intent to defraud, similar fraudulent acts of defendant, committed at or about the same time may be shown.[14] If conspiracy is alleged, plaintiff may recover against one, on proof of fraud, but not without.[15] The mode of proving value has already been stated.[16]

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[1] Lienan v. Dinsmore, 10 Abb. Pr. N. S. 209, s. c. 3 Daly, 365; Coghlan v. Dinsmore, 9 Bosw. 453. But compare Allen v. Suydam, 20 Wend. 321, rev'g 17 Id. 368; Waldrod v. Ball, 9 Barb. 271.

[2] Eichelberger v. Pike, 22 La. Ann. 142.

[3] Porter v. Ferguson, 4 Fla. 102.

[4] Scott v. Rogers, 4 Abb. Ct. App. Dec. 157; Loraine v. Cartwright, 3 Wash. C. Ct. 151; Bell v. Cunningham, 3 Pet. 69, 85. Otherwise of instructions on a separate and subsequent consignment. Milbank v. Dennistown, 10 Bosw. 382.

[5] Dainese v. Allen, 14 Abb. Pr. N. S. 363.

[6] Manella v. Bary, 3 Cranch, 415.

[7] Feild v. Farrington, 10 Wall. 148.

[8] Framingham v. Barnard, 2 Pick. 532.

[9] Beardsley v. Davis, 52 Barb. 159; Farmers, &c. Bank v. Sprague, 52 N.Y. 605.

[10] Pages 296, 485 of this vol. Compare Catlin v. Smith, 24 Vt. 85; Dwight v. Whitney, 15 Pick. 179.

[11] McArthur v. Wilder, 3 Barb. 66.

[12] Pope v. Barret, 1 Mas. 117; Field v. Moulson, 2 Wash. C. Ct. 155.

[13] Turner v. Yates, 16 How. U. S. 14, 26.

[14] Castle v. Bullard, 23 How. U. S. 172; and see Chapter on DECEIT.

[15] Price v. Keyes, 62 N. Y. 378, rev'g 1 Hun, 117, s. c. 3 Supm. Ct. (T. & C.), 720.

[16] Page 307 of this vol. As to the time to which the evidence should refer, see Scott v. Rogers, 4 Abb. Ct. App. Dec. 157; Blot v. Boiceau, 3 N. Y. 78, rev'g 1 Sandf. 111.

Ratification is presumed from evidence that plaintiff, after full information, made no objection within a reasonable time.[1] Intentional omission to reply raises a presumption of approval of a past course, even though contrary to instructions.[2]

To establish a *lien*, defendant must show; either, 1, that he had made advances specially upon the credit of this shipment; or, 2, that he was entitled, by arrangement with the consignor, to a lien for any balance of advances generally.[3]

14. *Forwarders.*]—An allegation that defendants acted only as carriers, is a variance.[4] The stipulation to forward, in the receipt, is a contract, subjecting it to the rule excluding oral evidence to vary.[5]

It is enough for defendant to satisfy the jury, by the best evidence in his power, that he performed his duty with care and fidelity, used all reasonable care and diligence in selecting proper carriers, and that the loss has not arisen from any default of himself or his servants.[6]

15. *Hirers of chattels.*]—The fact that the hirer returned the thing injured in a manner or from a cause ordinarily liable to occur in its careful use—such as a horse returned to the owner lame,[7] or galled[8]—does not raise a presumption of negligence.

16. *Innkeepers.*[9]]—The fact that defendant was an innkeeper may be proved by parol, although the law requires him to have a license.[10] It is enough to show that defendant habitually received, as guests, all who came to his house (it is not material that they be only travelers), without agreement as to the duration of their stay, or terms of their entertainment.[11] Evidence of slight entertainment is enough to show that plaintiff was a guest.[12] Authority in a servant to receive money or other property on the credit of the house, may be inferred from the capacity in which he was acting.[13] Plaintiff may prove the instructions he

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[1] Cairnes v. Bleecker, 12 Johns. 300; Hazard v. Spears, 2 Abb. Ct. App. Dec. 353.

[2] Feild v. Farrington, 10 Wall. 148.

[3] Beebe v Mead, 33 N. Y. 587.

[4] Herpstead v. N. Y. Central R. R. Co. 28 Barb. 485.

[5] Niles v. Culver, 8 Barb. 205.

[6] Am. Express Co. v. Second Nat. Bank, 69 Penn. St. 394, s. c. 8 Am. R. 260.

[7] Millon v. Salisbury, 13 Johns. 211; Harrington v. Snyder, 3 Barb. 380; s. p. Watson v. Bauer, 4 Abb. Pr. N. S. 273.

[8] Newton v. Pope, 1 Cow. 109.

[9] Cutler v. Bonney, 18 Am. R. 127; note, 130; 3 Abb. N. Y. Dig. new ed. 703, &c.

[10] Owings v. Wyant, 3 Harr. & McH. 393.

[11] Wintermute v. Clarke, 5 Sandf. 242; Taylor v. Monnot, 4 Duer, 116, s. c. 1 Abb. Pr. 325. Although the house was kept on the "European plan." Krohn v. Sweeny, 2 Daly, 200. Express contract with plaintiff, as to time or terms, does not necessarily supersede the innkeeper's liability. Hancock v. Rand, 17 Hun, 279. As to boarding-house keepers, see 17 Alb. L. J. 499.

[12] McDonald v. Egerton, 5 Barb. 560; Washburn v. Jones, 14 Id. 193.

[13] See Howser v. Tully, 62 Penn. St. 92, s. c. 1 Am. R. 390; Svenson v. Pacific

gave affecting the duty of the defendant or his servant.[1] The declarations of the person discovering the loss, made at the time, are competent as part of the *res gestæ*,[2] but do not prove any past fact narrated. Loss is presumptive,[3] but not conclusive evidence of liability.[4]

At common law this presumption can only be repelled by proof that the loss is attributable to negligence or fraud of the guest, or to the act of God or the public enemy.[5] A general denial of negligence will admit evidence of plaintiff's negligence.[6] Reasonable regulations or usages of the particular inn, of which plaintiff had notice, may be proved, but not the usage of another inn.[7] The opinions of witnesses, unacquainted with the facts of the particular case, upon the propriety or safety of carrying or keeping, are inadmissible.[8]

17. *Pledgees.*]—Evidence that the pledgee wholly failed to restore the goods, without indicating the cause of loss, is sufficient to go to the jury on the question of negligence, unless he show loss under such circumstances as will exculpate him.[9] A usage to sell, at private sale, contrary to the legal duty of pledgees, is inadmissible.[10]

18. *Tows.*]—Tow-boats are not common carriers.[11] The law implies an engagement that each party will use proper skill and diligence; that neither vessel will by neglect or misconduct, create unnecessary risk to the other, or increase any incidental risk which may be incurred.[12] Exemption from liability for injury by causes over which human agency has no control—such as the close of navigation—is implied.[13] All the surrounding cir-

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Mail St. Co. 57 N. Y. 108; and see South & No. Ala. R. R. Co. v. Henlein, 52 Ala. 606, s. c. 23 Am. R. 578.

[1] Jones v. Hill, 26 Geo. 194.

[2] Pope v. Hall, 14 La. Ann. 324. As to the competency of answers on inquiry, see page 44 of this vol., and chap. on NEGLIGENCE.

[3] Hulett v. Swift, 33 N. Y. 571, affi'g 42 Barb. 230; Rosc. N. P. 618; Story on Bailm. § 472; Murray v. Clarke, 2 Daly, 102.

[4] Hulett v. Swift (above).

[5] Hulett v. Swift, 33 N. Y. 571, affi'g 42 Barb. 230.

[6] Rosc. N. P. 618.

[7] Berkshire Woolen Co. v. Proctor, 7 Cush. (Mass.) 417.

[8] Taylor v. Monnot, 4 Duer, 116, s. c. 1 Abb. Pr. 325.

[9] Edw. on Bailm. § 236; Caldwell v. Nat. Mohawk Bank, 64 Barb. 333.

[10] Wheeler v. Newbould, 16 N. Y. 392, 401, affi'g 5 Duer, 29; approved in 5 Wall. 680.

[11] Pike v. Nash, 3 Abb. Ct. App. Dec. 610; Arctic Fire Ins. Co. v. Austin, 69 N. Y. 474, rev'g, 3 Hun, 195; Brown v. Clegg, 63 Penn. St. 51, s. c. 3 Am. R. 522; Hays v. Millar, 77 Penn. St. 238, s. c. 18 Am. R. 445. *Contra*, 24 La. Ann. 165, s. c. 13 Am. 120.

[12] Smith v. St. Lawrence Tow-boat Co. L. R. 5 P. C. 308, s. c. 8 Moak's Eng. 236, and cases cited; and see Arctic Fire Ins. Co. v. Austin, 54 Barb. 559; Milton v. Hudson R. Steamboat Co. 37 N. Y. 210; 4 Lans. 76.

[13] Worth v. Edmonds, 52 Barb. 40. The construction of the contract is for the court, not the jury. Arctic Fire Ins. Co. v. Austin, 69 N. Y. 470, 477, rev'g 3 Hun, 195, s. c. 6 Supm. Ct. (T. & C.) 63.

cumstances which may afford any just ground of inference relative to the question in issue, may be proved;[1] and the condition and character of the vessel towed,[2] and her unseaworthiness,[3] if these are relevant to the casualty. The burden is on the owner of the injured boat to show that the injury was caused by the negligence of those in charge of the tow-boat.[4] To recover expenses consequent on being left without any tow, plaintiff must prove an effort to procure another.[5]

19. *Warehousemen.*]—Plaintiff may show by defendant's advertisements, receipts and declarations, that the place was to be fire-proof.[6] The general rules as to estoppel by the receipt in respect to the quantity and condition of the goods, are the same as in case of carriers.[7] Evidence of the degree of care which other persons engaged in a similar business in the vicinity were in the habit of bestowing on property similarly situated, is competent;[8] but it should relate to the calling generally, rather than to a particular person in it.[9] To charge warehousekeepers with a loss by negligence of their servants, negligence within the scope of the employment must be shown; the test is: are the servants liable to the employer?[10]

Proof of the general care with which the warehouse and its contents were guarded is not sufficient to raise a legal presumption of due diligence in this particular instance.[11] Defendant need not show the precise manner in which loss occurred, any farther than to show that it was consistent with non-liability.[12]

20. *Wharfingers: Place-hire.*]—To recover of a wharfinger, or one who does not undertake actual custody, but only to give place-room, plaintiff must show negligence on the part of defendant and his servants. Mere loss or disappearance, or injury by accident, is not even *prima facie* evidence of negligence.[13]

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[1] Steam Navigation Co. v. Dandridge, 8 Gill & J. (Md.) 248, 315.
[2] Baird v. Daly, 68 N. Y. 547, 550.
[3] Id. 551. For the mode of proof, see page 496, of this vol.
[4] Hays v. Millar, 77 Penn. St. 238, s. c. 18 Am. R. 445; Pike v. Nash, (above).
[5] Worth v. Edmonds, 52 Barb. 40.
[6] Hatchett v. Gibson, 13 Ala. 587.
[7] Hale v. Milwaukee Dock Co. 29 Wis. 482, s. c. 9 Am. R. 603.
[8] Cass v. Boston & Lowell R. R. Co. 14 Allen, 448.
[9] See First National Bank v. Graham, 79 Penn. St. 106, s. c. 21 Am. R. 49, 53.
[10] Aldrich v. Boston & Worcester R. R. Co. 100 Mass. 31, s. c. 1 Am. R. 76.
[11] Fairfax v. N. Y. Central, &c. R. R. Co. 67 N. Y. 11, rev'g 40 Super. Ct. (J. & S.) 128.
[12] Lichtenhein v. Boston & Providence R. R. Co. 11 Cush. (Mass.) 70.
[13] Cases in paragraph 6, note 9.

III. Actions against Common Carriers of Goods.

21. *Defendant a common carrier.*]—If plaintiff relies on defendant's common law duty, he must show him to have been a common carrier.[1] This may be done by testimony of a witness that defendant had habitually done business as such for all that called on him;[2] or by producing defendant's advertisements or hand-bills issued before the transaction;[3] or any other admissions. Ownership of the vessel or vehicle is not necessarily enough, if defendant did not act as carrier in taking the goods.[4] Under an express contract, it is not necessary to prove that defendant had an interest in the vessels or vehicles employed.[5]

If defendant was also a warehouseman, forwarder, &c., plaintiff should show that he received the thing as carrier.[6] Receiving it marked to go to an address upon his route, is presumptive evidence that he took it as carrier.[7] A receipt given by him stating that the thing was received to be forwarded does not exclude evidence of the agreement to transport under which it was given.[8]

22. *Delivery to carrier.*]—Plaintiff must show that the property was actually delivered to defendant by being placed in such a position that it might be taken care of by him or his agent having charge of the business, and so as to be under his immediate control.[9] Neither notice that the goods are ready, without putting them in his custody,[10] nor delivery on his premises without notice,[11] is enough. To prove delivery a witness may testify that the goods were delivered to the defendant, subject of course to cross-examination as to details; but where the details have been stated he cannot be allowed to testify whether they constituted a delivery.[12] Evidence of the usual course of business, is competent, for the purpose of showing whether the fact

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[1] Edw. § 496.

[2] Haslam v. Adams Express Co. 6 Bosw. (N. Y.) 235.

[3] Farmers & M. B'k v. Champlain Transportation Co. 23 Vt. 186.

[4] Fish v. Clark, 49 N. Y. 122, affi'g 2 Lans. 176. Compare Moss v. Bettis, 4 Heisk. (Tenn.) 661, s. c. 13 Am. R. 1.

[5] Van Buskirk v. Roberts, 31 N. Y. 661.

[6] Stout v. Coffin, 28 Cal. 65. For the conflict of opinion as to the burden of proof and presumptions in case of carriage of animals,—see Cragin v. N. Y. Central, &c. 51 N. Y. 61, 49 N. Y. 204; Steiger v. Erie Rw. Co. 5 Hun, 345; Kansas Pacific Railw. Co. v. Nichols, 9 Kan. 235, s. c. 12 Am. R. 494; Lake Shore & Michigan Southern R. R. Co. v. Perkins, 25 Mich. 329, s. c. 12 Am. R. 275; Kendall v. London & South-western Rw. Co. L. R. 7 Ex. 373; and see 13 Am. R. 42, 53, note, and cases cited; 4 South. L. R. N. S. 564.

[7] Ladue v. Griffith, 25 N. Y. 364; and see Ætna Ins. Co. v. Wheeler, 49 N. Y. 616, 621; affi'g 5 Lans. 480.

[8] Blossom v. Griffin, 13 N. Y. 569; and see Scovill v. Griffith, 12 N. Y. 509.

[9] Grosvenor v. N. Y. Central R. R. Co. 39 N. Y. 34, s. c. 5 Abb. Pr. N. S. 345.

[10] Id.

[11] Spade v. Hudson River R. R. Co. 16 Barb. 383; Rosc. N. P. 609.

[12] Bowrie v. Baltimore, &c. R. R. Co. 1 McArthur, 609.

constituted a delivery.[1] Evidence of admission of the fact of the loss of the goods is competent on the question of delivery.[2]

Delivery may also be shown by the bill of lading[3] or receipt given by defendants; or by an entry in defendants' books showing that they had had possession of the goods.[4] The handwriting of the agent need not be proved if the entries appear to have been made in the same handwriting for a sufficient length of time for the jury to be satisfied that the person making them was a recognized agent of the company.[5] The bill of lading or receipt may be proved by producing it with proof of signature,[6] and of agency of clerk or servant who gave it.[7] The place of delivery is material where the agent's authority depends on it;[8] otherwise a variance in it is immaterial.[9]

23. *Authority of receiving agent.*]—In case of delivery to an agent or servant, the burden is on the plaintiff to show that the person was an agent of defendants, and authorized to receive the property for them, and to contract for its transportation.[10] Very slight evidence that a person, assuming to act as defendant's agent, was his agent, suffices to go to the jury.[11] But neither hearsay,[12] nor the supposition of the witness,[13] is competent. Evidence of a single similar act on the part of the alleged agent, and of a recognition of it by the defendant, may be enough.[14] But evidence that the clerk was accustomed to receive goods at the company's office does not show authority to receive them at other places.[15] *Prima facie*, a servant of common carriers, allowed by

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[1] Vaughan v. Raleigh, &c. R. R. Co. 63 N. C. 11; Edw. on B. § 288; Root v. Great Western Railw. Co. 1 Supm. Ct. (T. & C.) 10, s. c. 65 Barb. 619, affi'd in 55 N. Y. 636; Bartee v. Wheeler, 49 N. H. 9, s. c. 6 Am. R. 484.

[2] Southern Express Co. v. Thornton, 41 Miss. 216, 222.

[3] Notwithstanding it includes other goods not mentioned in the complaint. Wallace v. Vigus, 4 Blatchf. (Ind.) 260.

[4] Root v. Great Western R. Co. 1 Supm. Ct. (T. & C.) 10, s. c. 65 Barb. 619, affi'd in 55 N. Y. 636.

[5] Id.

[6] According to rules stated on pp. 391 to 398 of this vol. Armstrong v. Fargo, 8 Hun, 175.

[7] Id.

[8] Cronkite v. Wells, 32 N. Y. 247. As to delivery "on board," compare Goddard v. Mallory, 52 Barb. 87; Brown v. Powell, &c. Co. L. R. 10 C. P. 562, s. c. 14 Moak's Eng. 420.

[9] Newstadt v. Adams, 5 Duer, 43.

[10] Thurman v. Wells, 18 Barb. 500.

[11] Western Transp. Co. v. Hawley, 1 Daly, 327; Rogers v. Long Island R. R. Co. 2 Lans. 269; and see Hughes v. N. Y. & N. H. R. R. Co. 36 Super. Ct. (J. & S.) 222. As to evidence of authority to sign bills of lading on ship,—see Ward v. Green, 6 Cow. 173; Dows v. Greene, 16 Barb. 72; The Freeman v. Buckingham, 18 How. 182; Walter v. Brewer, 11 Mass. 99; Reynolds v. Toppan, 15 Mass. 370; Citizens' Bank v. Nantucket Steamboat Co. 2 Story C. Ct. 16.

[12] Spade v. Hudson River R. R. Co. 16 Barb. 383.

[13] Butler v. Hudson River R. R. Co. 3 E. D. Smith, 571.

[14] Wilcox v. Chicago, &c. R. R. Co. 5 Reporter, 114; Glasco v. N. Y. Central R. R. Co. 36 Barb. 557.

[15] Cronkite v. Wells, 32 N. Y. 247.

them to take particular property for carriage, takes it as their servant; and the fact that they allowed him to retain the compensation does not rebut this presumption, without evidence that the credit was given to him by the owner of the goods.[1]

24. *Implied contract.*]—Evidence that the goods were delivered on board is sufficient to charge the carrier without showing a bill of lading or other express agreement made.[2]

25. *Address; Instructions; "C. O. D."*]—The address may be proved by a witness without producing the writing.[3] It is *prima facie* evidence of instructions to deliver or forward accordingly.[4] Instructions or remonstrances as to care, communicated to the defendants or their proper servant, by the plaintiff or his agent,[5] are competent, as charging them with notice of their duty.[6] A mistake, even in written instructions, drawn up by defendant's agent, contrary to the previous oral agreement, may be proved by parol.[7]

The mark "C. O. D." may be explained by oral evidence of usage not inconsistent with it.[8]

26. *Express contract.*]—A contract, if alleged as the foundation of the action, must be proved, and negligence not alleged may also be proved;[9] but without proof of contract, negligence in gratuitous carriage is not enough.[10] Omission to allege special exemptions in the contract is not material, unless there is evidence to bring the case within an exemption.[11] The bill of lading or receipt, unless admitted in pleading, must be proved to have been executed on defendant's part, before it can be put in evidence. It is proved by evidence of the signature,[12] and of the authority of the agent if signed by agent.[13] In addition to the general principles already stated,[14] it should be observed that if duplicate bills of lading or contracts are given, the one signed by defendant and delivered to plaintiff is the primary evidence in

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[1] Farmers, &c. Bank v. Champlain Transp. Co. 23 Vt. 186, 203. Compare Butler v. Basing, 2 C. & P. 613.

[2] Robinson v. Chittenden, 69 N. Y. 525, 531, rev'g 7 Hun, 133; s. p. Baylis v. Lintott, L. R. 8 C. P. 345, s. c. 5 Moak's Eng. 319.

[3] Burrell v. North, 2 Car. & Kirw. 680; s. p. Commonwealth v. Morrell, 99 Mass. 542.

[4] Edw. on B. § 580.

[5] See South, &c. Ala. R. R. Co. v. Henlein, 52 Ala. 606, s. c. 23 Am. R. 578.

[6] Black v. Camden, &c. R. R. Co. 45 Barb. 40, 42; and see paragraph 16.

[7] Malpas v. London & Sw. Ry. Co. L. R. 1 C. P. 336; Rosc. N. P. 20.

[8] Collender v. Dinsmore, 55 N. Y. 200.

[9] Bostwick v. Baltimore, &c. R. R. Co. 45 N. Y. 712, rev'g 55 Barb. 137.

[10] Flint, &c. Rw. Co. v. Weir, Mich. S. Ct. June, 1877; Cent. L. J. 285.

[11] Newstadt v. Adams, 5 Duer, 43; School District in Medfield v. Boston, H. & Erie R. R. Co. 102 Mass. 552, 555, s. c. 3 Am. R. 502. Compare Edw. on B. § 671.

[12] For the mode of proving signature, see pp. 391–8 of this vol. Armstrong v. Fargo, 8 Hun, 145; and see The Columbo, 3 Blatchf. 521.

[13] Paragraph 23.

[14] Paragraphs 2 and 3, and 21.

plaintiff's favor,[1] and, if the two differ, is the controlling evidence of the contract as against the carrier, and in favor of the holder of the bill.[2] A promise of the agent of a second line, after receiving the goods and without new consideration, to forward them earlier than in usual course, is not evidence from which the jury may infer a contract to do so.[3] The power of a railroad company to make an express contract to carry beyond its own terminus may be presumed.[4]

27. *Authority to make special contract.*]—Evidence that the agent was the head agent of the road, at the station where the goods were received, and had full charge of receiving and forwarding there, is sufficient to sustain an inference that he was authorized to make a special contract in the ordinary course,[5] although he testify that he was not.[6] A single similar act, and the ratification of it by the defendants, may be enough to justify inferring authority.[7]

28. *Description of goods.*]—A variance in description which does not mislead is not usually material.[8] The invoice is not alone competent to prove contents of packages.[9] Its competency usually depends on the witness.[10]

29. *Amount.*]—If plaintiff produces no bill of lading, he must in some other way show the amount delivered to the carrier.[11] The returns of a private measurer are not competent against one who did not assent to his measuring,[12] except as auxiliary to the testimony of a witness.[13]

30. *Condition.*]—It is not an absolute rule that plaintiff must give direct evidence that the injured goods were in good condition when shipped;[14] but it is enough to show the existence on the vessel of a probable cause of the injury shown.[15] Goods shipped in cases are presumed to have been properly packed and in fit state for transportation.[16] Evidence that, at the time of delivery,

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[1] Cleveland & Toledo R. R. Co. v. Perkins, 17 Mich. 296.
[2] The Thames, 14 Wall. 105.
[3] Railroad Company v. Reeves, 10 Wall. 176.
[4] Railway Company v. McCarthy, 96 U. S. (6 Otto), 258, 266; and see Simmons v. Law, 4 Abb. Ct. App. Dec. 241. As to carriage beyond the realm, see Nugent v. Smith, L. R. 1 C. P. Div. 423, s. c. 17 Moak's Eng. 330, rev'g L. R. 1 C. P. Div. 19, 25, s. c. 15 Moak's Eng. 203, 209.
[5] Taff Vale Rw. Co. v. Giles, 22 Eng. L. & Eq. 202.
[6] Deming v. Grand Trunk Rw. Co. 48 N. H. 455, s. c. 2 Am. R. 267.
[7] Wilcox v. Chicago, &c. R. R. Co. 5 Reporter, 114.
[8] See Zeigler v. Wells, 28 Cal. 263, 265.
[9] Watson v. Yates, 10 Mart. La. 688.
[10] See pp. 319 to 326 of this vol.
[11] Manning v. Hoover, Abb. Adm. 188.
[12] Bissel v. Campbell, 54 N. Y. 353.
[13] Pages 319 to 326 of this vol.
[14] Paragraph 6, note 3.
[15] Moore v. Harris, L. R. 1 Abb. Cas. 318, 326, s. c. 16 Moak's Eng. 41.
[16] English v. Ocean Steam Nav. Co. 2 Blatchf. 425.

the goods were in good condition, in those respects in which they were open to inspection, is proved *prima facie*,[1] but not conclusively, by words in the bill of lading signed by defendants, such as "in good order," or "well conditioned,"[2] and this presumption is not reduced by the words "weight, contents and value unknown."[3] This evidence suffices to throw the burden of proof upon the carrier, to show that the goods were not in good order when received by him.[4] If defendants were a connecting line, evidence of delivery to the first company in good order raises a presumption that the goods came to defendant's hands in good order.[5]

Evidence of *bad condition* when the drayman employed by the carrier delivered the goods to plaintiff, is competent against the carrier from whom the drayman received them.[6] If defendants were the earlier of several connecting lines, and injury in their possession is shown, it may be presumed, in absence of anything to indicate the contrary, that no further injury occurred while the goods were in the hands of the succeeding carrier.[7] Evidence as to bad condition is not necessarily confined to the period when the goods were in the carrier's possession as carrier, but may include a later time within limits affording just inferences as to the existence, nature and cause of injury in relation to that period.[8] The declarations and admissions of the carrier's agent are competent within limits already stated.[9] The letter of plaintiff's agent, to him, written on receiving the goods, and stating their condition, is not evidence in favor of plaintiff against the bailee from whom the agent received them.[10]

Plaintiff having given a receipt for the goods as delivered to him in good condition, may explain it by testimony that they were not, and that he wished to qualify the receipt, but was not allowed to do so.[11]

31. *Instructions: Route: Terminus.*]—A bill of lading or receipt does not exclude oral evidence of instructions not inconsistent with it.[12]

If the receipt or bill expressly allows forwarding by any car-

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[1] Hastings v. Pepper, 11 Pick. 41; Nelson v. Woodruff, 1 Black, 156, 160.

[2] Tarbox v. Eastern Steamboat Co. 50 Me. 339.

[3] English v. Ocean Steam Nav. Co. 2 Blatchf. 425; and see The Columbo, 3 Id. 521; The California, 2 Sawy. 12.

[4] Price v. Powell, 3 N. Y. 322; Illinois R. R. Co. v. Cowles, 32 Ill. 116, 121.

[5] Smith v. N. Y. Central R. R. Co. 43 Barb. 225; Edw. on B. § 671; Laughlin v. Chicago, &c. R. R. Co. 28 Wis. 204.

[6] Barclay v. Clyde, 2 E. D. Smith, 95.

[7] The Norman, 1 Newb. Adm. 525.

[8] Curtis v. Chicago, &c. R. R. Co. 18 Wis. 312; Holden v. N. Y. Central R. R. Co. 54 N. Y. 662.

[9] Page 44 of this vol. Burnside v. Grand Trunk R. R. Co. 47 N. H. 554.

[10] Owen v. Jones, 14 Ark. 502. Compare Beaver v. Taylor, 1 Wall. 637.

[11] Tierney v. N. Y. C. & H. R. R. R. Co. 10 Hun, 569.

[12] Edw. on B. § 584.

rier, evidence of oral instructions to forward a particular way is not competent against the carrier.[1] If only the termini of a voyage are mentioned, there is a presumption that a direct voyage was intended; but this may be rebutted by evidence of usage, or parol understanding;[2] but if it be shown that there were two usual and customary routes, the carrier has his option, and cannot be charged by oral evidence of an agreement to take one exclusively.[3]

Plaintiff may show an express oral agreement,[4] or an implied agreement arising from the usage of business and his instructions,[5] as to what was to be done with the goods after reaching the terminus specified in the bill of lading, even though it require further transportation.[6]

32. *Stowage.*]—A clean bill of lading imports that the goods are to be carried under deck; and parol evidence of a prior or contemporaneous agreement of the shipper and carrier, that they might be carried on deck is not competent;[7] but evidence of a usage of the particular trade so to carry is competent.[8] Evidence of an agreement for particularly careful stowage under deck may be competent.[9]

The actual stowage may be shown by the declarations of the master, under limits already stated.[10]

The question whether goods were properly stowed is a proper subject for expert testimony; and a seafaring man accustomed to stowing and carrying such goods is competent to give an opinion;[11] but the question whether the injury could have occured to the goods had they been stowed as alleged may not be.[12]

33. *Time: Delay.*]—A bill of lading making no mention of time, cannot be varied by evidence of an incidental oral stipulation as to time.[13] But evidence of usage is competent.[14]

Since the time of the arrival is peculiarly within the carriers' knowledge, very slight evidence on plaintiff's part suffices to

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[1] Hinckley v. N. Y. Central R. R. Co. 56 N. Y. 429.

[2] Lowry v. Russell, 8 Pick. 360. Compare Niles v. Culver, 8 Barb. 205; White v. Van Kirk, 25 Id. 16.

[3] White v. Ashton, 51 N. Y. 280.

[4] Baltimore, &c. Steamboat Co. v. Brown, 54 Penn. St. 77.

[5] Hooper v. Chicago & Nev. R. R. Co. 27 Wis. 81, s. c. 9 Am. R. 439.

[6] Baltimore, &c. Steamboat Co. v. Brown (above). Compare Wolfe v. Myers, 3 Sandf. 7.

[7] The Delaware, 14 Wall. 579, 692, and cases cited; Edw. on B. § 588; and if it stipulates that a part may be so carried, oral evidence of consent that others be so carried is incompetent. Sayward v. Stevens, 3 Gray, 97, 102. The owner's knowledge is not a waiver. The Petona, Ware, 2d. ed. 541.

[8] Baxter v. Leland, 1 Blatchf. 526. But see p. 296 of this vol.

[9] The Star of Hope, 2 Sawy. 15

[10] Page 44 of this vol. Price v. Powell, 3 N. Y. 322. Compare Mallory v. Perkins, 9 Bosw. 572.

[11] Price v. Powell, 3 N. Y. 322.

[12] New Eng. Glass Co. v. Lowell, 7 Cush. (Mass.) 319.

[13] Higgins v. U. S. Mail Steamship Co. 3 Blatchf. 282.

[14] Id. Cochran v. Retberg, 3 Esp. 121.

throw on them the burden of proof as to time.[1] If injury is shown to have been caused by delay, plaintiff need not show the delay to have been unreasonable; but the burden is on the carriers to excuse it.[2] The cause of delay may be shown by evidence of declarations forming part of the *res gestae*.[3] If the carriers excuse delay by reason of accumulation of freight, evidence that other goods subsequently shipped arrived sooner is competent as tending to prove that plaintiff's goods were not sent in regular order.[4]

34. *Burden of proof as to loss, and cause of loss.*[5]]—The usual course of proof is for plaintiff to produce the bill of lading, showing the delivery of the property to defendants and their contract to carry, and to prove non-delivery, or arrival in a damaged state, and the damages sustained. This evidence, if there be nothing to indicate that the loss was from a cause consistent with the carriers' exemption from liability,[6] makes a *prima facie* case,[7] sufficient to go to the jury in the absence of other evidence. The presumption is that the injury was occasioned by defendants' act or default.[8]

If defendants rely on an exemption by reason of the nature of the cause of loss, they must show that it was one of the excepted perils;[9] but need not disprove negligence unless the circumstances are of such a character as to raise a presumption of negligence.[10]

Defendants having thus shown that the loss was due to an excepted peril, the burden is thrown on plaintiff to show defendants' negligence.[11]

If plaintiff's case shows a cause of loss presumptively consistent with the carriers' exemption, he must go further and show

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[1] Place v. Union Express Co. 2 Hilt. 19.

[2] Harris v. Northern Ind. R. R. Co. 20 N. Y. 232, 236.

[3] Sisson v. Cleveland, &c. R. R. Co. 14 Mich. 489, 496.

[4] Acheson v. N. Y. Central & H. R. R. R. Co. 61 N. Y. 652.

[5] The rule here stated is applied by the majority of the best considered cases, although there are numerous authorities to the contrary. It is applicable alike in cases of loss by expressly excepted perils, and of injury by latent causes existing in the goods before the issue of the bill of lading. When there is no contract, and the question is solely on the carrier's common law liability, Wharton says the carrier has the burden of disproving negligence. Whart. on Neg. § 593, and see Agnew v. Steamer, 27 Cal. 425, 431. *Contra*, 5 Am. L. Rev. 205, 225.

For the reasons in favor of requiring the carrier to prove the cause of loss, see, Rixford v. Smith, 52 N. H. 355, s. c. 13 Am. R. 42. For the contrary, see the dissenting opinion by BIGELOW, C. J., in Cass v. Boston & Lowell R. R. Co. 14 Allen, 448.

[6] Paragraph 6.

[7] Transportation Co. v. Downer, 11 Wall. 133, and cases cited; Fenn v. Timpson, 4 E. D. Smith, 276; Shaw v. Gardner, 12 Gray, 488. So held of live stock. Louisville, &c. R. R. Co. v. Hedger, 9 Bush. (Ky.) 645, s. c. 15 Am. R. 740.

[8] Nelson v. Woodruff, 1 Black, 156, 160.

[9] Id.; Steamer Niagara v. Cordes, 21 How. U. S. 7, 29; Taylor v. Liverpool & Gt. Western Steam Co. L. R. 9 Q. B. 546, s. c. 10 Moak's Eng. 172.

[10] Transportation Co. v. Downer, 11 Wall. 133, and cases cited.

[11] Downer v. Steam Nav. Co. (above); Railroad Co. v. Reeves, 10 Wall. 176; Patterson v. Clyde, 67 Penn. St. 500; Farnham v. R. R. 55 Id. 53.

negligence.[1] If it shows loss from a cause that would not have happened but for the want of care on defendants' part, this is enough to go to the jury.[2] Proof that defendants carried the thing in a manner contrary to reasonable instructions on the package, throws on them the burden of proving that the injury was not attributable to this.[3]

35. *Contract of connecting lines.*]—The carrier's acceptance of goods marked for a point beyond his own route, does not alone imply a contract involving liability as carrier beyond his route.[4] But such a liability may be established by express contract,[5] or by showing circumstances indicating such an understanding,[6]—for instance, that the company held itself out as a carrier for the entire distance,[7] or received freight for the entire distance,[8] or even agreed on an entire sum to be paid at the other end;[9] or that the connecting lines divided through freights in an agreed manner.[10]

36. *Non-delivery.*]—If plaintiff alleges non-delivery, the burden is on him to prove it.[11] Slight evidence is sufficient to go to the jury in the absence of evidence of delivery.[12] Evidence of the declaration or admission of the agent of the carrier (if competent,)[13] to the effect that the goods were lost, or that he did not

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[1] Paragraph 6.

[2] Russell Mfg. Co. v. N. H. Steamboat Co. 50 N. Y. 121, distinguishing Lamb v. Camden & Amboy R. R. Co. 46 Id. 121. Evidence that the casualty or the inability to rescue the goods resulted from a defect in the vehicle, is sufficient, without further proof of negligence, to sustain a verdict against the carrier. Empire Transp. Co. v. Wamsutta Oil Co. 63 Penn. St. 14, s. c. 8 Am. R. 515. If defendant would reduce the damage by the fact that the injury chiefly caused by his negligence was partly owing to an excepted peril, he must show to what extent. Speyer v. The Roberts, 2 Sawy. 1.

[3] Hastings v. Pepper, 11 Pick. 41.

[4] This is now recognized as the *American* rule. R. R. Co. v. Pratt, 22 Wall. 129, and cases cited; Root v. Great W. R. R. Co. 45 N. Y. 524; Gray v. Jackson, 51 N. H. 9, s. c. 12 Am. R. 1. The *English* rule, adopted in a few of the States, is the contrary. Muschamp v. Lancaster, &c. R. R. Co. 8 Mees. & W. 421; Nashua Lock Co. v. Worcester & Nashua R. R. Co. 48 N. H. 339, s. c. 2 Am. R. 242, and cases cited; Angle v. Mississippi, &c. R. R. Co. 9 Iowa, 487, 493; 2 Am. Law Rev. 426; Gray v. Jackson, 51 N. H. 9, s. c. 12 Am. R. 1, and cases cited. But the presumption may be rebutted. Cincinnati, &c. R. R. Co. v. Pontius, 19 Ohio St. 221, s. c. 2 Am. R. 391.

[5] *Contra*, as to railroad companies in Connecticut, 22 Conn. 502; 33 Id. 166.

[6] R. R. Co. v. Pratt (above).

[7] Id.; Mann v. Birchard, 40 Vt. 326, 337.

[8] R. R. Co. v. Pratt (above); St. John v. Express Co. 1 Woods, 612; and see Nashua Lock Co. v. Worcester & Nashua R. R. Co, 48 N. H. 339, s. c. 2 Am. R. 242.

[9] R. R. Co. v. Pratt (above).

[10] Barter v. Wheeler, 49 N. H. 9, s. c. 6 Am. R. 434; Nashua Lock Co. v. Worcester & Nashua R. R. Co. 48 N. H. 339, s. c. 2 Am. R. 242, and cases cited.

[11] Woodbury v. Frink, 14 Ill. 279; The Falcon, 3 Blatchf. 64. If the contract allows delivery to either of two persons, the evidence must relate to each. The Falcon (above).

[12] Griffith v. Lee, 1 Carr. & R. 110; The Falcon (above); Rosc. N. P. 610; Place v. Union Express Co. 2 Hilt. 19.

[13] Paragraph 44.

know of their delivery, and believed he must have known if they had been delivered, is *prima facie* enough.[1] Non-delivery (or delivery in bad condition) by the last of the lines connecting with defendants', by which the goods ought to have been carried after they left defendants' hands, is *prima facie* evidence of non-delivery (or delivery in bad condition, as the case may be) by defendants.[2]

37. *Negligence.*]—A negligent breach of contract may be proved, though negligence be not alleged.[3]

Non-delivery, or delivery, in bad condition, of goods received in good condition, is *prima facie* evidence of negligence.[4] So is unusual delay in failing to deliver according to the general course of business.[5] Negligence may be presumed from a loss and failure to give any account.[6]

A demand and refusal to deliver, unexplained, is enough to go to the jury as evidence of fraud or *gross* negligence.[7] But accident unexplained is not sufficient evidence of gross negligence.[8] Where the plaintiff is required, by the terms of the receipt, to prove negligence, he must also show that it caused or at least contributed to the injury.[9]

38. *Cause of injury.*]—If a cause, the knowledge of which involves special experience or skill, is assigned,—such as unseaworthiness,[10] bad stowage,[11] or chemical action,[12] and the like,—the opinions of witnesses are competent; but, on inferences from facts of common observation and experience, they are not.[13] Weather may be proved by testimony of witnesses,[14] or by the official record of weather;[15] and whether its severity was sufficient to freeze the goods, by the opinions of witnesses cognizant of the mode in which they were protected.[16]

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[1] Edw. on B. § 669.

[2] Laughlin v. Chicago, &c. Rw. Co. 28 Wis. 204, s. c. 9 Am. R. 493.

[3] Bostwick v. Baltimore & Ohio R. R. Co. 45 N. Y. 712, rev'g 55 Barb. 137; and see School District in Medfield v. Boston, H. & Erie R. R. Co. 102 Mass. 552, s. c. 3 Am. R. 502.

[4] Story on B. § 529; Edw. on B. § 671; Westcott v. Fargo, 6 Lans. 319, 326. So, also, of baggage, 45 N. Y. 184. But it is error to charge that this throws the burden of proof on defendant to show due care. Cochran v. Dinsmore, 49 N. Y. 249.

[5] Mann v. Birchard, 40 Vt. 326, 337.

[6] Am. Express Co. v. Sands, 55 Penn. St. 140.

[7] Newstadt v. Adams, 5 Duer, 43, and cases cited; Steers v. Liverpool, &c. St. Co. 57 N. Y. 1.

[8] French v. Buffalo, N. Y. & Erie R. R. Co. 2 Abb. Ct. App. Dec. 196; Bankard v. Baltimore, &c. R. R. Co. 34 Md. 197, 202.

[9] Cochran v. Dinsmore, 49 N. Y. 249.

[10] Baird v. Daly, 68 N. Y. 547.

[11] Paragraph 32.

[12] Turner v. The Black Warrior, 1 McAll. 181.

[13] Hayme v. Naylor, 18 Tex. 498, 509; and see pp. 310, 387 of this vol.

[14] Curtis v. Chicago, &c. R. R. Co. 18 Wis. 312.

[15] Page 499 of this vol.

[16] Curtis v. Chicago, &c. R. R. Co. (above).

39. *Theft or robbery.*]—The burden of proof, as to whether theft or robbery was committed by the carrier's servants or by a stranger, is on the carrier.[1] It is enough for plaintiff in any case to show that it is more probable the carrier's servant committed it, than that a stranger did; he need not fix the probability on any particular person.[2] Declarations of the proper officer of defendants' to the police, when causing investigation, are competent against the defendants.[3]

40. *Conversion.*]—An allegation of conversion does not admit of evidence of mere loss, non-delivery,[4] or delayed delivery.[5]

41. *Plaintiff's title.*]—If another than plaintiff is not named as consignee, plaintiff's evidence that the carrier's contract, express or implied, was made with himself, is sufficient proof of his title.[6] If plaintiff is the *consignor* in a bill of lading or receipt naming another as consignee, he must give extrinsic evidence of his ownership, to rebut the presumption that the consignee is owner,[7] unless he shows a special contract with himself, not necessarily dependent on title to the goods.[8] If he is *consignee*, the bill or receipt naming him, or the fact of consignment, is alone presumptive[9] but not conclusive[10] evidence of his ownership. If plaintiff is *not named*, evidence of an assignment to him from the consignee,[11] or his possession of the bill of lading by indorsement from the consignee,[12] or even possession of an unindorsed bill of lading, with extrinsic evidence that plaintiff is a *bona fide* holder for value, by a transfer with intent to pass title,[13] is enough.

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[1] Knell v. U. S. & Brazil Steamship Co. 33 Super. Ct. (1 J. & S.) 423; and see 28 Wisc. 204, s. c. 9 Am. R. 493.

[2] Vaughton v. London & N. W. Ry. Co. L. R. 9 Ex. 93, s. c. 8 Moak's Eng. 535.

[3] Kirkstall Brewery Co. v. Furness Ry. Co. L. R. 9 Q. B. 468, s. c. 10 Moak's Eng. 118.

[4] Tolano v. National Steam Navigation Co. 5 Robt. 318, s. c. 4 Abb. Pr. N. S. 316, 35 How. Pr. 496.

[5] Briggs v. N. Y. Central R. R. Co. 28 Barb. 515.

[6] Paragraphs 4 and 5. Further proof of title, if required, may be made as stated in the chapter on CONVERSION.

[7] Sweet v. Barney, 23 N. Y. 335, aff'g 24 Barb. 533; Krulder v. Ellison, 47 N. Y. 36.

[8] Southern Express Co. v. Craft, 49 Miss. 480, s. c. 19 Am. R. 4; Dunlop v. Lambert, 6 Cl. & F. 600, s. p. Blanchard v. Page, 8 Gray, 281. Compare Thompson v. Fargo, 49 N. Y. 188, rev'g 58 Barb. 575.

[9] Sweet v. Barney (above); Ogden v. Coddington, 2 E. D. Smith, 317; Taplin v. Packard, 8 Barb. 220. Compare Ela v. Am. Merchants' Union Express Co. 29 Wis. 611, s. c. 9 Am. R. 619.

[10] Price v. Powell, 3 N. Y. 322; Shepherd v. Harrison, L. R. 5 H. L. 116.

[11] Chandler v. Belden, 18 Johns. 157; proved as stated in chapter I.

[12] The Thames, 14 Wall. 106, and cases cited.

[13] Merchants' Bk. v. Union Co. 8 Hun, 249.

Oral evidence to show the real party in interest, is admissible within limits already stated.[1]

42. *Oral evidence to explain or vary bill or receipt.*]—A bill of lading, or other voucher giving the terms of transportation, cannot, in the absence of fraud or concurrent mistake, be varied by parol.[2] The principle does not exclude an antecedent parol agreement of a different character, and imposing a different but not inconsistent obligation.[3]

43. *Usage.*]—Evidence of usage is admissible to explain either the language of the parties,[4] or the course of business in view of which they contracted so as to show what acts constitute a performance; but not to vary or contradict the written contract, or vary the obligation created by it.

44. *Declarations of agents.*]—The principle determining the competency of agents' declarations has already been stated.[5]

45. Defenses: *Generally.*]—Except as against a *bona fide* transferee of the bill of lading for value,[6] the carrier may contradict it, as to the delivery to him of the goods,[7] or as to their description,[8] quantity,[9] or condition.[10]

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[1] Pages 298, 360 and 509 of this vol. Ide v. Sadler, 18 Barb. 32. Compare Chapin v. Siger, 4 McLean, 378.

[2] Paragraphs 3 and 25–33; Long v. N. Y. Central R. R. Co. 50 N. Y. 76. For a freer statement of the principle, see Baltimore, &c. Steamb. Co. v. Brown, 54 Penn. St. 77.

Thus, if it stipulates for the most direct route, it cannot be varied by evidence of a previous or contemporaneous oral agreement allowing deviation. Stapleton v. King, 33 Iowa, 28, s. c. 11 Am. R. 109. If the vessel is mentioned, it is presumed to have been selected by the owner with regard to voyage and date of sailing. Goddard v. Mallory, 52 Barb. 87. If the carriers rely on the fact that the owner selected the vehicle with knowledge of defects in it, which caused the injuries, they must show affirmatively that he had notice of such defects. Harris v. Northern Indiana R. R. Co. 20 N. Y. 232, 236.

[3] Blossom v. Griffin, 13 N. Y. 569. For a summary of the law, as to the effect of bill of lading, see 14 Wall. 600.

[4] See pp. 296, 485 and 517 of this vol. The Delaware, 14 Wall. 579; The Schooner Reeside, 2 Sumn. 567; Bourne v. Gatliffe, 11 Cl. & F. 45, 71.

[5] Page 44 of this vol. Burnside v. Grand Trunk R. R. Co. 47 N. H. 554; Price v. Powell, 3 N. Y. 322, 325; Fogg v. Child, 13 Barb. 246; Virginia & Tenn. R. R. Co. v. Sayers, 26 Gratt. 328, 351; Packet Co. v. Clough, 20 Wall. 528, 540; Gt. W. Ry. Co. v. Willis, L. J. 34 C. P. 195, s. c. 18 C. B. N. S. 748.

[6] Dickerson v. Seelye, 12 Barb. 99. Against such a holder, fraud, &c. must be shown. Backus v. Marengo, 6 McLean, 487. Compare Byrne v. Weeks, 7 Bosw. 372, 4 Abb. Ct. App. Dec. appendix.

[7] Schooner Freeman v. Buckingham, 18 How. U. S. 192; The Lady Franklin, 8 Wall. 328; Sutton v. Kettell, Sprague's Decisions, 307; Brown v. Powell Duffryn Steam Coal Company, L. R. 10 C. P. 562, s. c. 14 Moak's Eng. 420. He may show that the thing—for instance, money—was such as by uniform usage was never received by him as a common carrier, but only by his servants on their own account (Knox v. Rives, 14 Ala. 249, 257); and that in this instance plaintiff made a private arrangement with the servant, or gave credit to him alone (Farmers', &c. Bk. v. Champlain Transp. Co. 23 Vt. 186).

[8] See Hale v. Milwaukee Dock Co. 29 Wis. 482, s. c. 9 Am. R. 603.

[9] Wolfe v. Myers, 3 Sandf. 7; Graves v. Harwood, 9 Barb. 477, 481. But the proof of mistake must be clear. Goodrich v. Norris, Abb. Adm. 196. The method of ascertaining quantity, which was resorted to, may be shown to be such as to be frequently inaccurate. Manning v. Hoover, Abb. Adm. 188.

[10] Hastings v. Pepper, 11 Pick. 41; Nelson v. Woodruff, 1 Black, 156, 160; Tarbox

The *perils* for which the carrier is answerable,[1] depend on the express contract, if any, and on settled rules of law; and evidence, if not competent to show a usage, not to be liable for a peril thus imposed.[2]

46. *Contract for restricted liability.*]—The doctrine of the courts of the United States and those of some of the States is, that a common carrier for hire cannot stipulate for exemption from liability for negligence of himself or servants.[3] The doctrine of the New York courts, and those of some other States, is that he may, by express words, but not by a general phrase which does not express negligence.[4] If the contract was made in one State, to be performed in another, the parties may be presumed to have made part of their agreement that law, which is most favorable to its validity and performance.[5]

47. *Evidence of shipper's assent; The New York rule.*[6]]—In the absence of fraud, concealment or improper practice, the legal presumption is that stipulations limiting their common-law liability, contained in a receipt given by the carriers, were known at the time of their receiving the goods, and assented to by the party receiving it.[7] The law conclusively presumes, in the absence of fraud or imposition, that he read or was informed of its contents.[8] Showing the receipt to have been in plaintiff's possession raises a presumption of due delivery and assent.[9] Delivery several days

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v. Eastern Steamship Co. 50 Me. 339; Price v. Powell, 3 N. Y. 322; Ellis v. Willard, 9 Id. 529.

[1] The carrier is not liable for losses caused either by: 1. The act of God. 2. The public enemy. 3. The inherent defect, quality, or vice of the thing carried. 4. Its seizure, in his hands, under legal process. 5. An act or omission of the owner. Clear proof, leaving no reasonable doubt that the loss was from an excepted peril, has been said to be necessary. The Mohler, 21 Wall. 230; and see The Newark, 1 Blatchf. 203. But compare page 495 of this vol.

[2] The Schooner Reeside, 2 Sumn. 567; Garrison v. Memphis Ins. Co. 19 How. U. S. 312, 316; Boon v. Steamboat Belfast, 40 Ala. 184. So held, even as to a part of the route passing through a foreign country. Simmons v. Law, 4 Abb. Ct. App. Dec. 241, affi'g 8 Bosw. 213.

[3] R. R. Co. v. Lockwood, 17 Wall. 357; Bank of Kentucky v. Adams Express Co. 93 U. S. (3 Otto), 174; Virginia, &c. R. R. Co. v. Sayers, 26 Gratt. 328, 348, and cases cited.

[4] Magnin v. Dinsmore, 56 N. Y. 168; Farnham v. Camden, &c. Transp. Co. 55 Penn. St. 53.

[5] Talbott v. Merchants' Despatch Transp. Co. 41 Iowa, 247, s. c. 20 Am. R. 589.

[6] The question, which of these conflicting rules shall apply, does not depend on the law of the place of contract, but on the law of the forum. Hoadley v. Northern Transp. Co. 115 Mass. 304, s. c. 15 Am. R. 106.

[7] Belger v. Dinsmore, 51 N. Y. 166; s. p. in case of passenger and baggage, Steers v. Liverpool, &c. St. Co. 57 Id. 1; Mulligan v. Illinois Central Ry. Co 36 Iowa, 181, s. c. 14 Am. R. 514; Rosc. N. P. 594. Otherwise of a mere check or token, as distinguished from a contract. Blossom v. Dodd, 43 N. Y. 264. To avoid the effect of a limited liability clause, on the ground that the bill of lading was given to agents who had no authority to contract for exemption, it must appear that the carriers had notice that the shippers were agents when contracting. York Co. v. Central R. R. Co. 3 Wall. 107. As to connecting lines, see Irwin v. N. Y. Central R. R. Co. 59 N. Y. 653, affi'g 1 Supm. Ct. (T. & C.) 473.

[8] Grace v. Adams, 100 Mass. 505, s. c. 1 Am. R. 131.

[9] Booman v. Am. Express Co. 21 Wis. 158. Under the Massachusetts interpretation of the rule, the presumption of assent may be rebutted by showing that the

after receipt of goods is not conclusive evidence of assent,[1] but may be made so by proving the uniform cause of dealing.[2]

48. — *the Illinois Rule.*]—The Illinois rule, on the contrary, is that there is no legal presumption that such restrictions, although contained in a formal bill of lading, were assented to by the shipper, even if his usage of accepting similar bills is shown. The evidence must justify the finding of knowledge and assent.[3] The burden is on the carrier to satisfy the jury of such a contract,[4] and for this purpose all the circumstances attending the giving the receipt are competent.[5]

49. *Fraud as to value.*]—The carrier may show a concealment of the value, and its exceeding the $50 limit.[6] There is no presumption that the carrier has knowledge of the contents without evidence of circumstances tending to show it.[7] A direction marked on the package, C. O. D. a sum considerably in excess of the $50 limit, is notice to the carrier that the value exceeded that limit.[8] The shipper's admission that the packages were disguised with the intent that no one should suspect they contained anything valuable, is evidence of fraud.[9] Fraudulent concealment being shown, plaintiff must show gross negligence, such as would be reprehensible had the value been less than the limit.[10]

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bill or receipt was not accepted by plaintiff. For instance, it may be shown that the usual course of business between the parties was not to make out a receipt, and that, in the transaction in question, the goods were delivered for plaintiff to defendant by a casual favor of a stranger, who was not authorized to make a contract (Buckland v. Adams, 97 Mass. 124; s. p. 100 Id. 505; compare Soumet v. Nat'l Express Co. 66 Barb. 284); or that the usual course of dealing was not to make a receipt, and that the receipt in question could not be read intelligibly, by reason of the stamp on it (Perry v. Thompson, 98 Mass. 249, s. p. 100 Id. 505); or that a verbal contract without limit was made, and that the receipt was afterward given to a clerk who had no authority to make a contract (Fillebrown v. Grand Trunk Rw. 55 Me. 462; s. p. 100 Mass. 505).

But it has been recently held that he should show that, as soon as he had time to ascertain its contents, he returned it to the carrier with notice of his non-acceptance. Louisville, &c. R. R. Co. v. Brownlee, 14 Bush, s. c. 8 Rep. 144.

[1] Bostwick v. Balt. & O. R. R. Co. 45 N. Y. 712; Strohn v. Detroit & M. R. Co. 21 Wis. 554. Whether a parol agreement for transportation is merged by the carrier's subsequent delivery of the receipt, without assent by the shipper, compare Germania Fire Ins. Co. v. Memphis, &c. R. R. Co. 7 Hun, 233; Hill v. Syracuse, &c. R. R. 8 Hun, 296.

[2] Shelton v. Merchants' Despatch Co. 59 N. Y. 258, rev'g 36 Super. Ct. (J. & S.) 527.

[3] 8 Cent. L. J. 291; Erie & Western Tr. Co. v. Dater, Jan. 1879.

[4] Adams Express Co. v. Stettaners, 61 Ill. 184, s. c. 14 Am. R. 57; King v. Woodbridge, 34 Vt. 465.

[5] Boscowitz v. Adams Express Co. 5 Cent. L. J. 58, and cases cited.

[6] Magnin v. Dinsmore, 42 N. Y. Super. Ct. (J. & S.) 512; Boscowitz v. Adams Express Co. 5 Cent. L. J. 58; Little v. Boston & Me. R. R. Co. 4 Law & Eq. R. 136; Le Beau v. Gen. Steam Nav. Co. L. R. 8 C. P. 96, s. c. 4 Moak's Eng. 350; Oppenheimer v. U. S. Express Co. 69 Ill. 62, s. c. 18 Am. R. 596.

[7] The Nitro-Glycerine Case, 15 Wall. 536.

[8] Van Winkle v. Adams Express Co. 3 Robt. 59.

[9] Warner v. Western Transp. Co. 5 Robt. 490. So is silence. Magnin v. Dinsmore (above). *Contra*, Little v. Boston & Me. R. R. Co. (above).

[10] See Redf. on Rw. 273, § 133 (10, 11).

50. *Limited liability under the act of Congress.*[1]]—This is not available, except in actions in the courts of the United States, under the statute. To take a case out of the statute, an express contract should be proved; local usage is not competent.[2] Injury by escape of steam, throws on defendant the burden of disproving negligence.[3]

51. *Carriers' delivery; Notice to consignees.*]—The peculiar terms of the bill of lading are important on the question, what constitutes delivery.[4] Where a bill of lading requires delivery at a specified station (the carriers' terminus), but without saying what is to be done, parol evidence is admissible to show that plaintiff gave directions as to delivering the goods to the succeeding carrier, and that he had been accustomed to give, and the defendant to comply with, similar instructions.[5] When defendants are one of the earlier of several connecting lines, entries in their books showing that the goods reached their terminus where, in the usual course of business, they would have been forwarded, are not, alone, enough to show delivery.[6] The receipt, given by the next line to which they delivered the goods, is not evidence that the delivery was in good condition,[7] but may be competent as auxiliary to the testimony of a witness connected with it, who examined the goods.

Local usage and custom, if reasonable, and known to the customer, or so generally known as to be presumably known to him,[8] may be proved, to show what amounts to a delivery which terminates the carriers' duty,[9] provided they do not contradict the instrument.[10]

Misdelivery may be excused by evidence of misdirection,[11] or by evidence that the receiver was authorized to receive, though his authority was unknown to defendant at the time.[12] The fact

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[1] U. S. R. S. 827, §§ 4283–4287; 13 Wall. 104; Baird v. Daly, 57 N. Y. 242.

[2] Walker v. The Transportation Co. 3 Wall. 150.

[3] New World v. King, 16 How. U. S. 469.

[4] Compare Collins v. Burns, 63 N. Y. 1, affi'g 36 Super. Ct. (J. & S.) 518; The Santee, 7 Blatchf. 186, affi'g 2 Ben. 518; Gleadell v. Thompson, 56 N. Y. 194, affi'g 35 Super. Ct. (J. & S.) 232.

[5] Hooper v. Chicago & Northwestern R. R. Co. 27 Wis. 81, s. c. 9 Am. R. 439. Compare Hinckley v. N. Y. Central, &c. R. R. Co. 56 N. Y. 429. These facts being proved, the defendant's liability as carrier must be deemed to continue until such delivery to the succeeding carrier. Id.

[6] Root v. Great Western Ry. Co. 55 N. Y. 636, affi'g 65 Barb. 619, s. c. 1 Supm. Ct. (T. & C.) 10. What circumstances amount to evidence of completed delivery by one company to connecting company,—see Pratt v. Railway Co. 95 U. S. (5 Otto), 43.

[7] Hunt v. Michigan S. & N. Indiana R. R. Co. 37 N. Y. 162, s. c. 35 How. Pr. 287.

[8] McMasters v. Pennsylvania R. R. Co. 69 Penn. St. 374, s. c. 8 Am. R. 264.

[9] Edw. on B. § 288; Angle v. Miss. &c. R. R. Co. 9 Iowa, 487, 494. The carrier may show a local usage that the unloading apparatus shall be furnished by the consignee, and that it was so furnished, and the injury was caused by a latent defect in such apparatus. Loveland v. Burke, 120 Mass. 139, s. c. 21 Am. R. 507.

[10] Hinckley v. N. Y. C. & H. R. R. R. Co. 56 N. Y. 429.

[11] Lake Shore, &c. R. R. Co. v. Hodoff, Sup. Ct. Penn.

[12] Angle v. Mississippi, &c. R. R. Co. 9 Iowa, 487, 501.

that after wrongful delivery, the receiver obtained title, is competent, and reduces the damages to a nominal sum.[1]

Evidence that defendants' usual course of business was to send *notice*, is not sufficient evidence of notice.[2] Evidence of a usual course of business of both parties dispensing with notice, is competent.[3]

The defendants may prove that the uniform usage and course of their business, was to leave goods at their usual stopping places in the towns to which the goods are directed, without notice to the consignee; and if such usage be shown of so long continuance, uniformity and notoriety, as to justify a jury to find that it was known to the plaintiff, compliance with it is a sufficient delivery.[4]

52. "*Act of God*": *Inevitable accident.*]—The carrier is exonerated, if it appear that the loss was caused directly and exclusively by such a direct, and violent, and sudden, and irresistible, act of nature as he could not, by any reasonable amount of ability, foresee would happen; or (if he could foresee that it would happen), could not, by any reasonable amount of care and skill, resist so as to prevent its effect.[5] On the question of the necessity and good faith of a sale of perishing cargo, at an intermediate port, evidence of the advice of competent and disinterested men, taken and acted on by the master, is competent.[6] On the necessity of a jettison, a seaman of experience, who witnessed the storm, may testify to his opinion.[7]

IV. Actions against Common Carriers[8] of Passengers and Baggage.

53. *Plaintiff a passenger.*]—If the action is on contract to carry for hire, proof of negligence, without contract, is a variance,[9] and will prevent a recovery for loss of baggage, at least,[10] unless cured by amendment. It being shown that plaintiff was a common carrier of passengers, the fact that plaintiff was on his vehicle or vessel in course of transportation, is *prima facie* evidence that he was there as a passenger, having paid, or liable to

[1] Hiort v. London & N. W. Ry. Co. 40 Law Times N. S. 674.
[2] Stephenson v. U. S. Express Co. 21 Wis. 405.
[3] Wood v. Milwaukee & St. Paul Ry. Co. 27 Wis. 541, s. c. 9 Am. R. 465.
[4] Gibson v. Brown, 17 Wend. 305; McMasters v. Penn. R. R. Co. 69 Penn. St. 374, s. c. 8 Am. R. 264.
[5] See Nugent v. Smith (above), 4 So. Law Rev. N. S. 451, and cases cited. And see Bell v. Reed, 4 Binn. 127.
[6] Butler v. Murray, 30 N. Y. 88.
[7] Price v. Hartshorn, 44 N. Y. 94, aff'g 44 Barb. 645.
[8] As to private carriers see 12 Wall. 378.
[9] Nolton v. Western R. R. Co. 15 N. Y. 446.
[10] Flint, &c. R. R. Co. v. Weir, 37 Mich. 111.

pay, fare;[1] and this suffices to throw on the carrier the burden of disproving the contract or undertaking to carry.[2] A witness may, in the first instance, testify directly to the fact that plaintiff was a passenger, subject, of course, to cross-examination as to details; but the details having been stated, the witness cannot give an opinion as to whether he was a passenger or trespasser. Evidence of any circumstances tending to show the existence of the contract or undertaking, is competent: such as the payment of fare,[3] the possession of ticket, or of baggage check;[4] with evidence of the custom of defendants as to giving such checks; or production of the passenger list.[5] Where an authenticated list, made by defendants pursuant to law, exists, it is not the exclusive evidence, and defendants must produce it if they require it.[6]

The fact that plaintiff was carried on an apparently gratuitous pass or permission, may be explained by evidence of the contract[7] or usage[8] under which it was given.

54. *Express contract; Ticket.*]—Possession of an unmutilated railroad passage-ticket, is presumptive evidence that the holder has paid the regular price for it, and is entitled to be transported according to its terms, and that it has not been used.[9] It is presumed to have been purchased at some time on the day on which it bears date, but not at any particular hour of the day.[10] A ticket agent is not presumed to have power to bind the company by an oral promise that the ticket should be good at a later date.[11] To sustain such a promise, made after the sale of the ticket, a consideration must be shown.[12] Plaintiff's omission to procure a ticket before entering the cars may be explained by evidence that he applied in vain for one; and the testimony of the ticket agent is competent for this purpose.[13]

If there were several connecting lines, plaintiff, seeking to charge another than the one whose default caused the breach,

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[1] Buffit v. Troy, &c. R. R. Co. 36 Barb. 420, 423; even though he was in a freight car. Dunn v. Grand Trunk Ry. Co. 58 Me. 187, s. c. 4 Am. R. 267. But compare Eaton v. Delaware, &c. R. R. Co. 57 N. Y. 382.

[2] Dunn v. Grand Trunk Ry. Co. (above).

[3] Muscogee R. R. Co. v. Redd, 54 Georgia, 33.

[4] Davis v. Cayuga & Susq. R. R. Co. 10 How. Pr. 330.

[5] Merrill v. Grinnell, 30 N. Y. 594.

[6] Id.

[7] Grand Trunk R. W. v. Stevens, 5 Reporter, 161.

[8] The New World v. King, 16 How. U. S. 469.

[9] Pier v. Finch, 24 Barb. 514. Compare paragraph, 61. Where the ticket and check indicate another route than defendants', evidence that defendants frequently carried baggage bearing such checks, is not sufficient to charge them. Fairfax v. N. Y. Central, &c. Co. 40 Super. Ct. (J. & S.) 128.

[10] Id.

[11] Boice v. Hudson River R. R. Co. 61 Barb. 611; especially a way agent on a through route. McClure v. Phila. &c. R. R. Co. 34 Md. 532, s. c. 6 Am. R. 345.

[12] Boice v. Hudson River R. R. Co. (above).

[13] St. Louis, &c. R. R. Co. v. Dalby, 19 Ill. 353, 363.

must show either a contract by the company he seeks to charge, or that it had some community of interest in, or control over, the carriage of passengers by the one in default.[1] Proof that the defendants checked his baggage to the terminus of the connecting line, without evidence that he paid them his fare for passage by that line, is not alone enough to charge them for a loss on that line.[2] Although several tickets were given for the separate parts of the route, an entire contract to carry over the whole route may be proved by parol.[3] In the absence of all evidence on the subject, except such as may be inferred from the delivery of coupon tickets to the passenger, the presumption is that the carrier who sells the ticket and coupons has purchased of the connecting roads such coupons or the right to issue them, and that they were delivered in part performance of a contract of the carrier selling the ticket.[4]

55. *Authority of agency.*]—The fact that the ticket, and the baggage check obtained of the same agency, were issued by a person having authority, may be proved by evidence that the ticket was presented by the passenger, to the conductor, on the cars of the company sought to be charged, and recognized by him as valid.[5]

56. *Baggage.*]—On the question what is within the rule as to baggage, evidence of the circumstances and position in life of the passenger, of the whole contemplated journey, and of intended sojourns on the way, is competent.[6] Plaintiff is not precluded from recovering, because he may not be able to furnish very detailed evidence of every item of contents.[7] Testimony of a witness, who saw the trunk packed weeks before, may be enough to go to the jury.[8] The law only requires the best evidence in his power.

Evidence that it was defendants' custom to check baggage on the passenger showing his ticket, together with the production and identification of the check, is *prima facie* evidence of a delivery of the baggage.[9] Notice to the baggage master, that the trunks contained other than the passenger's baggage, may be inferred by the jury from circumstances, such as indication that the passen-

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[1] Green v. N. Y. Central R. R. Co. 12 Abb. Pr. N. S. 473; see paragraphs 21, 26, 35. Compare, Wilde v. Northern R. R. Co. 53 N. Y. 156; Milnor v. N. Y. & New Haven R. R. Co. 53 N. Y. 363.

[2] Id. Kessler v. N. Y. Central R. R. Co. 7 Lans. 62.

[3] Van Buskirk v. Roberts, 31 N. Y. 661.

[4] Kessler v. N. Y. C. R. R. Co. 7 Lans. 62.

[5] Chicago & Rock Island R. R. Co. v. Fahey, 52 Ill. 81, s. c. 4 Am. R. 587. Compare Mills v. Shult, 2 E. D. Smith, 139; Quimby v. Vanderbilt, 17 N. Y. 306.

[6] See Merrill v. Grinnell, 30 N. Y. 594; Abb. N. Y. Dig. new ed. tit. Carrier.

[7] Butler v. Busing, 2 C. & P. 613, 614.

[8] Sugg v. Memphis & St. L. Packet Co. 40 Mo. 442, 444.

[9] Edw. on B. § 574. As to the appropriate evidence in case of baggage not checked, see Gleason v. Goodrich Transp. Co. 32 Wis. 35, s. c. 14 Am. R. 716; Berghum v. Great Eastern Ry. Co. 38 L. T. R. N. S. 160; 17 Alb. L. J. 298; Welch v. Pullman Pal. Car Co. 16 Abb. Pr. N. S. 352.

ger was a traveling salesman, that the trunks were not ordinary traveling trunks, &c., and that an extra charge was made.[1]

Upon a through ticket and check, an intermediate or ultimate company may be held liable, if there is evidence that the baggage came to their hands and was lost by them.[2]

57. — *loss or non-delivery.*[3]]—Evidence that plaintiff's baggage was lost on the journey on defendants' route, is sufficient to throw the burden of proof on the defendants, and dispenses with proof of a demand and refusal.[4] If there is evidence of negligence on defendants' part, accounting for the loss, mere evidence of the course of business, according to which the baggage should have been duly delivered to the next connecting line, is not enough to exonerate defendants.[5]

58. *Negligence.*]—The mode of proving negligence is stated in the chapter on actions for negligence.[6]

59. *Authority of servant.*]—The fact that one assuming to act as a servant of the company was such, may be inferred from evidence of his position, conduct, or dress, &c., as such.[7] If he is shown to have been in charge of a car, his authority to remove trespassers may be inferred by the jury, although the rules are silent.[8] If an assault and expulsion by defendants' servants is proved, the burden of justifying it is on defendants.[9] Abusive language, not part of the *res gestæ*, is not competent.[10]

60. *Damages.*]—In addition to the damages for personal injury,[11] plaintiff may recover for lost time by neglect to transport, even without specific evidence of the value of his time.[12] Evidence of exposure by the delay, and consequent illness, is competent.[13] Opinions of witnesses are not generally competent evidence of the value of his time.[14] If he seeks to recover for the defeating of a particular errand, he must produce some evidence that if he had arrived at the appointed time he might have done his errand and would have promptly returned, and that he could not, with due effort, accomplish his errand by reason of his delay in arriving.[15]

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[1] Sloman v. Great Western Ry. Co. 67 N. Y. 208, rev'g 6 Hun, 546.

[2] Chicago & Rock Island R. R. Co. v. Fahey, 52 Ill. 81, s. c. 4 Am. R. 587. Compare paragraphs 35 and 36.

[3] See Paragraphs 6 and 36.

[4] Garvey v. Camden & Amboy R. R. Co. 1 Hilt. 280, s. c. 4 Abb. Pr. 171.

[5] Baltimore, &c. Co. v. Smith, 23 Md. 402.

[6] Page 582 of this vol. See, also, paragraphs 6 and 34–39 of this chapter.

[7] Page 41, note 8.

[8] Bayley v. Manchester, Sheffield, &c. Ry. Co. L. R. 7 C. P. 415, s. c. 3 Moak's Eng. 308.

[9] St. John v. Eastern R. R. Co. 1 Allen, 544.

[10] Hamilton v. N. Y. Central R. R. Co. 51 N. Y. 100.

[11] See chapter on NEGLIGENCE.

[12] Ward v. Vanderbilt, 4 Abb. Ct. App. Dec. 521.

[13] Williams v. Vanderbilt, 28 N. Y. 217, aff'g 29 Barb. 491.

[14] Hastings v. Uncle Sam, 10 Cal. 341; Lincoln v. Saratoga, &c. R. R. Co. 23 Wend. 425. Compare p. 368 of this vol.

[15] Benson v. New Jersey R. R. & Transp. Co. 9 Bosw. 412.

If there was no express stipulation to carry on time,[1] evidence that defendant did all that was reasonably practicable, is competent in excuse for delay.[2]

61. Defenses: *Restrictions of liability; Extrinsic evidence to vary ticket.*]—In determining whether a printed condition on a ticket, &c., limiting a carrier's liability, was sufficient notice to the plaintiff, the question is whether the condition was so exhibited as to make its non-notice negligent.[3] Ordinary tickets, which do not purport to be contracts, are not within the rule excluding parol evidence to vary a writing.[4] Such evidence is, therefore, admissible to show the nature of the agreement entered into between the carrier and the passenger, at the time of issuing them.[5] The reasonable regulations of the company, consistent with the terms expressed on the ticket, may be proved in its favor; and the company is not bound to prove notice of these regulations to the holder of the ticket.[6] Evidence of a usage of the subordinates, in violation of such a regulation, is not competent against the company, unless notice of it to the governing officers is shown.[7] If the terms were sufficiently displayed or actually communicated, the ticket is the evidence of the contract.[8]

62. *Contributory negligence.*]—If it appear that plaintiff was riding in a place of hazard in the car or train, the burden is upon him to disprove negligence.[9] This may be done by evidence that he could get no safer place, but not by evidence that those in charge suffered him to remain in a place he knew to be dangerous.[10] If defendants object, that plaintiff brought the injury on himself by leaping from the vehicle, he may prove that others did so, and also their declarations in the act.[11]

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[1] Rose N. P. 615.

[2] Gordon v. Manchester, &c. R. R. Co. 52 N. H. 596, s. c. 13 Am. R. 97.

[3] Wharton on Neg. § 587, 2d ed., citing Elmore v. Sands, 54 N. Y. 512; Evansville, &c. R. R. v. Androscoggin Mills, 22 Wall. 594. Compare Rawson v. Pennsylvania R. R. Co. 48 N. Y. 212, affi'g 2 Abb. Pr. N. S. 220; Wilson v. Chesapeake, &c. R. R. Co. 21 Gratt. 654, 672; Dietrich v. Pennsylvania, &c. R. R. Co. 71 Penn. St. 432, s. c. 10 Am. R. 711; Henderson v. Stevenson, L. R. 2 Sc. App. 470, s. c. 13 Moak's Eng. 141; and Stewart v. N. W. Ry. Co. 3 H. & C. 135. Whether the receipt of a ticket for deposit of luggage is *prima facie* evidence of assent to the special conditions printed on it, see Harris v. Great Western Ry. Co. 1 Queen's Bench Div. 515, s. c. 17 Moak's Eng. 156; Parker v. Southeastern Ry. Co. 1 C. P. Div. 618, s. c. 18 Moak's Eng. 238. Special limited receipt delivered sometime after transaction, and in answer to demand, not deemed contract without evidence of assent. Willner v. Morrell, 40 Super. Ct. (J. & S.) 222.

[4] Quimby v. Vanderbilt, 17 N. Y. 306.

[5] Id.; Van Buskirk v. Roberts, 31 Id. 661.

[6] Dietrich v. Pennsylvania R. R. Co. 71 Penn. St. 432, s. c. 10 Am. R. 711; Johnson v. Concord, &c. R. R. Co. 46 N. H. 213, 220.

[7] Id.

[8] Barker v. Coffin, 31 Barb. 556; Boice v. Hudson River R. R. Co. 61 Id. 611.

[9] Ward v. Central Park, &c. R. R. Co. 11 Abb. Pr. N. S. 411, s. c. 42 How. Pr. 289. There is no presumption that an engineer has authority to allow riding on the engine, contrary to rule. Robertson v. N. Y. & Erie R. R. Co. 22 Barb. 91.

[10] Ward v. Central R. R. (above).

[11] Mobile R. R. v. Ashcroft, 48 Ala. 15, 31.

CHAPTER XXXI.

ACTIONS FOR NEGLIGENCE.

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I. General Rules.

1. *Burden of proof.*]—The burden of proof, that the injury resulted from negligence on the part of defendant, is upon the plaintiff.[1]

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[1] Nitro-Glycerine Case, 15 Wall. 524; Holbrook v. Utica & Schenectady R. R. Co. 12 N. Y. 236, affi'g 16 Barb. 113; The Marpesia, L. R. 4 P. C. C. 212, s. c. 3 Moak's Eng. 92; The Benmore, L. R. 4 Ad. & Ec. 132; Curran v. Warren Chem. & Manuf.

2. *The pleading.*]—Under an allegation of negligence, a contract may be proved, together with actionable negligence, to plaintiff's injury, in the acts constituting a breach;[1] but a mere breach of contract, without evidence or inference of negligence, is a variance.[2] Under a general allegation of negligence, the circumstances constituting it may be proved,[3] even though other circumstances particularly specified in the complaint are unproved.[4]

3. *Elements of direct proof.*]—The characteristic elements of evidence in direct proof of actual negligence are, 1. The relation of the parties, if any, such as to raise a duty on defendant's part towards plaintiff; 2. The casualty; 3. What ought to have been done; 4. What actually was done.

4. *Degrees of negligence.*[5]]—Whether negligence was gross or not is not matter of opinion for a witness, but a conclusion to be drawn by the court or jury. It is to be established by evidence manifesting the nature and degree of care which defendant owed, and that which he actually took. But where plaintiff needs to prove gross negligence, it is best to express his offer of proof accordingly.[6] Gross negligence may be proved under a general averment of negligence.[7]

5. *Privity.*]—If the wrong is founded on breach of contract, plaintiff must be a party, or privy to the contract.[8] But the fact that a contract with a third person is proved by plaintiff, does not necessarily require him to show privity.[9] It is enough if the defendant's contract with the third person was made for the purpose of accommodating the plaintiff.[10]

6. *The casualty as evidence of negligence.*]—The mere happening of a casualty is not sufficient evidence of negligence to go to the jury. But the nature of the accident and the presumptions

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Co. 36 N. Y. 153, s. c. 3 Abb. Pr. N. S. 240, 34 How. Pr. 250; Caldwell v. N. J. Steamboat Co. 47 N. Y. 282, affi'g 56 Barb. 425. So if the negligence is in delivering a dangerous thing without giving notice, plaintiff must prove defendant's neglect to give notice. Williams v. East India Co. 3 East, 192, 198, 199; Steph. Ev. 98.

[1] See Dean v. McLean, 48 Vt. 412, s. c. 21 Am. R. 130.

[2] See Putnam v. Kingsbury, 16 Pick. 371.

[3] Oldfield v. N. Y. & Harlem R. R. Co. 14 N. Y. 310; Ware v. Gay, 11 Pick. 106; Wright v. Hardy, 22 Wis. 348 and see Indianapolis, &c. R. R. Co. v. Horst, 93 U. S. (3 Otto), 291, 297.

[4] Edgerton v. N. Y. & Harlem R. R. Co. 39 N. Y. 227, affi'g 35 Barb. 193, 389. At common law, an agent's negligence could not be proved under an allegation of the principal's negligence. Dunlop v. Moore, 7 Cranch, 242, 269, affi'g 1 Cranch C. Ct. 536.

[5] As to the controversy on the question of degrees, see 5 Am. Law Rev. 38.

[6] See Grinnell v. Western Union Tel. Co. 113 Mass. 299, s. c. 18 Am. R. 485.

[7] Nolton v. Western R. R. Co. 15 N. Y. 444.

[8] Clancy v. Byrne, 56 N. Y. 129, rev'g 65 Barb. 344.

[9] Baird v. Daly, 57 N. Y. 236, rev'g 4 Lans. 426.

[10] See Coughtry v. Globe Woolen Co. 56 N. Y. 124, rev'g 1 Supm. Ct. (T. & C.) 452; Baird v. Daly, 57 N. Y. 236, rev'g 4 Lans. 426.

it raises, may suffice.[1] Evidence that the act was such as, if done with proper care, ordinarily does not produce damage, will generally sustain an inference that it was negligently done, if there is no evidence to indicate the manner of it.[2] Otherwise the presumption is that in the performance of a lawful act, at least ordinary care was used.[3] It is enough for plaintiff to raise a fair presumption of negligence. Probability is sufficient to go to the jury.[4] If defendant had charge or control of the instrument of disaster, and if it was highly dangerous, or if he owed a special duty of care of one in the position of plaintiff, the disaster is evidence of negligence, sufficient to go to the jury, unless the circumstances indicate some cause consistent with due care on defendant's part.[5]

7. *Other negligences.*]—Evidence of other specific instances of negligence, on the part of defendant or the servant whose misconduct is alleged, independent of the negligence in question, is not competent,[6] because raising a collateral issue. For the same reason, if the disaster is attributed to a defect in structure, evidence of other disasters, attributed to the same cause, is not generally competent;[7] and when admissible, it is because they tend to show that the cause was a dangerous thing,[8] or that defendant

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[1] Wharton on Neg. § 421; citing Scott v. London, St. Kath. Docks, 3 H. & C. 596; Byrne v. Boadle, 2 Id. 722; Mullen v. St. John, 57 N. Y. 567, and other cases; and see Terry v. N. Y. Central R. R. Co. 22 Barb. 574.

[2] Sedg. on Dam. 592.

[3] Lansing v. Stone, 37 Barb. 15, s. c. 14 Abb. Pr. 199.

[4] Shearm. & Red. § 13. *Contra*, Sheldon v. Hudson R. R. R. Co. 29 Barb. 226.

[5] In illustration of this principle, compare, as to *Being found dead* on defendant's premises, Lehman v. City of Brooklyn, 29 Barb. 234; Curran v. Warren Mfg. Co. 36 N. Y. 153, s. c. 3 Abb. Pr. N. S. 240; 34 How. Pr. 250; or on the crossing of their road, Lyndsay v. Conn. &c. R. R. Co. 27 Vt. 643; Johnson v. Hudson River R. R. Co. 20 N. Y. 65; 6 Duer. 633; Waldron v. Rensselaer & Saratoga R. R. Co. 8 Barb. 390. *Blasting.* Ulrich v. McCabe, 1 Hilt. 251; Tremain v. Cohoes Co. 2 N. Y. 163. *Explosion.* McMahon v. Davidson, 12 Minn. 357, 371; Losee v. Buchanan, 51 N. Y. 476, rev'g 61 Barb. 86; Marshall v. Welwood, 9 Vroom. N. J. 339, s. c. 20 Am. R. 394; Illinois Cent. R. R. Co. v. Phillips, 49 Ill. 234, 239. *Falling bodies.* Muller v. St. John, 57 N. Y. 567; Welfare v. London & Brighton Ry. Co. L. R. 4 Q. B. 693; Kearney v. London, Brighton, &c. Ry. Co. L. R. 5 Q. B. 411; L. R. 6 Q. B. 759; Clare v. Nat. City Bank, 1 Sweeny, 539; Weitner v. Delaware & Hudson Canal Co. 4 Robt. 234; Kendall v. City of Boston, 118 Mass. 234, s. c. 19 Am. R. 446; Byrne v. Boadle, 2 H. & C. 722; Scott v. London, St. Kath. Docks Co. 3 Id. 596; Jager v. Adams, 123 Mass. 26. *Fire.* Lansing v. Stone, 37 Barb. 15. *Gas escaping.* Shearm. & Red. on Neg. § 340; Lannen v. Albany Gas L. Co. 44 N. Y. 459, 46 Barb. 264; Parry v. Smith, 41 L. T. R. N. S. 93.

[6] First Nat. Bank of Lyons v. Ocean Nat. Bank, 60 N. Y. 278, 295; Warner v. N. Y. Central R. R. Co. 44 N. Y. 465, rev'g 45 Barb. 299; Robinson v. Fitchburgh, &c. R. R. Co. 7 Gray (Mass.), 92, 95. Passenger thrown from horse car by driver's suddenly stopping. Maguire v. Middlesex R. R. Co. 115 Mass. 239; Miss. C. R. R. Co. v. Miller, 40 Miss. 45, 47. But it may be admissible in rebuttal of defendant's evidence of general care (Detroit, &c. R. R. Co. v. Van Steinburgh, 17 Mich. 99, 111), or to repel an inference of accident (1 Whart. Ev. 47, § 38).

[7] Sherman v. Kortright, 52 Barb. 267; Jacques v. Bridgeport, &c. R. R. Co. 41 Conn. 61; and see Bailey v. Trumbull, 31 Conn. 581.

[8] As, for instance, that it commonly frightened other horses than plaintiff's. House v. Metcalf, 27 Conn. 631, 636; Hill v. Portland, &c. R. R. Co. 55 Me. 438, 443; Darling v. Westmoreland, 52 N. H. 401. The competency of such evidence has been much contested. Compare Collins v. Dorchester, 6 Cush. 396. It would certainly be competent to prove by an expert, that at a time either before or after the

had notice of its existence,[1] or proving a frequency of occurrence which repels all inference of accident.[2] Evidence of disaster at another time, or another similar place, if adduced, is not competent for the purpose of proving dangerousness, unless it shows that all material conditions were the same.[3]

8. *Time of existence of defect.*]—Evidence of the existence of the defect to which plaintiff attributes the disaster, is not confined to the very time of the disaster,[4] but the limit of time depends on the nature of the structure and of the defect.[5] If one party, without objection, gives evidence overstepping these limits, the other may rebut by similar, but not greater liberty.[6]

9. *Other defects.*]—The mere existence of defects in a structure at other places than that where the casualty occurred,—as, for instance, a defect in track half a mile away from the scene of a railway wreck,—is not evidence that a similar defect existed at the place of the casualty, and caused it.[7]

10. *Incompetency.*]—Evidence of negligence having been given, the incompetency or unskillfulness of the actor may be proved.[8]

11. *Reputation.*]—Evidence of general reputation for negligence is inadmissible to prove negligence upon a particular occasion.[9]

12. *Intemperance.*]—Intoxication is competent, but not conclusive[10] evidence of negligence.[11] Evidence of the intemperate

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disaster, when the defect which is alleged to have caused it, was in no worse state than at the time of the disaster, he examined and experimented with it, and found it capable of producing the like disaster; hence there seems no reason for excluding ordinary experience when offered within the same limits and for the same purpose. Such evidence is sometimes admissible merely to show what called the attention of witness to the defect. Tomlinson v. Town of Derby, 43 Conn. 562.

[1] Mobile, &c. R. R. Co. v. Ashcraft, 48 Ala. N. S. 15; 1 Whart. Ev. 50, § 41.

[2] "There is no better evidence of negligence than the frequency of the accidents." Mobile, &c. R. R. Co. v. Ashcraft, 49 Ala. N. S. 305.

[3] See Fillo v. Jones, 2 Abb. Ct. App. Dec. 121; Haynes v. Burlington, 38 Vt. 350, 363. Compare Kent v. Lincoln, 32 Vt. 591, 597.

[4] Compare Kline v. Queen's Ins. Co. 69 N. Y. 614, affi'g 7 Hun, 267; Hutchinson v. Methuen, 1 Allen, 33.

[5] Thus, evidence of ice on the sidewalk must be confined within a brief period, for its formation and removal are quick; but evidence of a flaw in a boiler plate may relate to the original making of the boiler, though at a remote time.

[6] For illustrations of this rule, see Walker v. Westfield, 39 Vt. 246; Baird v. Daly, 68 N. Y. 547; Jacques v. Bridgeport Horse R. R. Co. 41 Conn. 61.

[7] It would be otherwise if the defect proved was shown to be the result of a cause presumably operating at the place of casualty also. Reed v. N. Y. Central R. R. Co. 45 N. Y. 574, overruling 56 Barb. 493. *Contra*, Murphy v. The Same, 66 Barb. 125; and see Cox v. Westchester Turnpike Co. 33 Barb. 414.

[8] Bigley v. Williams, 80 Penn. St. 107, 115; Penn. R. R. Co. v. Brooks, 57 Id. 339, 343; McKinney v. Neil, 1 McLean, 540.

[9] Jacobs v. Duke, 1 E. D. Smith, 271; Baldwin *v.* Western Railroad, 4 Gray, 333; Hays v. Millar, 77 Penn. St. 238, s. c. 18 Am. R. 445.

[10] Stuart v. Machiasport, 48 Me. 477; Baker v. Portland, 58 Id. 199, s. c. 4 Am. R. 274.

[11] Wynn v. Allard, 5 Watts & S. (Penn.) 524.

habits of the servant, whose negligence caused the injury, and that defendants were aware of such habits, is admissible for the purpose of making a case for exemplary damages.[1]

13. *Opinions of witnesses.*]—On a subject proper for an expert's testimony,[2]—such as a question of navigation or seamanship,[3] or the management of steam,[4] and of railroad trains,[5] the construction of railroad cars,[6] and tracks,[7] and of bridges,[8] the fastening of vessels, &c.[9]—a witness, shown to be an expert, may state his opinion. It is competent, thus, to prove what would have been the proper construction[10] and mode of operation;[11] the effect of a particular thing therein;[12] what is or what is not prudent;[13] whether a person of competent skill would have done what the witness testifies was done, or what is hypothetically put;[14] and whether the casualty could have been avoided by proper care.[15] It is objectionable to ask whether the person was negligent,[16] or whether he omitted anything that ought to have been done;[17] but if the point is a proper subject of opinion, and the question is properly framed, it is no objection that it involves the question to be decided by the jury.[18] An unskilled witness cannot testify whether anything could have been done to prevent the casualty.[19]

In a matter not requiring special skill or experience,—such as the necessity of gate and signals at an open drawbridge,[20] the management of fire,[21] and the like,—opinion evidence is not generally admissible. In such cases it is not competent to ask a

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[1] Cleghorn v. N. Y. Central & Hudson River R. R. Co. 56 N. Y. 44.

[2] See page 310 of this vol.

[3] The City of Washington, 92 U. S. (2 Otto), 39; Transportation Co. v. Hope, 95 Id. 297.

[4] The contrary held of the necessity of a spark arrester. Teall v. Barton, 40 Barb. 137.

[5] Cincinnati, &c. R. R. Co. v. Smith, 22 Ohio St 277, s. c. 10 Am. R. 729; Mott v. Hudson River R. R. Co. 8 Bosw. 345. But compare Keller v. N. Y. Central R. R. Co. 2 Abb. Ct. App. Dec. 480.

[6] Baldwin v. Chicago, &c. R. R. Co. 8 Cent. L. J. 497. The contrary held of the construction of cattle bars. Enright v. San Francisco, &c. R. R. Co. 33 Cal. 230, 236.

[7] Carpenter v. Central Park, &c R. R. Co. 11 Abb. Pr. N. S. 416.

[8] Conrad v. Village of Ithaca, 16 N. Y. 173.

[9] Moore v. Westervelt, 27 N. Y. 234, affi'g 9 Bosw. 558.

[10] Conrad v. Village of Ithaca (above); Baldwin v. Chicago, &c. R. R. Co. (above).

[11] Baldwin v. Chicago, &c. R. R. Co. (above).

[12] Id.

[13] Transportation Co. v. Hope, 95 U. S. (5 Otto), 297; Delaware, &c. Steam Towboat Co. v. Starrs, 69 Penn. St. 36.

[14] Malton v. Nesbit, 1 Carr. & P. 70.

[15] Fenwick v. Bell, 1 Carr. & K. 312; Bellefontaine, &c. R. R. Co. v. Bailey, 11 Ohio St. 333.

[16] Crofut v. Brooklyn Ferry Co. 36 Barb. 201.

[17] Carpenter v. Eastern Transp. Line, N. Y. Ct. App. 17 Alb. L. J. No. 9.

[18] Transportation Line v. Hope, 95 U. S. (5 Otto), 297.

[19] Haggerty v. Brooklyn, &c. R. R. Co. 61 N. Y. 624.

[20] Nowell v. Wright, 3 Allen, 166, 170.

[21] Teall v. Barton, 40 Barb. 137; Fraser v. Tupper, 29 Vt. 409.

witness whether the casualty would or would not have occurred had a specified circumstance been different.[1]

Facts discernible by judgment or estimate, but not requiring special knowledge or skill, are not regarded as matters of opinion within these rules. Hence any person of ordinary knowledge and experience may testify to his judgment of the speed of a train or vehicle,[2] or whether a person looked sick or well,[3] and the like.

14. *Declarations and admissions generally.*]—Where evidence of a declaration is admissible, a witness who was present may be allowed to state what he heard said, leaving it to others to identify the declarant; but the fairer course is to require that identification, if necessary at all, be given first.[4]

The rules as to competency of declarations, which are below stated, are to be taken with this qualification,—that declarations not competent on these grounds are often admissible for other purposes, such as to charge defendant with notice,[5] if independent evidence of the existence of the fact declared has been given;[6] or as a circumstance which fixed the fact on the witness's memory;[7] and, in some cases, a written statement may be admissible as an original memorandum auxiliary to the testimony of the writer, or in lieu of it after his death.[8]

15. *Plaintiff's declarations.*]—Declarations made by the injured person, though the plaintiff himself, at the time of his suffering the disaster, and growing out of it, or out of its immediate causes, and calculated to explain the character, nature or quality of the facts constituting the occurrence and its effects on him, are competent, even in his own favor,[9] if part of the *res gestæ*.[10] A declaration, which is not admissible under this rule, is not rendered admissible by the circumstance that it was a dying declaration.[11]

16. *Defendant's admissions, declarations, and conduct.*]—The admissions and declarations of a defendant are admissible against himself,[12] and so is the fact that he referred a question of fact to

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[1] Crane v. Northfield, 33 Vt. 124; Weaver v. Alabama, &c. Co. 35 Ala. 176, 183; Otis v. Thom, 23 Id. 469; Unger v. Forty-second St. R. R. Co. 6 Robt. 237.

[2] Salter v. Utica & Black River R. R. Co. 59 N. Y. 631; Detroit, &c. R. R. Co. v. Van Steinburgh, 17 Mich. 99, 105.

[3] Higbie v. Guardian Mut. Life Ins. Co. 53 N. Y. 603, 66 Barb. 462.

[4] Indianapolis, P. & C. R. Co. v. Anthony, 43 Ind. 183, 191.

[5] Parker v. Boston, &c. Steamboat Co. 109 Mass. 449.

[6] Hadencamp v. Second Ave. R. R. Co. 1 Sweeny, 490.

[7] Detroit, &c. R. R. Co. v. Van Steinburgh, 17 Mich. 99, 107.

[8] See Downs v. N. Y. Central R. R. Co. 47 N. Y. 83, and pages 319–322 of this vol.

[9] Frink v. Coe, 4 Greene (Iowa), 555. In favor of admitting declarations subsequent to the act, see Commonwealth v. M'Pike, 3 Cush. (Mass.) 181; Harriman v. Stowe, 57 Mo. 93. *Contra*, Cleveland, &c. R. R. Co. v. Mara, 26 Ohio St. 185.

[10] Brownell v. Pacific R. R. Co. 47 Mo. 239, 244; see paragraph 17.

[11] Marshall v. C. &. G. E. R. R. Co. 48 Ill. 475.

[12] De Benedetti v. Mauchin, 1 Hilt. 213. And, equally, conduct indicating a con-

a third person, together with such person's answer.[1] But such evidence is not conclusive against the defendant;[2] nor is it competent against a co-defendant,[3] except when made so by being part of the *res gestæ*, or when some connection between the defendants is shown to justify one in speaking for the other.[4]

An admission of having been in fault is cogent evidence; but an admission of having caused the casualty is not necessarily an admission of having been in fault.[5]

17. *Admissions and declarations of servants, &c.*]—The declarations of defendant's servants[6] and equally those of plaintiff's servants[7] are competent in favor of either party, if part of the *res gestæ*, or if within the scope of agency for the party against whom they are offered. The two main rules, allowing and limiting such evidence on these grounds, have been already stated.[8] In illustration of the rule of the *res gestæ*, it will suffice to say that declarations of a railroad engineer or steamboat captain, made while running recklessly, and characterizing the act,[9] are competent against the employer, in an action for an injury caused by that recklessness; but such declarations or admissions, made after the heat of the emergency had passed, and other acts had intervened,[10]—as, for instance, on arriving at the next station, after the casualty;[11]

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sciousness of liability. Banfield v. Whipple, 10 Allen, 27, 31. The conduct of defendant or his servant, immediately on the happening of the casualty, in staying or fleeing, is competent as tending to show animus. Barker v. Savage, 1 Sweeny, 288, 291. Evidence of subsequent precautions against a recurrence of the disaster is admitted in Pennsylvania (Penn. R. R. Co. v. Henderson, 51 Pa. St. 315; Westchester R. R. v. McElure, 67 Penn. St. 311; McKee v. Bidwell, 74 Penn. St. 218, 225); but not in New York (Dougan v. Champlain Transp. Co. 56 N. Y. 1, affi'g 6 Lans. 430; Salters v. Delaware & Hudson Canal Co. 3 Hun, 338; Payne v. Troy & Boston R. R. Co. 9 Hun, 526. *Contra*, Westfall v. Erie Ry. Co. 5 Hun, 75; Baldwin v. N. Y. & Harlem Nav. Co. 4 Daly, 314. And see Bevier v. Delaware & Hudson Canal Co. 13 Hun, 254, 256; Baird v. Daly, 68 N. Y. 547). The true principle is that subsequent precautions may admit inadequacy but not fault. The defendant's private reprimand and dismissal of the servant at fault, held not competent as an admission of his negligence. Betts v. Farmers' Loan, &c. Co. 21 Wis. 80, 86.

[1] Sybray v. White, 1 M. & W. 435; Rosc. N. P. 73.

[2] Id.; Sutherland v. N. Y. C. & H. R. R. R. Co. 41 Super. Ct. (J. & S.) 17.

[3] Daniels v. Potter, 1 M. & M. 501.

[4] Compare chapter VII of this vol., and Reagan v. Grim, 14 Penn. St. 508.

[5] Lansing v. Stone, 37 Barb. 15, s. c. 14 Abb. Pr. 199.

[6] See, for instance, Reed v. Dick, 8 Watts (Pa.), 479.

[7] See, for instance, Toledo, &c. R. R. Co. v. Goddard, 25 Ind. 185, 190.

[8] Page 44 of this vol.

[9] Gerke v. Cal. Steam Nav. Co. 9 Cal. 251, 255; R. R. Co. v. Messino, 1 Sneed (Tenn.), 220, 227.

[10] The principle applied by those courts that admit such declarations most freely, is to receive those which are obviously elicited by the casualty, though not literally simultaneous with it, if they follow in close connection and before other acts intervene, so as to be apparently the spontaneous expression of the natural consciousness while still under the heat of the emergency. Compare Ins. Co. v. Mosely, 8 Wall. 397; approved in 9 Id. 408, and cases cited. The New York courts exclude such declarations, unless it affirmatively appears that they were made at the time of the injury. Whitaker v. 8th Avenue R. R. Co. 51 N. Y. 295, rev'g Whitaker v. 8th Avenue R. R. Co. 5 Robt. 650; Luby v. Hudson R. R. Co. 17 N. Y. 131.

[11] Sims v. Macon, &c. R. R. Co. 28 Geo. 94; Bellefontaine Ry. Co. v. Hunter, 33 Ind. 335, s. c. 5 Am. R. 201.

or on a later day though while continuing the voyage;[1] or on being arrested when leaving the spot,[2]—are not competent.

Declarations made *before or after* the casualty may be made admissible by showing that the declarant was acting in the scope of his employment at the time, in a matter involved in the duty or care required of defendant, and default in which caused the disaster,[3] or aggravated the wrong.[4] If it be shown that the declarant spoke in response to timely inquiries addressed to him, and relating to matters under his charge, in respect to which he was authorized, in the usual course of business, to give information,[5] this principle suffices to admit the declaration of the agent, and hence narratives of past facts are not necessarily excluded, as they are where only the rule of *res gestæ* is invoked.

18. — *of third person injured.*]—Where the beneficial as well as legal right of action is in another than the injured person,—as where a parent sues for injuries to his minor child,—the admissions of the latter are not competent against the plaintiff,[6] unless as part of the *res gestæ*, or brought home to plaintiff by independent evidence.

19. *Strangers.*]—The declarations of any persons present, made in the heat of the emergency, and forming part of the incident and illustrating the nature, cause or extent of the wrong, may be proved as part of the *res gestæ*.[7]

20. *Violation of Statute.*]—Although the fact that an act required by statute was omitted, or that an act done was a violation of a statute, does not alone necessarily sustain an action against the offender for negligence,[8] nor necessarily bar an action by him for negligence injurious to him while offending;[9] yet it is relevant as evidence on the question of negligence in the act; and if the statute regulated the manner for purposes of safety, and the injury resulted from the disregard of such regulations,

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[1] Packet Co. v. Clough, 20 Wall. 528.

[2] Whitaker v. Eighth Ave. R. R. Co. (above).

[3] Thus declarations of those engaged in construction may be competent if the cause of disaster was a defect in that construction. Brehm v. Great Western R. R. Co. 34 Barb. 226; Peyton v. Governors of St. Thomas Hospital, 3 M. & Ry. 625 n.; Matteson v. N. Y. Central R. R. Co. 62 Barb. 364.

[4] For instance, the master's refusal to allow the injured passenger assistance, after the casualty. Hall v. Steamboat Co. 13 Conn. 319, 324. Otherwise if the conduct of the declarant is not implicated in the fault. Maury v. Talmadge, 2 McLean, 157; Mobile & M. R. R. Co. v. Ashcraft, 48 Ala. 15.

[5] See page 44 of this vol.

[6] Ohio, &c. R. R. Co. v. Hammersley, 28 Ind. 371.

[7] Norwich Transp. Co. v. Flint, 13 Wall. 3; 7 Blatchf. 536. Under these rules a newspaper account (Downs v. N. Y. Central R. R. Co. 47 N. Y. 83), or a passengers' card of exoneration (Macon, &c. R. R. Co. v. Johnson, 38 Geo. 409, 436), are not competent. As to proving outcries, compare 1 Whart. Ev. 46, § 36; Messner v. People, 45 N. Y. 1.

[8] Smith v. Lockwood, 13 Barb. 209, 217; Van Hook v. Whitlock, 2 Ed. Ch. 304.

[9] Hoffman v. Union Ferry Co. 68 N. Y. 390; Baker v. Portland, 58 Me. 199, s. c. 4 Am. R. 274.

this is sufficient *prima facie* evidence of negligence.[1] But, on the other hand, compliance with the statute is not usually conclusive evidence of due care.[2]

21. — *of municipal ordinance.*]—Violation of a municipal ordinance regulating the manner of the act, is relevant on the question of negligence.[3]

22. *Usage.*]— Plaintiff may show the general course and usage of the business, so far as necessary for the purpose of showing what ought to have been done in conducting the transaction in which defendant is alleged to have been negligent.[4] Where the measure of defendant's duty is ordinary care, the manner in which other persons in the same general business are accustomed to do, is competent.[5] Otherwise where the duty is not to be thus measured.[6] In neither case is the defendant's own usage competent in his favor.[7]

A general usage may be proved by testimony of experts, to decide a question of duty not governed by law.[8]

23. *Ownership of the thing causing the injury.*]—Ordinarily evidence that the property, mismanagement of which caused the injury, was owned by and in the control of defendant, is *prima facie* evidence that the negligence was imputable to him.[9] To make a municipal corporation liable for the unsafe condition of public property, its custody and control of the property must be shown.[10]

Ownership[11] and possession[12] may each be proved by direct testimony of a witness to the fact, subject of course to cross-examination. Evidence of acts of ownership, such as applying for

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[1] Cordell v. N. Y. Central R. R. Co. 64 N. Y. 535, rev'g 6 Hun, 461. See also Wooster v. Canal Bridge Co. 16 Pick. 541, 544; Shearm. & Red. Negl. § 484.

[2] Caldwell v. N. J. Steamb. Co. 47 N. Y. 282, affi'g 56 Barb. 425. Compare Doward v. Lindsay, L. R. 5 P. C. 338, s. c. 8 Moak's Eng. 261.

[3] McGrath v. N. Y. Central & H. R. R. R. Co. 63 N. Y. 522; Beisigel v. N. Y. Central, 14 Abb. Pr. N. S. 29; Jetter v. New York & Harlem R. R. Co. 2 Abb. Ct. App. Dec. 458; Phila. & Reading R. R. Co. v. Ervin, Supreme Ct. Pa. March, 1879, Reporter, 153.

[4] Brown v. Hitchcock, 28 Vt. 452.

[5] Page 573 of this vol.

[6] As in case of a city's liability for defective highway (City of Champaign v. Patterson, 50 Ill. 61, 65); or bridge (Bliss v. Wilbraham, 8 Allen, 564); or that of a railroad company to guard against fires from sparks (Grand Trunk. Ry. v. Richardson, 91 U. S. [1 Otto], 454, 469); or of the keeper of gunpowder (Bradley v. People, 56 Barb. 72). Compare Bacon v. Boston, 3 Cush. (Mass.) 174, 181.

[7] Gahagan v. Boston, &c. R. R. Co. 1 Allen, 187; Maury v. Talmadge, 2 McLean, 157.

[8] Barnard v. Kellogg, 10 Wall. 383; The City of Washington, 92 U. S. (2 Otto), 31; The Clement, 2 Curt. 363, 369.

[9] Shearm. & R. on Negl. §§ 71, 72, 195; reviewing conflicting authorities. Compare Mullen v. St. John, 57 N. Y. 567; English v. Brennan, 60 Id. 609.

[10] Shearm. & R. § 150; Terry v. Mayor, &c. of New York, 8 Bosw. 504; and, according to some authorities, that it received profit or advantage from it as property. Hill v. City of Boston, 122 Mass. 344.

[11] De Wolf v. Williams, 69 N. Y. 622.

[12] Hardenbergh v. Crary, 50 Barb. 32; Knapp v. Smith, 27 N. Y. 277.

a license,[1] or receiving proceeds,[2] is competent. A sign-board is competent,[3] but not necessarily sufficient. Evidence that the thing was leased to a third person, is competent in defense.[4]

24. *Connection of cause with injury.*]—Plaintiff cannot recover unless he proves that the injury was caused by defendant. It is not enough to prove that it was possibly, or even probably, caused by him;[5] nor that his negligence was the remote cause or mere occasion.[6] What is the proximate cause is ordinarily a question for the jury, to be determined upon a view of all the circumstances.[7] Plaintiff is not bound to show the precise cause. It is enough if he shows the injury to be attributable to one or other of several causes, for each of which defendant is responsible.[8]

Where the facts suggest several hypotheses, an expert may be asked, what would have been the indications on one or another hypothesis without first proving it to be the true one.[9]

Evidence of the true source of injury is admissible under a general denial.[10]

25. *Notice of defect: Request.*]—Notice to defendant of the defect in his premises which caused the injury, may be presumed from its existence for a sufficient lapse of time previously; but such pre-existence will not be presumed without evidence.[11] Express notice to an agent or servant, whose duty it was to attend to or to report on the defect, is enough.[12]

Under an allegation of request, evidence of excuse for not making request is not competent.[13]

26. *The delinquent an agent or servant of defendant.*]—In addition to what has been said in the previous chapter,[14] it should be observed that the fact that the delinquent was, at the time of the disaster, in charge of the property of the defendant which caused

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[1] Commonwealth v. Gorman, 16 Gray, 601.

[2] Grier v. Sampson, 27 Pa. St. 183, 192.

[3] Stables v. Ely, 1 Carr & P. 614.

[4] Kastor v. Newhouse, 4 E. D. Smith, 20; Hart v. New Orleans, &c. Co. 4 La. Ann. 261.

[5] Sheldon v. Hudson River R. R. Co. 29 Barb. 226; Lehman v. City of Brooklyn, Id. 234.

[6] For illustrations see Card v. City of Elsworth, 65 Me. 547, s. c. 20 Am. R. 722; Kellogg v. St. Paul, &c. R. R. Co. 94 U. S. (4 Otto), 469; Burke v. Louisville, &c. R. R. Co. 7 Heisk. (Tenn.) 451, s. c. 19 Am. R. 618; Clark v. Chambers, 38 L. T. R. N. S. 454. But it is not necessary that the negligence complained of be the sole cause of the injury. Pollett v. Long, 56 N. Y. 200.

[7] Kellogg v. St. Paul, &c. R. R. Co. (above).

[8] See, for instance, Bevier v. Delaware & Hudson Canal Co. 13 Hun, 254, 257.

[9] Erickson v. Smith, 2 Abb. Ct. App. Dec. 64.

[10] Schaus v. Manhattan Gas-light Co. 14 Abb. Pr. N. S. 371.

[11] Sherman v. Western Transp. Co. 62 Barb. 150.

[12] Conger v. Chicago, &c. R. R. 24 Wis. 157, s. c. 1 Am. R. 164; Parker v. Steamboat Co. 109 Mass. 449; compare Black v. Camden & Amboy R. R. Co. 45 Barb. 40; Swords v. Edgar, 59 N. Y. 28.

[13] Lyman v. Eclerton. 29 Vt. 305.

[14] Pages 41, 480 and 580.

the injury, is sufficient evidence to go to the jury that he was defendant's agent or servant, and that the property was in use for defendant's benefit.[1]

If the delinquent was acting within the scope of his employment,[2] the master is liable; and is not exempt simply because the servant acted maliciously.[3]

27. *Contractor or servant.*]—In determining whether a person is a "contractor" or not, the circumstance that he always serves the same person affords a very strong presumption that he has no independent occupation; but this presumption is not conclusive.[4] The fact that a person doing work is subject to dismissal by his employer at any moment, is a circumstance raising a presumption that he is a servant and not a contractor, but not conclusive.[5]

28. *Common employment.*]—If defendant relies on the fact that plaintiff was a fellow servant of the delinquent,[6] and plaintiff's case only shows an injury received through defendant's negligence, the defendant has the burden of showing that the relation of master and servant existed between them.[7] If that relation is shown or admitted, the servant must prove that the risk by which he was injured was not one of those which he assumed.[8] The presumption that the servant contracted with a view to peril, cannot arise where the risk is not within the contract of service, and the servant had no reason to believe he would have to encounter it.[9]

If defect of machinery is proved, there must be evidence im-

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[1] Norris v. Kohler, 41 N. Y. 42, rev'g 1 Sweeny, 39, and see Boniface v Relyea, 5 Abb. Pr. N. S. 259, s. c. 6 Robt. 397; Svenson v. Atlantic Mail Steamship Co. 57 N. Y. 108, affi'g 33 Super. Ct. (1 J. & S.) 277.

[2] A stevedore's foreman, dissatisfied with a cartman's unloading, zealously took the cartman's place, and, in throwing a package, injured plaintiff. *Held* evidence to go to the jury that he was acting for the stevedore. The question was, did he act, perhaps over-zealously, in his employment, or did he act for a purpose of his own? Burns v. Poulson, L. R. 8 C. P. 563, s. c. 6 Moak's Eng. 261. On the other hand, a master was held liable for negligent act of clerk when watching for thief (Courtney v. Baker, 60 N. Y. 1; 37 Super. Ct. (5 J. & S.) 249); but not liable for malicious act in shooting a trespasser. Fraser v. Freeman, 43 N. Y. 566, rev'g 56 Barb. 234.

A driver went out with the team on an errand of his own, and returning called for some of his master's goods on the way, and while carrying them had a collision. *Held*, that he was not acting within the scope of his employment. Rayner v. Mitchell, 25 Weekly R. 633. On the other hand, a driver took a load of coal to the wrong house, and delivered it to one who had not ordered it but subsequently paid for it; and the driver left the coal-hole open. *Held*, that he was acting within the scope of his employment. Whitely v. Pepper, 36 L. T. R. N. S. 588.

[3] Mott v. Consumers Ice Co. 73 N. Y. 543, and cases cited.

[4] Shearm. & Red. § 76.

[5] Id. § 78.

[6] For the grounds of this exemption, see 3 Am. R. 146, n; 3 South. L. Rev. N. S. 735, 2 Id. 108, 5 Id. 200, 380; Mullan v. Philadelphia, &c. Mail Steamship Co. 78 Penn. St. 25, s. c. 21 Am. R. 2, and cases cited; Malone v. Hathaway, 64 N. Y. 5, 12.

[7] Wharton on Neg. §§ 226, 243.

[8] Beaulieu v. R. R. 48 Me. 291.

[9] Railroad Company v. Fort, 17 Wall. 553.

puting or implying cognizance of it in the master, unless it was a defect which he was bound to know.[1] The burden of proving that the plaintiff also knew of the defect which caused the injury, but continued his service notwithstanding, rests upon the defendant.[2] If defendant proves this, plaintiff may then show that defendant induced him to continue his work by promising to remedy the defect.[3]

29. *Negligent employment of unfit servant.*]—Where a servant in common employment relies on negligence of the employers in engaging an incompetent fellow servant, the negligence may be proved by evidence that the latter was an unfit person, and was known to defendants, or generally known and reputed, to be such.[4] The negligence of the employee, on the occasion of the injury, is not by itself sufficient evidence to charge the defendants with negligence in appointing or retaining the employee;[5] but the evidence of his incompetency may show circumstances which raise a fair inference that they were negligent in selecting him, or in omitting ordinary inquiries as to his qualifications, &c.[6] For the purpose of charging the defendants with notice of the incompetency, it may be shown that the servant had been guilty of specific acts of carelessness, unskillfulness and incompetency, and that such acts were known to defendants or their officers prior to his employment, or that he had been retained in service after notice of such acts.[7] For, when character is the subject of investigation, specific acts tend to exhibit the peculiar qualities and indicate the adaptation or unfitness for a particular duty.[8] One single act of negligence by a servant, does not of itself have any tendency to establish general incompetency.[9]

The declarations of the agent for hiring and discharging servants, made to the plaintiff, are admissible to show his knowledge of the unfitness of a servant whom he neglected to discharge, if part of the *res gestæ*;[10] otherwise not;[11] except for the purpose

[1] Wharton on Neg. § 243; Columbus, Chicago & Indiana Central Ry. Co. v Froesch, 68 Ill. 545, s. c. 18 Am. R. 578.

[2] Shearm. & Red. § 99. Evidence that he knew that some of the cars were not adequately provided, is enough, although he did not notice the condition of the particular car which caused the accident. Ladd v. New Bedford Railroad Company, 119 Mass. 412, s. c. 20 Am. R. 331.

[3] Shearm. & Red. § 99.

[4] Gilman v. E. R. R. Co. 10 Allen, 233, s. p. 20 Mich. 105, s. c. 4 Am. R. 364; Cook v. Parham, 24 Ala. 21, 33.

[5] Wharton on Neg. § 240; Shearm. & Red. on Neg. § 91.

[6] Shearm. & Red. on Neg. § 91.

[7] Pittsburgh, Fort Wayne & Chicago Ry. Co. v. Ruby, 38 Ind. 294, s. c. 10 Am. R. 111, and cases cited; 1 Whart. Ev. 68, § 56. Compare Frazier v. Penn. R. R. Co. 38 Penn. St. 104, 110.

[8] Baulec v. N. Y. & Harlem R. R. Co. 59 N. Y. 356, s. c. 48 How. Pr. 399, affi'g, in effect, 14 Abb. Pr. N. S. 310, s. c. 5 Lans. 436; 62 Barb. 623.

[9] Lee v. Detroit Bridge, &c. 62 Mo. 565; Baulec v. N. Y. & Harlem R. R. Co. 59 N. Y. 356.

[10] Laning v. N. Y. Central R. R. Co. 49 N. Y. 521, affi'g, in effect, 2 Lans. 506.

[11] Huntington R. R. v. Decker, 3 Weekly Notes, 120.

of charging defendant with notice, for which purpose evidence of declarations made before the disaster, is competent.[1] If there is no evidence that the person engaged was unfit before his engagement, he may be presumed by the jury to have become so, if at all, after his engagement; and the jury may presume that the employer made due inquiries. The burden is on the plaintiff to show the contrary.[2]

30. *Plaintiff's title.*]—Plaintiff must show that he has some title or interest in the thing injured.[3] A witness may testify directly, in the first instance, who owned the thing, and who was in possession,[4] subject, of course, to cross-examination. Defendant's recognition of the thing as plaintiff's, is competent.[5] Slight evidence is enough, if uncontradicted. As to personal property, possession is *prima facie* enough.[6]

31. *Manner of injury.*]—If negligence alleged is substantially proved, a variance in the manner of resulting injury is not usually material.[7]

32. *Condition of person or thing injured.*]—The person injured may be asked, as a witness, to state the effect of the injury upon him, and may detail the nature and extent of the injury, stating facts within his knowledge, as distinguished from matters of opinion requiring professional skill in their just formation.[8] The injury must be proved by witnesses; but the thing injured may be produced for the inspection of the jury under such testimony.[9] A photograph of the place is admissible.[10]

33. *Burden of proof as to contributory negligence.*]—Three rules contend for control as to whether plaintiff must prove his own freedom from contributory negligence. 1. That ordinary care is presumable; and if plaintiff can prove his case without showing contributory negligence, the burden is on defendant. 2. That plaintiff's care is not presumed, and the burden is on him to disprove contributory negligence. 3. That neither care, nor the want of it, is presumable, in the absence of evidence; and that, if the facts show a duty of care, plaintiff must give some evidence

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[1] Chapman v. Erie Ry. Co. 55 N. Y. 579, rev'g 1 Supm. Ct. (T. & C.) 526.

[2] Davis v. Detroit & Milwaukee R. R. Co. 20 Mich. 105, s. c. 4 Am. R. 364.

[3] See Cook v. Champlain Transp. Co. 1 Den. 91; Ohio, &c. R. R. Co. v. Jones, 27 Ill. 41.

[4] See De Wolf v. Williams, 69 N. Y. 622; Miller v. Long Island R. R. Co. 9 Hun, 194.

[5] See Smith v. Causey, 28 Ala. 655. Grand Trunk R. R. Co. v. Richardson, 91 U. S. (1 Otto) 454.

[6] Fish v. Skut, 21 Barb. 333.

[7] Pollard v. New Haven R. R. Co. 7 Bosw. 437; and see Antisdel v. Chicago, &c. R. R. Co. 26 Wis. 145.

[8] Creed v. Hartman, 8 Bosw. 123; aff'd, on other points, 29 N. Y. 591. The rules applicable to testimony to the condition of persons and things have been already indicated. Pages 586, 587, 594.

[9] Mulhado v. Brooklyn City R. R. Co. 30 N. Y. 370. *Contra*, Jacobs v. Davis, 34 Md. 204, 216.

[10] Cozzens v. Higgins, 1 Abb. Ct. App. Dec. 451.

from which the jury may infer that he exercised it; otherwise, he need not.

34. — *the United States Court rule.*]—The rule applied by the Supreme Court of the United States,[1] is, that the plaintiff is not bound to prove affirmatively that he was himself free from negligence. If he can prove his case without showing contributory negligence, it is a defense to be proved by the defendant.[2]

35. — *the Massachusetts rule.*]—The rule applied by the Supreme Court of Massachusetts[3] is, that the burden is always upon the plaintiff to establish, either that he himself was in the exercise of due care, or that the injury is in no degree attributable to any want of proper care on his part;[4] and while the inference of such care may be drawn from the absence of all appearance of fault, either positive or negative, on his part, in complete and affirmative evidence of all the circumstances under which the injury was received,[5] yet evidence which only partially discloses the facts, leaving a case consistent alike with negligence and with care on plaintiff's part, is not enough to sustain a verdict.[6] Plaintiff must show himself in the right, and defendant in the wrong.

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[1] Following and extending the doctrine of the New York cases stated in Oldfield v. N. Y. & Harlem R. R. Co. 14 N. Y. 310, affi'g 3 E. D. Smith, 103.

[2] Railroad Co. v. Gladmon, 15 Wall. 401; Indianapolis, &c. R. R. Co. v. Holst, 93 U. S. (3 Otto), 291. *Contra*, Hull v. Richmond, 2 Woodb. & M. 337; Beardsley v. Swann, 4 McLean, 333.

Applied also in *Alabama* (Smoot v. Mayor, &c. 24 Ala. 112). *Californin* (Gay v. Winter, 34 Cal. 153). *Georgia* (n. 3, below). *Kentucky* (P. & M. R. R. Co. v. Hoehl, 12 Bush, 41). *Maryland* (Northern Cent. Ry. v. State, 31 Md. 357). *Minnesota* (Hocum v. Witherick, 22 Minn. 152). *Missouri* (Thompson v. North Mo. R. R. 51 Mo. 190). *New Hampshire* (White v. Concord R. R. Co. 30 N. H. 188, 207; Smith v. Eastern R. R. Co. 35 Id. 356, 366). *New Jersey* (Durant v. Palmer, 29 N. J. L. [5 Dutcher], 244; N. J. Express Co. v. Nichols, 33 Id. [4 Vroom], 434). *Ohio* (Cleveland, &c. R. R. Co. v. Crawford, 24 Ohio St. 631, 636). *Pennsylvania* (Pennsylvania R. R. Co. v. Weber, 76 Penn. St. 157, s. c. 18 Am. R. 407). *Rhode Island* (Cassidy v. Angell, Mar. 1879, cited in 20 Alb. L. J. 305). *Texas* (Texas, &c. R. R. v. Murphy, 46 Tex. 356; *contra*, Walker v. Herron, 22 Id. 55); and *Wisconsin* (Hoyt v. Hudson, 41 Wis. 105, s. c. 22 Am. R. 714; Prideaux v. City of Mineral Point, 43 Wis. 513).

Wharton approves presuming plaintiff's freedom from negligence, in the absence of all evidence on the point. Whart. on Negl. § 425.

[3] Applied also in *Georgia* (Brannan v. May, 17 Geo. 136; Campbell v. Atlanta R. R. Co. 53 Id. 488; *contra*, Thompson v. Cent. R. R. 54 Id. 509). *Illinois* (Dyer v. Talcott, 16 Ill. 300; Galena, &c. R. R. Co. v. Fay, Id. 558). *Indiana* (Maxfield v. Cin. &c. R. R. 41 Ind. 269; R. R. Co. v. Dexter, 24 Id. 411; compare Scudder v. Crossan, 43 Id. 343). *Iowa* (Greenleaf v. Ill. Cent. R. R. Co. 29 Iowa, 14, s. c. 4 Am. R. 181, and cas. cit.) *Louisiana* (Moore v. Shreveport, 3 La. Ann. 645). *Maine* (Dickey v. Maine Tel. Co. 43 Me. 492). *Michigan* (L. S. & M. S. R. R. v. Miller, 25 Mich. 274; Michigan Cent. R. R. v. Coleman, 28 Id. 440, 447). *Mississippi* (Miss. Cent. R. R. Co. v. Mason, 51 Miss. 234). *North Carolina* (Doggett v. R. & D. R. R. Co. 78 N. C. 305; and see Manly v. Wilmington, &c. R. R. Co. 74 Id. 655); and *Oregon* (Kahn v. Love, 3 Oreg. 206). But in some of these States the rulings are equally consistent with the New York doctrine. As to *Connecticut*, see next p.

[4] Murphy v. Deane, 101 Mass. 455, s. c. 3 Am. R. 390.

[5] Mayo v. Boston & Me. R. R. Co. 104 Mass. 137.

[6] Crafts v. Boston, 109 Mass. 519. To contrast the Massachusetts rule with the New York rule, compare this case with Johnson v. Hudson R. R. Co. 20 N. Y. 65, and Hill v. New Haven, 37 Vt. 501.

36. — *the New York rule.*[1]]—By the New York rule, it depends on the circumstances of each case whether plaintiff must introduce affirmative evidence that he was not chargeable with negligence. If his own case indicates his presence at the disaster, or his conduct, or that of his servants, in it or in the occasion of it,[2] it must appear that he exercised such care and vigilance to avoid danger, as prudent persons usually exercise in view of the danger in question. If this does not affirmatively appear, where the want of it contributed to the casualty,[3] he must be nonsuited. If there is any evidence tending to show it was exercised, the question must be submitted to the jury.

Under this rule, the absence of contributory negligence may be inferred as well from the circumstances of the case as from evidence directly establishing the fact.[4] The circumstances may be considered in connection with the ordinary habits, conduct, and motives of men,[5] and the fact that when last seen, plaintiff was proceeding in view of the peril with due care,[6] or was found in a situation indicating the exercise of such care,[7] will sustain a finding; and the jury may consider also the inference of care arising from the instinct of self-preservation,[8] although this is not alone enough.

On the other hand, the circumstances of the disaster,[9] or the character of defendant's delinquency itself,[10] may be such as to prove, *prima facie*, the whole issue, without any independent evidence to indicate the conduct of plaintiff or his servants.[11]

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[1] Observing the distinction stated in the text, I understand the New York rule to be substantially applied in *Connecticut* (compare Park v. O'Brien, 23 Conn. 339, 345—where plaintiff suing for a collision, in driving on the highway, was held bound to negative contributory negligence—with Bell v. Smith, 39 Id. 211—where plaintiff, whose vessel was at anchor, was held to have made a *prima facie* case by proving that defendant's vessel in attempting to pass collided, and that the burden was on defendant to show contributory negligence); and in *Vermont* (compare Trow v. Vt. Central R. R. Co. 24 Vt. 487; Hill v. New Haven, 37 Id. 501; Walker v. Westfield, 39 Id. 246).

[2] As, for instance, where the injury was by a railroad train at a highway crossing; or in stepping over skids on which merchandise was being moved across the sidewalk; or a carriage collision when driving on the highway. See 18 Alb. L. J. pp. 144, 164, 184, where the New York cases are collected.

[3] Haley v. Earle, 30 N. Y. 208. To have this effect, plaintiff's negligence must have been a proximate, not merely a remote cause of the injury. Austin v. N. J. Steamboat Co. 43 N. Y. 82. Compare Lewis v. Baltimore & Ohio R. R. Co. 38 Md. 588, s. c. 17 Am. R. 521.

[4] Cases above cited. Button v. Hudson River R. R. Co. 18 N. Y. 248; Johnson v. Hudson R. R. R. Co. 20 Id. 65; affi'g, 6 Duer, 633.

[5] Johnson v. Hudson R. R. R. Co. (above).

[6] Greenleaf v. Ill. Cent. R. R. Co. 29 Iowa, 14, s. c. 4 Am. R. 181.

[7] Johnson v. Hudson R. R. R. Co. (above).

[8] Morrison v. N. Y. Central & H. R. R. R. Co. 63 N. Y. 643, affi'g 4 Hun, 424; and see Greenleaf v. Ill. Cent. R. R. Co. 29 Iowa, 14, s. c. 4 Am. R. 181, 193.

[9] As, for instance, if the owner of lumber sues a wharfinger for negligently setting it on fire.

[10] Johnson v. Hudson R. R. R. Co. 20 N. Y. 65, affi'g 6 Duer, 633.

[11] In other words, the principle requiring plaintiff to negative contributory negligence, is not characteristic of all actions for negligence as such; but only of those where the evidence shows his presence or conduct, or that of his servant or agent, to have been involved in the disaster or its causes. This principle is recognized even

37. ***Disproving contributory negligence.***]—Evidence of the acts and declarations of other persons in the same peril, is competent as part of the *res gestæ*, and also as evidence of what was deemed prudent by those thus exposed.[1] Neither the fact that the injured person was a careful and prudent person, nor that he had been careful on other occasions, is competent.[2] The fact that he was incapable, by reason of years or of physical or mental infirmity, of taking the same care as ordinarily prudent persons take, is competent.[3]

The existence, and violation by defendant, of a statute or municipal ordinance, on which plaintiff had a right to rely for safety, is competent as tending to negative contributory evidence.[4] Plaintiff may show that notwithstanding his negligence defendant might by ordinary care have avoided doing the injury.[5]

38. *Contributory negligence of infants.*]—A child of very tender years,[6] is presumptively incapable of care, and, therefore, not chargeable with negligence. The opinion of a qualified witness as to the physical or mental capacity of a child, is admissible.[7] On the question of a parent's negligence in protecting the

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in Massachusetts. Parker v. Lowell, 11 Gray, 353, 356. In this class of cases, which includes nearly all those of personal injuries by negligence, except medical malpractice, the requisite degree of evidence to negative contributory negligence increases with the duty of care required in view of the peril in question.

[1] Twomley v. Central Park, &c. R. R. Co. 69 N. Y. 158; Galena R. R. Co. v. Fay, 16 Ill. 558, 568; Mobile, &c. R. R. v. Ashcraft, 48 Ala. N. S. 16.

[2] Morris v. Town of East Haven, 41 Conn. 254.

[3] See Casey v. N. Y. Central R. R. Co. 6 Abb. New Cas. 104 and note, 116; Curtis v. Avon, 49 Barb. 148.

[4] Williams v. O'Keefe, 9 Bosw. 536; Lax v. Mayor, &c. of Darlington, 40 Law Times, N. S.; Jetter v. N. Y. & Harlem R. R. Co. 2 Abb. Ct. App. Dec. 458; and see McGrath v. N. Y. Central, &c. R. R. Co. 63 N. Y. 522.

[5] Kenyon v. N. Y. Central, &c. R. R. Co. 5 Hun, 479, and cases cited. The doctrine of *comparative negligence* (that is, allowing plaintiff, to recover if his contributory negligence is slight as compared with the negligence of defendant), is adopted in *Georgia* (124 Mass. 44, 50), and *Illinois* (Chicago & Alton R. R. Co. v. Pondrom, 51 Ill. 333, s. c. 2 Am. R. 306). Not in *Maryland* (Pittsburgh & Connellsville R. R. Co. v. Andrews, 39 Md. 329, s. c. 17 Am. R. 568, 576). *Massachusetts* (124 Mass. 44, 50).

[6] In this case, two years. Prendegast v. N. Y. Central, &c. R. R. Co. 58 N. Y. 652; and see Ihl v. 42d St. R. R. Co. 45 Id. 317; North Penn. R. R. v. Mahoney, 57 Penn. St. 187. It has generally been considered that the question of degree of incapacity is to be determined in each case, upon evidence of the age, maturity and capacity of the child. Railroad Co. v. Gladman, 15 Wall. 401; R. R. Co. v. Stoul, 17 Id. 657. Some recent cases draw lines of presumption at seven and fourteen years respectively, holding that evidence of negligence of a child under seven is incompetent or unavailing; (Government St. R. R. v. Hanlon, 53 Ala. 70;) that as to children between that age and fourteen, there must be evidence of the degree of capacity; and that as to children over fourteen, there is a presumption of ability to take full care of self, which can only be rebutted by proof of the want of such discretion and intelligence as is usual with youths of fourteen. (Nagle v. Alleghany Valley R. R. Co. 6 Weekly Notes [Penn.] 510.) For the doctrine that the disability is only relevant to the question of the degree of care which was due from *defendant*, see Cent. L. J. 109 (1878).

[7] Lynch v. Smith, 104 Mass. 52, s. c. 6 Am. R. 188. As to contributory negligence of persons suffering from other incapacities, see Colt v. Sixth Ave. R. R. Co. 33 Super. Ct. (J. & S.) 189; Gonzales v. N. Y. & Harlem R. R. Co. Id. 57; Daven-

child, the jury may consider the probability of care resulting from maternal affection.[1]

39. *Effect of peril on witnesses.*]—The law recognizes the unreliableness of the observation[2] and the declarations[3] of a witness overcome with fear in view of the peril.[4]

40. *Damages.*]—The mode of proving value has already been stated.[5]

Where the damage consists in a depreciation of pecuniary value, in an object which had a market value, a witness, qualified to testify to the value, may testify to the amount of the damage, if he first states the facts forming the basis of his opinion, or if he is an expert, speaking on a point requiring expert testimony. A witness should not be allowed to testify directly to the amount of damages recoverable; but if he is questioned within the limits of the above rule, it is no objection to his testimony that it gives the sum for which the jury ought to give a verdict.[6]

41. *Loss of earnings.*]—In the case of personal injuries, evidence of the employment in which he was engaged, its extent and the rate of his earnings previous to the injury, and the consequent loss arising to him from his inability to prosecute it, is competent.[7] Uncertain profits such as those of a merchant[8] or a vessel[9] are not; but the question is, what was usually paid for such services done for others? Loss of earnings should be specially alleged.[10] If the business was illegal without license, he must prove his license, in order to recover for loss of income.[11]

42. *Suffering and impaired powers.*]—Any physical injury or physical suffering[12] may be considered, though not specially

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port v. Ruckman, 37 N. Y. 568; affi'g 16 Abb. Pr. N. S. 341, and note in 6 Abb. New Cas. 116.

[1] Fallon v. Central Park, &c. R. R. Co. 64 N. Y. 13, 17, affi'g 6 Daly, 8.

[2] The Masten, 1 Brown Adm. 468.

[3] The Laura, 14 Wall. 348.

[4] So the testimony of a witness who was on a moving vessel, as to the absolute movements of another vessel, is likely to be deceptive. McNally v. Mayor, 5 Ben. 239; see, also, The Ship Marcellus, 1 Black, 414; The Governor, Abb. Adm. 108; The Neptune, Olc. 483; Delaware, &c. Tow-boat Co. v. Starrs, 69 Penn. St. 36, 41.

[5] Pages 306, 348, of this vol.

[6] Miller v. Long Island R. R. Co. 9 Hun, 194; 1 Whart. Ev. 416, § 450: Wells v. Cone, 55 Barb. 585; and see page 348 of this vol. Compare Simons v. Monier, 29 Barb. 419; Harger v. Edmonds, 4 Barb. 256; Whitmore v. Bowman, 4 Greene (Iowa), 128.

[7] Nebraska City v. Campbell, 2 Black, 590; Walker v. Erie Ry. Co. 63 Barb. 260; Grant v. City of Brooklyn, 41 Barb. 381.

[8] Masterton v. Village of Mount Vernon, 58 N. Y. 391. Compare Chandler v. Allison, 10 Mich. 460; Hanover R. R. Co. v. Coyle, 55 Penn. St. 396, 402.

[9] The R. L. Maybey, 4 Blatchf. 439.

[10] Stapenhorst v. Am. Manuf. Co. 15 Abb. Pr. N. S. 355; Baldwin v. Western R. R. 4 Gray, 333; Chicago v. O'Brennan, 65 Ill. 160.

[11] Kane v. Johnston, 9 Bosw. 154.

[12] Ransom v. N. Y. & Erie R. R. Co. 15 N. Y. 415; Curtis v. Rochester & Syracuse R. R. Co. 18 Id. 534, affi'g 20 Barb. 282. For instance, even aggravation of suffering in subsequent childbirth. De Forrest v. City of Utica, 69 N. Y. 614.

alleged.[1] Mental suffering,[2] also, as well as mental impairment,[3] may be considered.

43. *Continuing effect.*]—To show the nature and extent of the injury and suffering, it is competent to give evidence of their continuing effect up to the time of the trial,[4] and their probable effect in the future.[5]

44. *Testimony of the party.*]—The injured person may testify directly to his physical condition,[6] ability to work, travel, &c.,[7] if his testimony is confined to the facts within his knowledge or consciousness, as distinguished from matters of professional skill and opinion. The injured member may be exhibited to the jury.[8]

45. *Expressions of suffering.*]—On the question of suffering at any given time,[9] the declarations, complaints, groans,[10] exclamations, gestures,[11] and demeanor, of the injured person at that time, being manifestations in the nature of the usual concomitants and expressions of pain and distress, may be proved in his own favor.[12]

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[1] Curtiss v. Rochester & Syracuse R. R. Co. 20 Barb. 282; and though the negligence was not gross, and vindictive damages be not claimed; Morse v. Auburn & Syracuse R. R. Co. 10 Barb. 621.

[2] Matteson v. N. Y. Central, &c. R. R. Co. 62 Barb. 364, 379, and cases cited; 53 N. Y. 28. *Contra*, Covington St. Ry. Co. v. Packer, 9 Bush (Ky.), 455, s. c. 15 Am. R. 752.

[3] T. W. & W. R. R. Co. v. Baddeley, 54 Ill. 19, s. c. 5 Am. R. 71.

[4] Sheehan v. Edgar, 58 N. Y. 631, and cited.

[5] Caldwell v. Murphy, 1 Duer, 233; 11 N. Y. 416; T. W. & W. R. R. Co. v. Baddeley, 54 Ill. 19, s. c. 5 Am. R. 71. As, for instance, that in the ordinary course of nature and without extrinsic superinducing cause, they will probably be fatal (T. W. &c. R. R. Co. v. Baddeley, 54 Ill. 19, s. c. 5 Am. R. 71); or permanent (Buell v. N. Y. Central R. R. Co. 31 N. Y. 314); or affect the general health, or that a disease induced by them will return (Filer v. N. Y. Central R. R. Co. 49 N. Y. 42).

[6] Creed v. Hartman, 8 Bosw. 123.

[7] See People v. Tubbs, 37 N. Y. 586.

[8] Mulhado v. Brooklyn City R. R. Co. 30 N. Y. 370.

[9] The competency of this natural evidence of suffering depends upon its simultaneousness with the suffering, not upon its simultaneousness with the casualty which caused the injury. Hence such manifestations observed when examining the person for the purpose of learning the physical condition, are admissible (Matteson v. N. Y. Central R. R. Co. 35 N. Y. 487, s. p. in a further decision, 62 Barb. 364); even though after the commencement of the action (Murphy v. N. Y. C. R. R. Co. 66 Barb. 125, 130; Kent v. Lincoln, 32 Vt. 591, 597; Barber v. Merriam, 11 Allen, 322), but the lapse of time affects the cogency of the evidence, and suspicion of feigning may render it worthless. This is a question for the jury. But to reduce the effect of defendant's evidence that plaintiff continued to labor long after the injury, plaintiff cannot prove his declarations of suffering while laboring. Reed v. N. Y. Central R. R. Co. 45 N. Y. 574, overruling 56 Barb. 493.

Compare Bacon v. Charlton, 7 Cush. 581, 586, where the line is drawn between spontaneous manifestations of present pain, and statements drawn forth by question, or made with a view to communicate information.

The same evidence is, of course, admissible in favor of a parent plaintiff. Kennard v. Burton, 25 Me. 39, 46.

[10] As to mode of proving significance of inarticulate cries, see People v. Messner, 45 N. Y. 1, a doubtful authority on this point. Compare McKee v. Nelson, 4 Cow. 355.

[11] Bacon v. Charlton, 7 Cush. 581, 586.

[12] Caldwell v. Murphy, 11 N. Y. 416; Werely v. Persons, 28 N. Y. 344; Baker v. Griffin, 10 Bosw. 140; Phillips v. Kelley, 29 Ala. 628, 634.

Since parties are now competent to testify, such evidence is to be received with caution, if the declarant is living. Reed v. N. Y. Central R. R. Co. 45 N. Y. 574.

But this rule does not justify receiving statements of past facts,[1] although connected with such complaints or made as the reason of them;[2] and when such statements are commingled with the declarations, and are admitted with them, they are no evidence of the truth of what was thus stated.[3]

Such declarations, if competent, may be proved by any witness who heard them; but are of greater weight if made to and proved by a medical attendant, than if proved by an ordinary witness.[4]

46. *Opinions of witnesses.*]—Any witness of *ordinary* intelligence and powers of observation, who is conversant with the facts, may testify whether a person appeared sick or well;[5] worse or better at one time than another;[6] able to work;[7] how far able to help himself, and at what point requiring assistance to do what was necessary to be done;[8] and whether the attendance of a physician was necessary.[9]

An expert[10] may testify to his opinion as to the condition of the person, the nature, cause,[11] curableness,[12] probable continuance,[13] and probable result[14] of the injury, and the mode and effect of medical treatment.[15] If the witness speaks from personal examination, his opinion must be derived from his examination, and not dependent on what was narrated to him by the attendants,[16] and he should state the facts upon which he bases his opinion.[17] He may state, as a part of the facts on which his opinion is founded, statements, which the sufferer made, of his own condition to the witness, for the purpose of receiving his professional ad-

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[1] Page v. N. Y. Central R. R. Co. 6 Duer, 523; Indianapolis, &c. R. R. Co. v. Anthony, 43 Ind. 183. Whether complaining of sleeplessness is a statement of past fact within the rule, compare Taylor v. Grand Trunk Ry. 48 N. H. 304; Cleveland v. N. J. Steamboat Co. 5 Hun, 523, 529.

[2] See Tilson v. Terwilliger, 56 N. Y. 273; People v. Davis, Id. 95.

[3] People v. Williams, 3 Park. Cr. 84, 100.

[4] Howe v. Plainfield, 41 N. H. 135; Perkins v. Concord, &c. R. R. 44 Id. 223.

[5] Paragraph 13.

[6] Parker v. Boston, &c. Co. 109 Mass. 449.

[7] Id.

[8] Sloan v. N. Y. Central R. R. Co. 45 N. Y. 125.

[9] Chicago, &c. R. R. Co. v. George, 19 Ill. 510, 516.

[10] See note 10 on p. 116, and following notes.

[11] Compare People v. Rector, 19 Wend. 569; People v. Bodine, 1 Den. 281, 311; Gardiner v. People, 6 Park. Cr. 615; Kennedy v. People, 39 N. Y. 245, s. c. 5 Abb. Pr. N. S. 147; Roberts v. Johnson, 58 N. Y. 613, affi'g 37 Super. Ct. (5 J. & S.) 157; New Orleans, &c. Co. v. Albritton, 38 Miss. 242, 273.

[12] Matteson v. N. Y. Central R. R. Co. 35 N. Y. 487.

[13] Buell v. N. Y. Central R. R. Co. 31 N. Y. 314. Although he does not remember the particulars of the injury, or of the treatment he first prescribed. Rowell v. Lowell, 11 Gray, 420.

[14] Briant v. Trimmer, 47 N. Y. 96; T. W. & W. R. R. Co. v. Baddeley, 54 Ill. 19, s. c. 5 Am. R. 71.

[15] Barber v. Merriam, 11 Allen, 322.

[16] Page 117 of this vol. note 1, and see Lund v. Tyngsborough, 9 Cush. 36.

[17] Wendell v. Mayor, &c. of Troy, 39 Barb. 329, affi'd in 3 Abb. Ct. App. Dec. 568.

vice;[1] but narratives of a past fact are not thus admissible,[2] unless made in such close connection with the fact as to form part of the *res gestæ*.[3] If the witness does not speak from personal examination, the question must be hypothetical, based either upon the hypothesis of the truth of all the evidence given in the case, or upon an hypothesis specially framed, of certain facts, within the limits of the evidence, assumed to be proved.[4]

47. *Plaintiff's family and circumstances.*]—Evidence of the number of plaintiff's family, his habits, industry and economy, is inadmissible.[5] So of his poverty,[6] except, perhaps, where exemplary damages are recoverable.[7]

48. *Defendant's wealth.*]—Evidence of defendant's wealth is not competent, directly or indirectly.[8]

49. *Exemplary damages.*]—To justify exemplary damages, there should be evidence of gross negligence amounting to recklessness, or to indifference to the dangers and consequences to others.[9]

50. *Action for causing death.*]—The mode of proving the family relation has been already stated.[10] The burden of proof is on plaintiff to prove the pecuniary injury which he seeks to recover, and such facts as enable the jury to determine what would be a fair and just compensation.[11] Neither evidence that the next of kin had legal claims on the deceased for support,[12] nor any positive evidence of actual pecuniary loss is, however, essential,[13] even to sustain a recovery of more than nominal damages,[14] unless the age or ability of the deceased is such that no pecuniary injury could result.[15]

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[1] Barber v. Merriam, 11 Allen, 322.

[2] Chapin v. Marlborough, 9 Gray, 244; Illinois, &c. R. R. Co. v. Sutton, 42 Ill. 438. Compare Looper v. Bell, 1 Head (Tenn.) 373, 377.

[3] Hamman v. Stowe, 57 Mo. 93.

[4] Filer v. N. Y. Central, 49 N. Y. 42; Carpenter v. Blake, 2 Lans. 206, rev'd, on another ground, in 50 N. Y. 696; Hoard v. Peck, 56 Barb. 202, and see p. 117 of this vol.

[5] Penn. R. R. Co. v. Books, 57 Penn. St. 339, 344. *Contra*, Winters v. Hannibal, &c. R. R. Co. 39 Mo. 468.

[6] Shearm. & R. on Neg. § 606.

[7] Chicago v. O'Brennan, 65 Ill. 160.

[8] Myers v. Malcolm, 6 Hill, 292; Moody v. Osgood, 50 Barb. 628.

[9] Shearm. & Red on Neg. § 600, and see Caldwell v. N. J. Steamboat Co. 47 N. Y. 282, affi'g 56 Barb. 425; Milwaukee, &c. R. R. Co. v. Arms, 91 U. S. (1 Otto), 489, 493; Cleghorn v. N. Y. Central & Hudson River R. R. Co. 56 N. Y. 44.

[10] Page 71 of this vol., and see Pennsylvania R. R. v. Adams, 55 Penn. St. 499.

[11] McIntyre v. N. Y. Central R. R. Co. 37 N. Y. 287, s. c. 35 How. Pr. 36, affi'g 47 Barb. 515.

[12] Barron v. Illinois Central R. R. Co. 1 Biss. 453.

[13] Keller v. The N. Y. Central R. R. Co. 2 Abb. Ct. App. Dec. 480.

[14] Dickens v. N. Y. Central R. R. Co. 1 Abb. Ct. App. Dec. 504.

[15] As in case of a child of two years. Prendegast v. N. Y. Central, &c. 58 N. Y. 652. Compare O'Mara v. Hudson River R. R. Co. 38 N. Y. 445; Mitchell v. N. Y. Central & Hudson River R. R. Co. 2 Hun, 535.

To show pecuniary loss, evidence of the capacity of the deceased to conduct business and make money,[1] and of what he usually earned,[2] is proper; and, in the case of a parent rearing children, the capacity to bestow such training, instruction, and education as would be pecuniarily serviceable to the children in after life.[3]

The probable duration of life, and the value of an annuity, may be shown by the Northhampton tables,[4] or by the testimony of an expert in life insurance.[5] The opinion of a qualified witness is competent, as to how long the deceased would probably have been useful to his family.[6]

II. Defenses.

51. *Disproof of negligence.*]—If the question of negligence depends on the circumstances of the case, defendant may show the nature and character of his business, in course of which the alleged negligence occurred,[7] and any circumstances showing a reasonable necessity to act as he did,[8] and that a prudent man would have acted as he did.[9]

52. *Advice.*]—Where willful intent to do injury, or reckless indifference, is in issue, defendant may prove, in connection with evidence of his innocence and good faith, that he took the opinion of competent advisers and acted on it.[10]

53. *Former acquittal.*]—The record of an acquittal of defendant, on an indictment for the same act, is irrelevant.[11]

54. *Plaintiff's contributory negligence.*[12]]—A general denial

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[1] Tilley v. Hudson River R. R. Co. 29 N. Y. 252.

[2] McIntyre v. N. Y. Central R. R. Co. 37 N. Y. 287, s. c. 35 How. Pr. 36, affi'g 47 Barb. 515.

[3] Tilley v. Hudson River R. R. Co. (above).

[4] Sauter v. N. Y. Central, &c. R. R. Co. 66 N. Y. 50, affi'g 6 Hun, 446. As to these tables and others equally competent, see note at p. 724 of this vol. It is not essential, though usual, to show, as introductory, that the person enjoyed health usual to one of that age. Rowley v. London, &c. R. R. Co. L. R. 8 Ex. 221, s. c. 6 Moak's Eng. 293. The widow's probable duration of life is relevant, but not the possibility of her marrying again. Balt. R. R. v. State, 33 Md. 542, 554.

[5] Rowley v. London & N. W. Ry. Co. (above). It is not essential that the witness be an actuary. It is enough that he testify that he has experience in the business of life insurance,—for instance as an accountant (Id.). A life insurance agent of six months' experience is not competent. Donalson v. R. R. 18 Iowa, 280, 291.

[6] Pennsylvania R. R. Co. v. Henderson, 51 Penn. St. 315, 320.

[7] Philadelphia & Reading R. R. Co. v. Evin Supreme Ct. Pa. March, 1879, 8 Reporter, 153. See paragraph 22.

[8] Elliot v. Steamboat James Robb, 12 La. Ann. 12.

[9] Burkett v. Bond, 12 Ill. 87.

[10] Sherman v. Kortright, 52 Barb. 267. Perhaps such evidence is proper wherever it does not affirmatively appear that plaintiff claims only actual damages. Compare Furth v. Foster, 7 Robt. 484, and Yates v. N. Y. Central, &c. R. R. Co. 67 N. Y. 100.

[11] 2 Whart. Ev. § 776, citing Cottingham v. Weeks, 54 Geo. 275.

[12] As to the burden of proof, see paragraphs 33–36.

admits this defense.[1] Evidence of plaintiff's previous knowledge of the defect which caused the injury he might have avoided, is competent, but not conclusive.[2] Intoxication at the time of exposure to the peril is competent,[3] but not conclusive.[4] Intoxication at other times, though habitual, is not competent.[5] The intoxication may be proved by opinions of eye witnesses,[6] but not by declarations of a third person, not made as part of the *res gestæ*.[7] Evidence that plaintiff had admitted that he was in fault, is not necessarily conclusive against him.[8]

Gross negligence in respect of treatment or conduct, which retarded recovery, is competent on the question of damages.[9] Where there is evidence of negligence in this respect, plaintiff may show that he acted under the advice of a competent physician, for the purpose of showing that he acted in good faith, and used proper care.[10]

55. *Plaintiff's conduct illegal.*]—Defendant cannot set up the separate or distinct wrongful act of plaintiff, done not to himself nor to his injury, and not necessarily connected with, or leading to, or causing or producing the wrongful act complained of.[11] Illegality, when amounting to contributory negligence, may be shown under a general denial.[12]

56. *Mitigation.*]—Where plaintiff may enhance the damages by showing circumstances of aggravation, defendant may mitigate them by showing circumstances of palliation.[13]

The existence of a remedy against a third person,[14] or even the receipt of insurance against fire, accident or death, cannot be considered in reduction of damages.[15]

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[1] McDonell v. Buffum, 31 How. Pr. 154; Cunningham v. Lyness, 22 Wis. 245, 250; Indianapolis, &c. R. R. Co. v. Rutherford, 29 Ind. 82.

[2] Frost v. Inhab. of Waltham, 12 Allen, 85; Shearm. & Red. on Neg. § 414; Reed v. Northfield, 13 Pick. 94.

[3] Barker v. Savage, 1 Sweeny, 288.

[4] Shearm. & Red. on Neg. § 487.

[5] Barker v. Savage (above).

[6] People v. Eastwood, 14 N. Y. 562, affi'g 3 Park. Cr. 25.

[7] Chicago, &c. R. R. Co. v. Bell, 70 Ill. 102.

[8] Zemp v. Wilmington, &c. R. R. Co. 9 Rich. (S. C.) L. 84.

[9] But see 23 Am. R. 21, note.

[10] Lyons v. Erie Ry. Co. 57 N. Y. 489; Gilman v. Deerfield, 15 Gray, 577.

[11] Sutton v. Town of Wanwatosa, 29 Wis. 21, s. c. 9 Am. R. 534. Thus traveling on Sunday, in violation of the Sunday law, does not contribute to a disaster caused by a defect in the highway or vehicle, Id; Carroll v. Staten Island R. R. Co. 58 N. Y. 126, and see Baker v. Portland, 58 Me. 199, s. c. 4 Am. R. 274; Steele v. Buckhardt, 104 Mass. 59, s. c. 6 Am. R. 191, and cases cited. *Contra*, Johnson v. Town of Irasburgh, 47 Vt. 28, s. c. 19 Am. R. 111, and see cases cited in 18 Alb. L. J. 84, and see 18 Id. 168.

[12] Jones v. Andover, 10 Allen, 18.

[13] Millard v. Brown, 35 N. Y. 297.

[14] Nims v. Mayor, &c. of Troy, 59 N. Y. 500, affi'g 3 Supm. Ct. (T. & C.) 5.

[15] Lansing v. Stone, 37 Barb. 15, s. c. 14 Abb. Pr. 199.

CHAPTER XXXII.

ACTIONS AGAINST TELEGRAPH COMPANIES.

1. The undertaking to carry.
2. Burden of proof as to cause of error.
3. Damages.

1. *The undertaking to carry.*]—The original dispatch delivered to the operator is the primary evidence and must be produced, or be accounted for, to let in secondary evidence.[1] Evidence that plaintiff did not read the conditions at the head of the paper signed by him is unavailing.[2]

2. *Burden of proof as to cause of error.*]—In the absence of special conditions, plaintiff makes a *prima facie* case by proving (1.) The undertaking to carry,—shown by delivery of the message to the apparently proper clerk,[3] and payment of charges, if pre paid; (2.) A default, apparently due, not to the nature of the electric telegraph, but to want of ordinary care—such as non-delivery,[4] or misdelivery,[5] and (3.) Damages.

If the error apparently resulted from the risks and contingencies peculiar to the nature of the telegraph, plaintiff may recover if the evidence will sustain an inference that it resulted from negligence or other default on part of defendants.[6]

Notwithstanding the usual condition, evidence of gross negligence or willful misconduct is competent;[7] but an offer to prove "negligence," is not enough.[8]

3. *Damages.*]—To recover damages beyond the price paid for transmission, there must be evidence, from the face of the message or otherwise, from which it may be inferred that defendants or their servant had notice that other and further loss might occur from a breach of the undertaking.[9]

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[1] Western Union, &c. Co. v. Hopkins, 49 Ind. 224.

[2] Grinnell v. Western Union Co. 113 Mass. 299, s. c. 18 Am. R. 485; Breese v. U. S. Tel. Co. 48 N. Y. 139, s. c. 8 Am. R. 526; and see p. 290 of this vol. But compare Tyler v. West. Un. Co. 60 Ill. 421, s. c. 14 Am. R. 38; and Dig. to Am. R. pp. 774–7.

[3] See pages 40, 275–480 of this vol.

[4] W. U. Tel. Co. v. Graham, 1 Col. T. 230.

[5] Baldwin v. U. S. Tel. Co. 45 N. Y. 751, s. c. 1 Allen's Tel. Cas. 613. Or stoppage at a way office. U. S. Tel. Co. v. Wenger, 55 Pa. St. 262; W. U. Tel. Co. v. Fontaine, 58 Geo. 433.

[6] Whether the burden is on plaintiff to show this, or, in the present state of the art, on the defendants to explain the cause of error, is disputed. For the former view see, Baldwin v. U. S. Tel. Co. (above); Sweetland v. Illinois, &c. Co. 27 Iowa, 433, s. c. 1 Am. R. 285. For the latter, see Bartlett v. West. Un. Co. 62 Me. 209, s. c. 16 Am. R. 437; Rittenhouse v. Independent Line, 44 N. Y. 263, affi'g 1 Daly, 474; Edw. on B. § 489; Shearm. & R. § 559; Turner v. Hawkeye, 41 Iowa, 458, s. c. 20 Am. R. 605; Western Union Co. v. Tyler, 74 Ill. 168, s. c. 24 Am. R. 279.

[7] Breese v. U. S. Tel. Co. 48 N. Y. 141, and cases cited; s. c. 8 Am. R. 526.

[8] Grinnell v. Western Union Co. 113 Mass. 299, s. c. 19 Am. R. 485.

[9] Baldwin v. U. S. Tel. Co. (above); McColl v. West. Un. Co. 7 Abb. N. C. note.

CHAPTER XXXIII.

ACTIONS BY AND AGAINST SHERIFFS, CONSTABLES AND MARSHALS.

1. Official character and acts.
2. Officer's action against receiptor.
3. Officer's action for conversion or trespass.
4. — for price of goods sold.
5. — against attorney or party, for fees.
6. Action against officer, for failure to serve or collect process.
7. — defenses.
8. Action for storage.
9. Action for loss of property from custody.
10. — for failure to pay over.
11. — for taking insufficient security, or as bail.
12. — for escape.
13. — defenses.
14. — for failure to return.
15. — for false return.
16. Admissions, declarations, and conduct of deputies, &c.

1. *Official character and acts.*]—The general rules have been already stated.[1]

2. *Officer's action against receiptor.*]—The rules governing the mode of proving the contract are elsewhere stated.[2] Defendant's refusal to deliver is evidence of a conversion.[3]

The receiptor is estopped from showing that the property belonged to himself[4] or to a third person,[5] or that the property not accounted for was less than the value fixed upon it by the receipt,[6] or that the levy was excessive.[7] But he may show fraud or gross mistake in these respects,[8] or a re-delivery.[9] Otherwise he is discharged only by act of God, or the public enemy.[10]

3. *Officer's action for conversion or trespass.*]—The process, with plaintiff's return, is evidence of levy;[11] and, with proof of possession or of the judgment,[12] is sufficient to show his title.

The consent of the officer to the taking of the property is a bar to an action in his own name.[13]

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[1] Chapter VII, ACTIONS BY AND AGAINST PUBLIC OFFICERS.
[2] Chapter XXX, ACTIONS AGAINST BAILEES, AGENTS, &c.
[3] Dezell v. Odell, 3 Hill, 215.
[4] Cornell v. Dakin, 38 N. Y. 253, and cases cited. (Except, perhaps, in mitigation of damages in some cases. Bursley v. Hamilton, 15 Pick. 40.)
[5] Id.
[6] Id.
[7] Dezell v. Odell, 3 Hill, 215.
[8] Id.
[9] Clark v. Weaver, 17 Hun, 481.
[10] Cornell v. Dakin, 38 N. Y. 253.
[11] Page 197; Williams v. Herndon, 12 B. Mon. 484.
[12] Spoor v. Holland, 8 Wend. 445; Pryne v. Westfall, 3 Barb. 496.
[13] Earl v. Coup, 16 Wend. 562, 570.

9. — *for loss of property from custody.*]—The burden of proof is the same as in an action against a warehouseman.[1] Mere proof of delay to remove the goods is not enough without showing negligence.[2]

10. — *for failure to pay over.*]—The levy, and receiving the money, may be proved by parol.[3] The dockets and records of the court to which the officer belonged, are competent evidence against him to show that money has been received by him and his sureties or his deputies, upon its process.[4] The return, if proved, is conclusive on the officer.[5] Jurisdiction of the action being shown or presumable,[6] the officer cannot object to irregularity in the judgment or execution.[7] An appraisement participated in by the officer, and certified in his return, is competent against him.[8]

11. — *for taking insufficient security.*]—The writ, and a subsequent judgment thereon against the debtor, are sufficient *prima facie* evidence of the original indebtedness.[9] The officer's return indorsed, is sufficient evidence of the delivery of the process to him.[10]

The mode of proving insolvency, or pecuniary responsibility or credit, or repute, is stated in the next chapter. It is enough to show negligence, without proving willful wrong.[11] The declarations of the bail, are competent against the sheriff to show his insufficiency; for instance his repeated promises to pay creditors and his defaults.[12] In the absence of evidence of sufficiency of the bail, it is not necessary for plaintiff to show proceedings taken against them.[13] In the absence of evidence as to the responsibility of the original debtor, the burden is on the sheriff to show that he had no property, if that is relied on in mitigation.[14] It is enough for the officer to show that the bail were at the time apparently in good credit, and responsible for the amount.[15] Evidence of actual inquiry is not essential.[16] Evidence that they stated to the officer at the time, that they were responsible, is not enough.[17]

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[1] Witowski v. Brennan, 41 Super. Ct. (J. & S.) 284.
[2] Moore v. Westervelt, 21 N. Y. 103, rev'g 1 Bosw. 357.
[3] Bryant v. Dana, 8 Ill. 343.
[4] Williams v. United States, 1 How. 290, s. c. 17 Pet. 144.
[5] Sheldon v. Payne, 7 N. Y. 453; Tiffany v. Johnson, 27 Miss. 227; Denton v. Livingston, 9 Johns. 96.
[6] Page 544 of this vol.
[7] Nutzenholster v. State, 37 Ind. 457; Germon v. Swartwout, 3 Wend. 282; Walden v. Davison, 15 Wend. 575.
[8] Sanborn v. Baker, 1 Allen, 526.
[9] Young v. Hosmer, 11 Mass. 89.
[10] Blatch v. Archer, Cowp. 63.
[11] Sparhawk v. Bartlet, 2 Mass. 188, 197, 199; Rice v. Hosmer, 12 Id. 129.
[12] Gyllim v. Scholey, 6 Esp. 100.
[13] Young v. Hosmer, 11 Mass. 89.
[14] Young v. Hosmer, 11 Mass. 89. Compare People *ex rel.* Metcalf v. Dikeman, 3 Abb. Ct. App. Dec. 520; Bensel v. Lynch, 44 N. Y. 162, aff'g 2 Robt. 448.
[15] Hindle v. Blades, 5 Taunt. 225, 227.
[16] Id.
[17] 2 Greenl. Ev. 527, § 586.

12. — *for escape.*[1]]—In the case of original or *mesne* process, issued without judicial ascertainment of the fact and amount of *indebtedness of the original defendant*, plaintiff must give some evidence thereof.[2] Whatever evidence would be competent to charge the original debtor, is competent against the sheriff.[3] In the case of final process, the judgment is sufficient evidence of the indebtedness.

The *process* should be produced, or its absence be accounted for to let in secondary evidence.[4] Showing failure to return and refusal to produce on notice, lets in secondary evidence of the writ.[5]

The return of *arrest* is conclusive against the officer.[6] Absence of a return being accounted for, the arrest may be proven by parol.[7]

Under an allegation of a voluntary *escape*, plaintiff may prove a negligent escape.[8] An escape is presumed to be only negligent in the absence of anything to show that it was voluntary.[9]

The escape may be proved by oral evidence that the prisoner was not in custody.[10] The fact of the prisoner being off the limits, must be affirmatively and satisfactorily shown by direct and positive proof. Nothing will be intended or inferred.[11] But evidence that he was seen at large, is sufficient, *prima facie*.[12] If it be shown that the prisoner was in defendant's custody under the process, a subsequent return of not found, is evidence of the escape.[13] To prove the debtor beyond the limits, ineffectual search, and a letter received from him, are competent.[14]

The *damages* are presumptively the amount of the judgment or bail.[15] Where the judgment is not conclusively the measure of damages,[16] plaintiff should be prepared with evidence of actual loss. Declarations by the prisoner, made before escape, tending to show that he had property, are competent against the sheriff.[17]

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[1] For definition of escape, see N. Y. Code Civ. Pro. § 155; Wilckens v. Willet, 4 Abb. Ct. App. Dec. 596.

[2] See 2 Greenl. Ev. 529, § 589.

[3] Sloman v. Herne, 2 Esp. 695, Lord Kenyon. The New York rule is that declarations of the debtor, adduced against the sheriff, must be shown to have been made before escape. Patterson v. Westervelt, 17 Wend. 543, 549. *Contra*, Hart v. Stevenson, 25 Conn. 499, 506, unless part of the *res gestæ*.

[4] Van Slyck v. Taylor, 9 Johns. 146.

[5] Hinman v. Brees, 13 Johns. 529; Dygert *ads.* Crane, 1 Wend. 534.

[6] 2 Greenl. Ev. 529, § 589. So is a bond given to the officer's predecessor, reciting the process and custody. Tallmadge v. Richmond, 9 Johns. 86.

[7] Hinman v. Brees, 13 Johns. 529.

[8] Bonafous v. Walker, 2 T. R. 126.

[9] Patterson v. Westervelt, 17 Wend. 543, 545.

[10] Fairlie v. Birch, 3 Campb. 397.

[11] Visscher v. Gansevoort, 18 Johns. 496.

[12] Stewart v. Kip, 7 Johns. 165.

[13] Bensel v. Lynch, 44 N. Y. 162, aff'g 2 Robt. 448; Wheeler v. Hambright, 9 Serg. & Rawle, 390, 395.

[14] *Per* Cowen, J. Patterson v. Westervelt, 17 Wend. 543, 549.

[15] Patterson v. Westervelt, 17 Wend. 543; State *ex rel.* Shirk, 50 Ind. 598; Latham v. Westervilt, 26 Barb. 256; but see N. Y. Code Civ. Pro. § 158, sub. 1.

[16] As in case of final process, etc., under N. Y. Code Civ. Pro. § 158, sub. 2.

[17] Patterson v. Westervelt, 17 Wend. 549.

13. — *defenses.*]—An *error or irregularity* in the judgment or process is not material, unless rendering it void.[1] Even reversal of the judgment does not necessarily exonerate the officer.[2]

A general question as to the manner of *escape* is irrelevant, unless counsel states an intention to show facts which would excuse the officer.[3] A *voluntary return* is not admissible under a general denial.[4] In an answer of voluntary return, an allegation that prisoner continued in custody to time of suit brought, is immaterial, though put in issue.[5]

The sheriff can justify under a *discharge* by showing that the court had jurisdiction. The regularity of the proceedings is not material.[6] If the jurisdictional facts do not appear by the recitals in the discharge, they may be proved *aliunde*.[7]

As to *damages*,—in the case of negligent escape,[8] or of escape from mesne process,[9] it is competent to give in evidence the circumstances of the debtor, in order to limit the recovery to what the plaintiff has actually lost.[10] Insolvency of the debtor, though not pleaded, may be proved in mitigation.[11] General reputation of insolvency is inadmissible.[12]

14. *Action for failure to return.*]—Plaintiff is, *prima facie*, entitled to recover the whole amount due on his judgment, upon proving the judgment,[13] the delivery of the writ to the defendant to be executed,[14] together with his neglect to return it.[15] The nature of an action against an officer for neglect to return an execution is sufficient notice to defendant to produce the execution.[16] That the officer had sufficient time to proceed under the writ, may be inferred from circumstances.[17] It is best to give some evidence of failure to return.[18] Very slight evidence is enough

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[1] Jones v. Cook, 1 Cow. 300; Ross v. Luther, 4 Cow. 158, 163; Ontario Bank v. Hallett, 8 Cow. 192. Compare Carpentier v. Willet, 1 Abb. Ct. App. Dec. 312.

[2] Smith v. Knapp, 30 N. Y. 581.

[3] Fairchild v. Case, 24 Wend. 381.

[4] Howland v. Squier, 9 Cow. 91.

[5] Middle District Bank v. Deyo, 6 Cow. 732.

[6] Cantillon v. Graves, 8 Johns. 472; Wiles v. Brown, 3 Barb. 37; Bush v. Pettibone, 5 Barb. 273.

[7] Bullymore v. Cooper, 46 N. Y. 236, modifying 2 Lans. 71.

[8] Patterson v. Westervelt, 17 Wend. 546, and cases cited.

[9] Compare N. Y. Code Civ. Pro. § 158.

[10] Smith v. Knapp, 30 N. Y. 581, 592. As to the mode of proving insolvency, see the next chapter. As to the test of pleading, distinguishing between this action and that on the officer's liability as bail, compare Smith v. Knapp, 30 N. Y. 581; Metcalf v. Stryker, 31 N. Y. 255; People v. Dikeman, 3 Abb. Ct. App. Dec. 520; Bensel v. Lynch, 44 N. Y. 162, affi'g 2 Robt. 448.

[11] Barnes v. Willett, 35 Barb. 514.

[12] Fairchild v. Case, 24 Wend. 381, 384.

[13] See, as to the mode, Chapter XXIX; Cornell v. Barnes, 7 Hill, 35.

[14] See paragraphs 6 and 15.

[15] Pardee v. Robertson, 6 Hill, 550.

[16] Story v. Patten, 3 Wend. 486; Wilson v. Gale, 4 Id. 623.

[17] Wilson v. Gale, 4 Wend. 623.

[18] That this is unnecessary was held in State v. Schar, 50 Mo. 393.

to shift the burden of proof. It is not necessary to show the collection of money,[1] nor the existence of property out of which it might have been collected;[2] but this may be proved if alleged.[3]

Plaintiff need not show that the debtor had property.[4] *Prima facie* the measure of damages is the amount required to be raised by the execution;[5] but the officer may show that the debtor had nothing from which the money could have been made;[6] or anything which attacks the judgment; or shows that plaintiff's interest is affected.[7]

In rebuttal plaintiff may show that the debtor had property, though this be not alleged.[8]

Tardy return is no defense.[9]

15. —*for false return.*]—The judgment must be proved;[10] or, in the case of mesne process, the original cause of action;[11] and the issue, delivery and return of the process.[12] The identity of the process is sufficiently proved by the officer's indorsement on it (made under the statute[13]) and his return, and proof of his acts intermediate these times, without extrinsic evidence of manual possession by the officer at the time of acting under it.[14]

A *return* amended by leave of court, though after action commenced, may be read in evidence with the same effect as if an original return.[15]

Plaintiff must give some evidence of *falsity;*[16] but slight evidence suffices to throw on defendant the burden of proving its truth.[17] To prove falsity of a return of *nulla bona*, the debtor's possession of property is *prima facie* evidence of ownership, until the officer gives evidence of title, or at least of some adverse

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[1] Sloan v. Case, 10 Wend. 370.

[2] Pardee v. Robertson, 6 Hill, 550.

[3] Stevens v. Rowe, 3 Den. 327. Compare Ledyard v. Jones, 7 N. Y. 550.

[4] Pardee v. Robertson (above).

[5] Ledyard v. Jones, 7 N. Y. 550.

[6] Dunphy v. Whipple, 25 Mich. 10; Swezey v. Lott, 21 N. Y. 481. For the mode of proof, see next chapter.

[7] Wehle v. Connor, 69 N. Y. 546, 549, rev'g 41 Super. Ct. (J. & S.) 201. As, for instance, that such interest was levied upon by an attachment, and liable to be applied otherwise than in payment to the plaintiff, or that plaintiff has less interest than the face of it, and has no right to demand payment to the full amount, or that the judgment was fraudulent and void, that it had been paid, assigned, and does not belong to plaintiff, or that plaintiff has directed the execution not to be returned, or that it was stayed by order of court. Id.

[8] Pardee v. Robertson, 6 Hill, 550; Ledyard v. Jones (above); Humphrey v. Hathorn, 24 Barb. 278.

[9] Brookfield v. Remsen, 1 Abb. Ct. App. Dec. 210.

[10] McDonald v. Bunn, 3 Den. 45. *Contra*, Blivin v. Bleakley, 23 How. Pr. 126 As to the mode of proof, see Chapter XXIX.

[11] Parker v. Fenn, 2 Esp. 477, n.; 2 Greenl. Ev. 531, § 592.

[12] See paragraphs 6 and 12.

[13] Paragraph 6.

[14] Williams v. Lowndes, 1 Hall, 578, 597.

[15] People v. Ames, 38 N. Y. 484; Bradford v. Read, 2 Sandf. Ch. 168.

[16] Watson v. Brennan, 66 N. Y. 621, rev'g 39 Super. Ct. (J. & S.) 81.

[17] 2 Greenl. Ev. 531, § 592; Holbrook v. Brennan, 6 Daly, 50.

claim.[1] To prove falsity of a return of not found, the fact that the debtor did not abscond, but continued in the daily exercise of his usual occupation, appeared publicly as usual, and was visible to all who came to him on business, is sufficient evidence that he could have been arrested.[2] To prove a levy, enough must be shown to make the officer a trespasser but for the process.[3]

The judgment rendered ineffectual is *prima facie* evidence of the measure of *damages*;[4] but it may be met by evidence of the total inability of the debtor;[5] not, however, by showing that the amount so directed to be levied was not due upon the judgment.[6]

A levy made under the process does not conclude the officer from showing that the debtor had no *title*, and that he abandoned the levy in good faith on that account,[7] even after plaintiff had indemnified him.[8] An inquisition taken by the sheriff's jury is conclusive on the right of property,[9] unless it be shown that the sheriff did not act in good faith,[10] or that there was a sufficient tender of indemnity.[11]

The fact that the process was voidable had the debtor chosen to object is not relevant.[12] The sheriff's knowledge that the return was false, does not alone aggravate the damages.[13]

16. *Admissions, declarations, and conduct of deputies, &c.*]—Against the sheriff, the admissions and declarations of one who has given him an indemnity, being the real party in interest, are admissible.[14] So are those of his under-sheriff[15] or deputy,[16] if the action is for the default of the declarant, or if they were made as part of the *res gestæ* of an act properly in evidence, or were made within the scope of the agency.[17] Proof of a person's being deputy-sheriff, and of his advertising property for sale under an execution, as such, is sufficient to authorize evidence of his declarations, without proving the issuing and delivery of an execution to him.[18] Whether the sheriff recognized the act of his deputy or not need not be shown.[19]

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[1] Magne v. Seymour, 5 Wend. 312.
[2] Beckford v. Montague, 2 Esp. 475.
[3] Camp v. Chamberlain, 5 Den. 198; and see Bond v. Willett, 1 Abb. Ct. App. Dec. 165; Elias v. Farley, 2 Id.
[4] Weld v. Bartlett, 10 Mass. 472; Bacon v. Cropsey, 7 N. Y. 195.
[5] Weld v. Bartlett (above).
[6] Bacon v. Cropsey (above).
[7] Lummis v. Kasson, 43 Barb. 373.
[8] Id.; but compare Curtis v. Patterson, 8 Cow. 65, 67.
[9] Bayley v. Bates, 8 Johns. 139.
[10] Id.
[11] Van Cleef v. Fleet, 15 Johns. 147.
[12] Bacon v. Cropsey, 7 N. Y. 195; Blivin v. Bleakley, 23 How. Pr. 124.
[13] Potter v. Lansing, 1 Johns. 215.
[14] Bayley v. Bryant, 24 Pick. 198; Rosc. N. P. 71.
[15] Rosc. N. P. 74.
[16] Tyler v. Ulman, 12 Mass. 163; 1 Greenl. Ev. 210, § 180.
[17] Stewart v. Wells, 6 Barb. 79.
[18] Stewart v. Wells (above).
[19] McIntyre v. Trumbull, 7 Johns. 35.

To prove instructions from the party such as to exonerate the sheriff from liability for acts of his deputy, it must be shown, not only that the party directed the deputy to depart from the line of duty imposed by law, but that the deputy followed, or, at least, undertook to follow directions given.[1]

[1] Sheldon v. Payne, 7 N. Y. 453; Walden v. Davison, 15 Wend. 575.

CHAPTER XXXIV.

ACTIONS FOR DECEIT OR FRAUD.

1. Frame of the action.
2. The representation.
3. Liberal rule of evidence: Cogency.
4. Falsity.
5. — as to solvency, &c.
6. — reason to believe one insolvent, &c.
7. Scienter.
8. Intent to deceive.
9. Plaintiff's reliance.
10. Damages.
11. Oral evidence to vary writing.
12. Testimony of the parties.
13. Declarations of conspirators.
14. Defenses.
15. — former adjudication.

1. *Frame of the action.*]—Plaintiff cannot recover on proof of a mere breach of contract,[1] even coupled with mistake[2] or conversion.[3] If the complaint contains all the allegations necessary to authorize recovery on a breach of contract, and, also, all those necessary to sustain a recovery for fraud and deceit, plaintiff cannot recover without proving the fraud.[4] The averment of a contract may be deemed matter of inducement merely.[5] If the deceit is proved, an allegation of conspiracy unproved does not necessarily defeat the action.[6]

2. *The representation.*[7]]—The fraudulent representation relied on must be stated in the complaint.[8] Proof of it in substance and legal effect, is enough.[9] If a sufficient fraudulent representation is duly alleged and proved, a representation not specifi-

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[1] Barnes v. Quigley, 59 N. Y. 265; Peck v. Root, 5 Hun, 547.

[2] Dudley v. Scranton, 57 N. Y. 424.

[3] Saltus v. Genin, 3 Bosw. 250.

[4] Ross v. Mather, 51 N. Y. 108, extended by amendment of § 549 of N. Y. Code of Civ. Pro., in 1879, to all cases of an allegation of fraud in contracting the liability, except, perhaps, promises of marriage. Before that amendment, allegations of fraud, if incidental, in a complaint, the main scope of which was a breach of contract, might be disregarded. Graves v. Waite, 59 N. Y. 156. As to amending, see Crosby v. Watts, 41 Super. Ct. (J. & S.) 208; Saltus v. Genin, 8 Abb. Pr. 253; Hochstetter v. Isaacs, 14 Abb. Pr. N. S. 235.

Fraud not alleged may be proved in avoidance of the effect of an agreement proved by the adverse party. Claflin v. Taussig, 7 Hun, 223.

[5] Elwood v. Gardner, 10 Abb. Pr. N. S. 233, s. c. 45 N. Y. 349, aff'g 9 Abb. Pr. N. S. 99. As to the frame of the action compare pp. 285 and 339 of this vol.

[6] Hayward v. Draper, 3 Allen, 551.

[7] For the distinction between actionable false representations, and promissory representations or opinions, &c., see Sawyer v. Prickett, 19 Wall. 146; Simar v. Canaday, 53 N. Y. 298. Compare Ellis v. Andrews, 56 N. Y. 83; Foster v. Swasey, 2 Woodb. & M. 217.

[8] Ellis v. Andrews (above). But deceit may be proved by actions without evidence of express words. Chandelor v. Lopus, 1 Smith's L. Cas. 299, 320, and cases cited.

[9] Craig v. Ward, 1 Abb. Ct. App. Dec. 454, s. c. 3 Abb. Pr. N. S. 235; 3 Keyes, 387, affi'g 36 Barb. 377.

cally alleged may also be proved.[1] A variance by proving only one of several representations alleged,[2] if the one alleged and proved be sufficient to maintain the action, is not material.

Fraud by defendants' agent,[3] or by one of a firm, defendants,[4] when it will sustain the action, is admissible under an allegation of fraud by defendants.[5] Against a co-defendant, evidence of his original knowledge of the scheme, and of acceptance of its benefits, is sufficient to go to the jury, without evidence of direct representations by him.[6]

If representations directly to the plaintiff or his agent are not shown, there must be evidence that defendant had in mind the plaintiff, or a class of which he was one.[7]

3. *Liberal rule of evidence: Cogency.*]—Evidence tending to show the true nature of the transaction is freely received, unless forbidden by settled rules.[8] Even slight evidence having a tendency to establish fraud, is competent.[9] Thus, for the purpose of throwing light on the transaction, evidence of acts, tending to effect the fraud sued for, done by some of several partners, even though before the formation of their partnership, may be competent.[10] Evidence tending to show the impossibility that the representations should have been true is relevant, as well as evidence directly to their falsehood.[11]

Testimony of a single competent witness is sufficient to sustain a verdict.[12]

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[1] Calkin v. Manhattan Oil Co. 65 N. Y. 557.

[2] Yates v. Alden, 41 Barb. 172; Updike v. Abel, 60 Barb. 15.

[3] Elwell v. Chamberlain, 31 N. Y. 611; Durst v. Burton, 2 Lans. 137, affi'd in 47 N. Y. 167; 8 Am. L. Rev. 631; 3 Id. 442, and cases cited. Compare Lansing v. Coleman, 58 Barb. 611.

s. p. in case of husband acting for wife. Warner v. Warren, 46 N. Y. 228; Graves v. Spier, 58 Barb. 349. Compare Birdseye v. Flint, 3 Barb. 500; Weckler v. First National Bank of Hagerstown, 42 Md. 581, s. c. 20 Am. R. 95.

[4] Pages 214 and 217 of this vol., and Chamberlin v. Prior, 1 Abb. Ct. App. Dec. 338.

[5] King v. Fitch, 2 Abb. Ct. App. Dec. 508; Mackay v. Commercial Bank of New Brunswick, L. R. 5 P. C. 394, s. c. 9 Moak's Eng. 202.

As to corporate officers, see p. 38, of this vol. 1 Redf. Ry. 592 (14); Arthur v. Griswold, 55 N. Y. 400; Morgan v. Skiddy, 62 N. Y. 319, affi'g in part and rev'g in part, 36 Super. Ct. (J. & S.) 152; Peck v. Gurney, L. R. 6 Ho. of L. 377, s. c. 8 Moak's Eng. 1.

[6] Miller v. Barber, 66 N. Y. 558, affi'g 4 Hun, 802.

[7] Swift v. Winterbotham, L. R. 8 Q. B. 244, s. c. 5 Moak's Eng. 202; 2 Abb. N. Y. Dig. new ed. 334, &c. Compare Faris v. Peck, 10 Abb. Pr. N. S. 55, s. c. 2 Sweeny, 689; Simpson v. Wiggin, 3 Woodb. & M. 418; Crocker v. Lewis, 3 Sumn. 1; Peck v. Gurney, L. R. 6 House of L. 377, s. c. 8 Moak's Eng. R. 1. See Iasigi v. Brown, 17 How. U. S. 183.

[8] See Bigelow on Fr. 476.

[9] See Hubbard v. Briggs, 31 N. Y. 518.

[10] Chester v. Dickerson, 54 N. Y. 1, s. c. 45 How. Pr. 326, affi'g 52 Barb. 349; and see Gethy v. Devlin, 24 N. Y. 403.

[11] See, for instance, Thorn v. Helmer, 4 Abb. Ct. App. Dec. 408.

[12] Morgan v. Skidmore, 3 Abb. New Cases, 95. Whether more than a preponderance of evidence can be required, see page 495 of this vol.

4. *Falsity.*]—The burden is on plaintiff to give evidence of falsity.[1] If the falsity consists in the existence and contents of documents, such as the fact of incumbrances on real property, the admissions of defendant are not competent without excuse for not producing the best evidence.[2] Representations as to the amount of property, sales, &c., are proved to be false by showing substantial exaggerations.[3]

5. — *as to solvency, &c.*]—On the question of solvency or pecuniary ability,[4] facts which are the usual concomitants or consequences of pecuniary ability, or the contrary, are competent: thus, a judgment and execution, and its return unsatisfied;[5] dishonor of a check drawn by a merchant upon his banker;[6] the small amount a merchant had on deposit in bank at the time of his purchases;[7] the fact of having absconded and having been proceeded against as an absconding debtor, without sufficient assets to pay in full,[8] and the like, are competent; and such evidence is received more or less freely, according as direct evidence is wanting or accessible. The taking of the poor debtor's oath, or a discharge from imprisonment for insolvency, if not in a court of record, may be proved by parol;[9] and irregularity in the certificate is immaterial.[10]

Ability or inability to pay debts, is a fact which a witness conversant with the particulars may directly testify to.[11] Such a witness may be asked "what were the circumstances" of the person, or "what was his situation as to property;"[12] "whether he was responsible for" a given sum, and the like.[13] Solvency within a reasonable period before the date in question will, in the absence of evidence of change, support an inference that the solvency continued.[14] To testify that the person "was considered good" is hearsay, or evidence of repute only, and not

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[1] Bigelow on Fr. 493; and see Gray v. Lessington, 2 Bosw. 257.
[2] Sherman v. People, 13 Hun, 577.
[3] Westcott v. Ainsworth, 9 Hun, 53.
[4] See paragraph 6.
[5] Stahl v. Stahl, 2 Lans. 60.
[6] Brown v. Montgomery, 20 N. Y. 287.
[7] Jordan v. Osgood, 109 Mass. 457, s. c. 12 Am. R. 731. As to the mode of proving the balance in bank, see Lewis v. Palmer, 28 N. Y. 271; Clark v. Dearborn, 6 Duer, 309; Sullivan v. Warren, 43 How. Pr. 188; Boston & W. R. R. Co. v. Dana, 1 Gray, 83; Jordan v. Osgood, 109 Mass. 457, s. c. 12 Am. R. 731.
[8] Ten Eyck v. Tibbits, 1 Cai. 427. Compare Babcock v. Middlesex, &c. Bank, 28 Conn. 302; Simpson v. Carleton, 1 Allen, 109.
[9] Richardson v. Hitchcock, 28 Vt. 757.
[10] Id.
[11] Thompson v. Hall, 45 Barb. 214.
[12] Caswell v. Howard, 16 Pick. 567.
[13] Hard v. Brown, 18 Vt. 87.
[14] Walrod v. Ball, 9 Barb. 271, 275. Compare French v. Willett, 10 Bosw. 566. So, on the question of the falsity of representations as to professional income in a given year, evidence of actual income in the next year, is relevant. Thorn v. Helmer, 4 Abb. Ct. App. Cas. 408. Compare, as to fluctuating profits, Masterton v. Village of Mt. Vernon, 58 N. Y. 391.

competent on the question of actual condition;[1] but to testify that the witness considered him good at the time, is admissible, in connection with his testimony to the facts.[2]

A witness who states the facts on which his opinion is based, and his means of knowledge[3] may state his opinion.[4] Without the facts his opinion is incompetent.[5] To qualify the witness for this purpose, he must show some knowledge as to the existence and ownership of property.[6] Mere inference from style of living, &c., is not competent.[7] It is no objection that the opinion was based partly on what was said by others, acquainted with the person, at the place[8] and at and before the time. In connection with direct opinions, evidence that the party was industrious and of good habits, is competent.[9]

When it is essential to prove actual insolvency it cannot be proved by general reputation.[10]

6. — *reason to believe one insolvent, &c.*]—Upon the question whether a party had reasonable cause to believe another insolvent, it is competent to show that he was generally reputed at the place, to be so,[11] or the contrary;[12] and to show his business credit and pecuniary standing among those neighbors, creditors, etc., having dealings with him;[13] also his habits affecting credit and the probability of insolvency, such as attention or inattention to business, frugality or extravagance in expenditure, habitual waste of time;[14] and defendant's knowledge of these facts.[15]

A qualified witness may state his opinion whether the credit of the party was good;[16] whether he was in good reputation for property;[17] and the like. The fact that the knowledge of the witness does not extend to the condition of the party at places other

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[1] Sheldon v. Root, 16 Pick. 567.

[2] Commonwealth v. Thompson, 3 Dana (Ky.) 301. Compare note on testimony to belief, &c., in 3 Abb. New Cas. 234.

[3] Sherman v. Blodgett, 28 Vt. 149.

[4] Hard v. Brown, 18 Vt. 87; Crawford v. Andrews, 6 Geo. 244, 251. Compare Griffin v. Brown, 2 Pick. 304, 309.

[5] Andrews v. Jones, 10 Ala. 460, 470.

[6] Babcock v. Middlesex Savings Bank, 28 Conn. 302, 306. The head note is too broad.

[7] Id.

[8] Hard v. Brown, 18 Vt. 87, 97.

[9] Hard v. Brown, 18 Vt. 87; and see paragraph 6.

[10] Fairchild v. Case, 24 Wend. 381; Molyneaux v. Collier, 13 Geo. 406, 417. So, of the admissions of plaintiff's attorney. Potter v. Lansing, 1 Johns. 215.

[11] Lee v. Kilburn, 3 Gray, 594, 598; Ward v. Herndon, 5 Port. 382; Amsden v. Manchester, 40 Barb. 158.

[12] Bartlett v. Decreet, 4 Id. 113; Sheen v. Bumpstead, 2 H. & C. 193, s. c. 10 Jur. N. S. 242.

[13] Heywood v. Reed, 4 Gray, 574.

[14] Simpson v. Carleton, 1 Allen, 109, 117.

[15] Id; Sheen v. Bumpstead (above).

[16] Hard v. Brown, 18 Vt. 87; Iselin v. Peck, 2 Robt. 631.

[17] Bartlett v. Decreet, 4 Gray, 113.

than his chief residence or domicil, does not necessarily render it incompetent.[1]

7. *Scienter.*]—If the false representations do not imply personal knowledge, plaintiff must show that the speaker knew them to be false when he made them,[2] or had good reason to believe that they were when made,[3] or that he intended them to be understood as communicating his own actual knowledge, though conscious that he had not such knowledge.[4]

The allegation and the proof should correspond on these points.[5]

To show scienter, plaintiff may prove other declarations by defendant, on matters relevant to the issue, presumably or actually within his knowledge, and then show their falsity.[6]

8. *Intent to deceive.*]—Intent to deceive must be alleged and proved.[7] Proof of a false representation knowingly made, raises a presumption of a fraudulent intent.[8] Representations made in defendant's hearing, and without objection from him, may be proved in connection with evidence of false representations previously made by him; as tending to show intent.[9] For the same purpose, evidence of other similar frauds committed by defendant on other persons, at about the same time, is competent.[10] Where the alleged deceit was by fraudulent suppression of facts, it is competent to prove that, in the other instances, it was committed by actual misrepresentation concerning the same facts, if they were both false and fraudulent.[11] But such other misrepresentations will not alone sustain a recovery, unless the maker intended they should be, and they were, communicated to, and acted on, by plaintiff.[12] Plaintiff need not prove defendant's motive,[13]

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[1] Stebbins v. Miller, 12 Allen, 591, 594, 597.

[2] Oberlander v. Spiess, 45 N. Y. 175; Hubbell v. Meigs, 50 N. Y. 480.

[3] Or knew facts sufficient to have put him upon inquiry. Craig v. Ward, 1 Abb. Ct. App. Dec. 454. Otherwise of merely having the means of knowledge. Lefever v. Lefever, 30 N. Y. 27.

[4] Marsh v. Falker, 40 N. Y. 562; *per* Brady, J., in Indianapolis, &c. R. R. Co. v. Tyng, 2 Hun, 311, 319; limiting Bennett v. Judson, 21 N. Y. 238; Cabot v. Christie, 42 Vt. 121, s. c. 1 Am. R. 313.

[5] Marshall v. Fowler, 7 Hun, 237.

[6] Coleman v. People, 58 N. Y. 555; affi'g, 1 Hun, 596, s. c. 4 Supm. Ct. (T. & C.) 61.

[7] Lefler v. Field, 52 N. Y. 621; compare Dudley v. Scranton, 57 Id. 424; Marshall v. Fowler, 7 Hun, 237; *contra*, Polhil v. Walter, 3 Barn. & Ad. 114; compare Watson v. Poulson, 15 Jur. 1111.

[8] People v. Herrick, 13 Wend. 87; 3 Am. L. Rev. 430, and cases cited.

[9] Hubbard v. Briggs, 31 N. Y. 518, 537.

[10] Butler v. Watkins, 13 Wall. 464; Cary v. Houghtaling, 1 Hill, 311; Amsden v. Manchester, 40 Barb. 158; Van Vleeck v. Le Roy (below). *Contra*, unless such frauds were parts of one fraudulent scheme, Jordan v. Osgood, 109 Mass. 457, s. c. 12 Am. R. 731; Edwards v. Warner, 35 Conn. 517.

[11] Hall v. Naylor, 18 N. Y. 588, rev'g 6 Duer, 71.

[12] Van Kleek v. Le Roy, 4 Abb. Ct. App. Dec. 431, s. c. 4 Abb. Pr. N. S. 431, affi'g 37 Barb. 544.

[13] Gould v. St. John, 16 Wend. 650, and cases cited.

nor that a defendant actually guilty, was benefited, or was in collusion with one who was benefited.[1]

9. *Plaintiff's reliance on the representations.*]—Plaintiff's reliance must be shown.[2] His conduct in consequence of the deceit may be proved for this purpose,[3] even though it be not specially pleaded so as to be considered on the question of damages.[4] His testimony that his subsequent acts were in consequence of, or on the faith of the representation, is competent.[5] And it is not sufficiently met by proving that he also sought, and in part relied on, information from other sources.[6] To show that the credit given by plaintiff, was given to the person alleged, the plaintiff's oral declarations[7] and entries in his books,[8] made at the time, are competent. But the letters and declarations of third persons,[9] even his agents,[10] are not competent unless as part of the *res gestæ* of an act properly in evidence.[11] If the parties dealt on equal terms, each may be presumed to have relied upon his own judgment in matters of value and opinion.[12]

10. *Damages.*]—The price plaintiff paid defendant, under the inducement of false representations of value, is competent evidence for the jury, of what the value would have been had the representations been true.[13] Other rules for proving value and damage have been already stated.[14]

11. *Oral evidence to vary writing.*]—Oral evidence of misrepresentations, though not usually admissible to show the meaning of an instrument embodying a contract,[15] is admissible to show the intent of the parties,[16] and the deceit by which assent was obtained,[17] and to show what would have been covered by the terms

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[1] Hubbard v. Briggs, 31 N. Y. 518.

[2] Taylor v. Guest, 58 N. Y. 262. And must be alleged. Goings v. White, 33 Ind. 125; Saxton v. Dodge, 57 Barb. 84, 116.

[3] Thorn v. Helmer, 4 Abb. Ct. App. Dec. 408.

[4] Id; Dung v. Parker, 3 Daly, 89.

[5] People v. Sully, 5 Park Cr. 142; Bruce v. Burr, 67 N. Y. 237, affig 5 Daly, 510; Hardt v. Schulting, 13 Hun, 537; and see pp. 240, 245, 265, of this vol.

[6] Bruce v. Burr (above).

[7] Fellowes v. Williamson, M. & M. 306; Powell Ev. 146; Rosc. N. P. 54.

[8] Place v. Minster, 65 N. Y. 89, 107. To the contrary, Moore v. Meecham, 10 Id. 207. Compare p. 245 of this vol. note 4.

[9] Longenecker v. Hyde, 6 Binn. 1.

[10] Small v. Gilman, 48 Me. 506.

[11] See pp. 245 and 265, of this vol.

[12] Blease v. Garlington, 92 U. S. (2 Otto), 1.

[13] Miller v. Barber, 66 N. Y. 558, 568, affi'g 4 Hun, 802.

[14] Pages 308, 347, 489 and 598, of this vol. Clark v. Baird, 9 N. Y. 183; McDonald v. Christie, 42 Barb. 36; Page v. Parker, 40 N. H. 47, 59; Lane v. Wilcox, 55 Barb. 615; Rice v. Manley, 66 N. Y. 82, rev'g 2 Hun, 492, s. c. 5 Supm. Ct. (T. & C.) 14.

[15] For the limitations of this rule, see p. 294 of this vol. Webster v. Hodgkins, 5 Fost. (N. H.) 128, 143.

[16] Thomas v. Beebe, 25 N. Y. 244.

[17] See Salem India Rubber Co. v. Adams, 23 Pick. (Mass.) 256; Benj. on Sales, § 621, n.; Bigelow on Fr. 488; Culver v. Avery, 7 Wend. 380, and see cases cited.

of the instrument if the representations had been true;[1] and the relation of the parties, under which the instrument was made, may be shown, not to vary its terms, but to show the defendant's liability in respect of the transaction.[2] The fact that certain false representations were reduced to writing and delivered, does not exclude evidence of other oral misrepresentations.[3] Ambiguous words used for the purpose of deceit, are taken in the sense in which the defendant intended they should be understood.[4]

12. *Testimony of the parties.*]—If the facts are not conclusive as to fraud, the parties may be examined as to their knowledge,[5] ignorance,[6] belief,[7] opinion,[8] and reliance,[9] at the time of the transaction; and for the purpose of showing reliance, plaintiff can testify that he would not have acted as he did had the facts been known to him,[10] but defendant cannot testify that he did not intend to deceive,[11] nor that he intended only to give an opinion.[12]

Defendant is privileged to refuse to answer a question and equally from producing documents,[13] if the court can see that his answer, or the documents, may in some way criminate him, directly or indirectly, in a criminal fraud, either by furnishing direct evidence of his guilt, or by establishing one of many facts, which together may constitute a chain of evidence sufficient to warrant his conviction, although the one answer or document could not itself produce such result. The witness claiming the privilege is not obliged to explain how he will be criminated, nor need the court see that he must be in some way; it is enough that the situation is such that he might be.[14] But if the party, in testifying on his own behalf, has voluntarily opened the subject, he may be cross-examined so far as necessary to sift his testimony, notwithstanding the claim of privilege.[15]

Where the privilege exists, it is personal to the witness. His counsel cannot be heard to object to the evidence as such, nor

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[1] Sharp v. Mayor, &c. of N. Y. 40 Barb. 256, 270, s. c. less fully, 25 How. Pr. 389.
[2] Richards v. Millard, 56 N. Y. 574, s. c. below, 1 Supm. Ct. (T. & C.) 247.
[3] Match v. Hunt, 6 Cent. L. J. 155.
[4] Johnson v. Hathorn, 2 Abb. Ct. App. Dec. 465.
[5] See Reynolds v. Commerce Fire Ins. Co. 47 N. Y. 597.
[6] Id.
[7] Smith v. Countryman, 30 N. Y. 655; Watson v. Cheshire, 18 Iowa, 202, 210.
[8] Blanchard v. Mann, 1 Allen (Mass.), 433.
[9] Smith v. Countryman, (above); White v. Dodds, 42 Barb. 554, s. c. 18 Abb. Pr. 250, and 28 How. Pr. 197.
Such evidence is necessarily open to suspicion, since it undertakes to prove good faith by an appeal to the very good faith which is to be proved. 1 Whart. Ev. 45, § 35.
[10] King v. Fitch, 2 Abb. Ct. App. Dec. 515. *Contra*, Learned v. Ryder, 61 Barb. 552, s. c. 5 Lans. 539.
[11] Ballard v. Lockwood, 1 Daly, 158. *Contra*, Pope v. Hart, 35 Barb. 630.
[12] Waugh v. Fielding, 48 N. Y. 681.
[13] See Byass v. Sullivan, 21 How. Pr. 50.
[14] People v. Mather, 4 Wend. 229. But the question is for the court not the witness. Fellows v. Wilson, 31 Barb. 162. If inspection of a document is necessary the court may require to see it. Mitchell's Case, 12 Abb. Pr. 249.
[15] People v. Carroll, 3 Park. Cr. 73.

should the judge refuse to allow the objectionable question to be put, but only advise the witness of his privilege. The witness has a right to advise with his counsel in the hearing of the court, but not privately, but must give his own answer without aid in writing or otherwise. An exception lies to a refusal to require an answer, but not to a requirement of an answer.[1] As to a non-criminal fraud he has no privilege.[2] A knowledge of falsity being proved is not overcome by oath to belief, or to intent to pay.[3]

13. *Declarations of conspirators.*]—Slight evidence of concert or collusion between the parties to an illegal transaction, admits evidence of the acts and declarations of one against the others, under the rule already stated.[4] It is in the discretion of the court to allow evidence of the declarations of one, to be admitted against the other, in anticipation of evidence to connect.[5]

14. *Defenses.*]—On the question of good faith, defendant may show that he previously made inquiries, and from the result believed the statement which he thereupon made.[6] If charged with deceit by suppressing information received from a document, he may prove its contents to repel the charge.[7]

Plaintiff's knowledge is admissible under a general denial.[8] It must be clearly shown, to amount to a bar.[9] Defendant may prove plaintiff's representations, on the same subject, to third persons, or his use with third persons, of representations made by others.[10]

Evidence of the good character for honesty and fair-dealing of the defendant,[11] or of the agent who acted for him,[12] is not competent.

15. —*former adjudication.*]—The acquittal of the defendant on a criminal prosecution, is not competent in his favor.[13] A judgment for defendant in a civil action on contract, is not necessarily a bar.[14] Judgments and judicial proceedings to which the party was an entire stranger, are not competent against him, to show the truth of facts alleged or established by them.[15]

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[1] 6 Abb. N. Y. Dig. 2d ed. 239. Remedy to strike out pleading for refusal to answer. Richards v. Judd, 15 Abb. Pr. N. S. 184.

[2] Bigelow on Fr. 498.

[3] Westcott v. Ainsworth, 9 Hun, 53.

[4] Page 190 of this vol; 2 Whart. Ev. § 1205; Bigelow on Fr. 434.

[5] Miller v. Barber, 66 N. Y. 558, 567, affi'g 4 Hun, 802.

[6] Oberlander v. Spies, 45 N. Y. 175. Compare Ballard v. Lockwood, 1 Daly, 158.

[7] Bronson v. Wiman, 8 N. Y. 187, 189.

[8] Howell v. Biddleton, 62 Barb. 131.

[9] Chandelor v. Lopus, 1 Smith's L. Cas. 299, 320, and cases cited.

[10] Atkins v. Elwell, 45 N. Y. 753.

[11] Gough v. St. John, 16 Wend. 646; Anderson v. Long, 10 Serg. & R. 55.

[12] Bassett v. Lederer, 1 Hun, 274, s. c. 3 Supm. Ct. (T. & C.) 671. *Contra*, said, where the evidence is circumstantial. See Bigelow on Fr. 478.

[13] Peek v. Gurney, L. R. 13 Eq. Cases, 70, 112, s. c. 1 Moak's Eng. 567, 600.

[14] N. Y. Code of Civ. Pro. § 549; 1 Abb. N. Y. Dig. new ed. 630; 3 Id. 465, 473. Nor competent. Norton v. Huxley, 13 Gray, 285.

[15] Degraff v. Hovey, 16 Abb. Pr. 120; Lefever v. Lefever, 30 N. Y. 27. Otherwise of a purchaser *pendente lite*. Craig v. Ward, 1 Abb. Ct. App. Dec. 454.

CHAPTER XXXV.

ACTIONS FOR CONVERSION.

1. Frame of the complaint.
2. The existence and identity of the thing.
3. Plaintiff's title.
4. Possession as evidence of title.
5. Mode of proving possession.
6. Mode of proving source of title.
7. Title by mortgage.
8. Equitable title: lien.
9. Plaintiff owner, notwithstanding void sale.
10. The conversion.
11. Demand.
12. Value.
13. Declarations of former owner.
14. Title in defense.
15. Title derived through wrong-doer.
16. Illegality.
17. Mitigation of damages.

1. *Frame of the complaint.*]—If the complaint alleges a wrongful conversion as the distinctive ground of the action, it is not sustained by proof of a mere breach of contract or duty.[1] Otherwise, if a cause of action on contract is sufficiently alleged, and the allegations of conversion are incidental.[2]

Under an allegation of conversion of plaintiff's property, evidence of conversion of the property of another, and a subsequent assignment of the property, or of the cause of action for conversion, is a variance.[3] The assignment should be alleged;[4] but its consideration need not be set forth.[5]

2. *The existence and identity of the thing.*]—Defendant's representations may be used to estop him from denying that the alleged property ever existed.[6] Conversion of checks or money may be proved under allegations of conversion of property.[7] Proving the specific description of the bills or coins converted is not necessary if the amount is not doubtful.[8]

If the thing converted is a written instrument, the nature of the action is sufficient notice to produce, to let in secondary evi-

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[1] Tolano v. National Steam Nav. Co. 5 Robt. 318, 326, s. c. 4 Abb. Pr. N. S. 316; 35 How. Pr. 496. Compare Gordon v. Hostetter, 37 N. Y. 99, s. c. 4 Abb. Pr. N. S. 263.

[2] Conaughty v. Nichols, 42 N. Y. 83; but see 50 Id. 1; 51 Id. 108. Compare Austin v. Rawdon, 44 Id. 63.

[3] Bowman v. Eaton, 24 Barb. 528; Duell v. Cudlipp, 1 Hilt. 166; Hodges v. Lathrop, 1 Sandf. 46; Whittaker v. Merrill, 30 Barb. 389; Sherman v. Elder, 24 N. Y. 381. Compare Read v. Lambert, 10 Abb. Pr. N. S. 428; Corsan v. Oliver, 2 Abb. New Cas. 352; Hicks v. Cleveland, 48 N. Y. 84.

[4] See Chap. I.

[5] Vogel v. Badcock, 1 Abb. Pr. 176.

[6] Griswold v. Haven, 25 N. Y. 595; Harding v. Carter, Park on Ins. 4 (Lord MANSFIELD.)

[7] Knapp v. Roche, 37 Super. Ct. (J. & S.) 395; 62 N. Y. 614.

[8] Gorden v. Hostetter, 37 N. Y. 99, s. c. 4 Abb. Pr. N. S. 263.

dence of its contents[1] and indorsements.[2] If the things converted were commingled with a larger quantity, without defendant's fault, the burden is on plaintiff to show the part that he was entitled to.[3] The rules applicable to proving quantity, kind, dates, etc., by witnesses and memoranda, or entries, have been already stated.[4] A qualified witness[5] may testify directly to the identity of the thing; but belief or opinion of identity is not competent without statement of the facts on which it is founded.[6]

3. *Plaintiff's title.*]—Under a general averment of title or ownership, the source of plaintiff's title may be proved.[7] A witness may testify directly, in the first instance, who owned the property,[8] if he can do so positively, and not as mere opinion.[9] Absolute title need not be shown. A bailee may sue.[10]

4. *Possession as evidence of title.*]—The mere facts of lawful possession in plaintiff, and wrongful taking by defendant, are sufficient.[11] Lawful possession is sufficient evidence of title without proving the transfer by which plaintiff acquired title;[12] and possession is presumed lawful unless the contrary appears.

5. *Mode of proving possession.*]—A witness may testify directly in the first instance to the fact of possession,[13] if he can do so positively (subject, of course, to cross-examination as to details); but not to inference or opinion.[14]

6. *Mode of proving source of title.*]—If the title was acquired by bill of sale, or other written instrument, it must be produced, or accounted for and secondary evidence of its contents given, in order to prove the transfer.[15] But if title passed by oral sale and delivery, a receipt or bill of parcels, though given at the time,[16] or a bill of sale *subsequently* delivered,[17] need not be produced.

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[1] Bissel v. Drake, 19 Johns. 66; Hays v. Riddle, 1 Sandf. 248.

[2] Howell v. Huyck, 2 Abb. Ct. App. Dec. 423.

[3] Wilson v. Wilson, 37 Md. 1.

[4] Pages 319–26 of this vol.; and see Glover v. Hunnewell, 6 Pick. 222; Bartlett v. Hoyt, 33 N. H. 151.

[5] It requires knowledge of the thing. Rich v. Jones, 9 Cush. (Mass.) 329. But not necessarily an expert. Morrissey v. People, 11 Mich. 327.

[6] Goodwin v. Goodwin, 20 Geo. 600.

[7] Heine v. Anderson, 2 Duer, 318.

[8] De Wolfe v. Williams, 69 N. Y. 621; Walsh v. Kelly, 42 Barb. 98, s. c. 27 How. Pr. 359; Nelson v. Iverson, 24 Ala. 9, 18.

[9] Wells v. Ship, 1 Miss. (Walk.) 353; Maxwell v. Harrison, 8 Geo. 61, 66.

[10] Van Bokkelin v. Ingersol, 5 Wend. 315, confirming 7 Cow. 670; Baker v. Hoag, 7 N. Y. 555; Faulkner v. Brown, 13 Wend. 63; and see Truslow v. Putnam, 4 Abb. Ct. App. Dec. 425; Nesmith v. Dyeing, &c. Co. 1 Curt. C. Ct. 130, s. c. 1 Am. Law Reg. 82, and cas. cit.

[11] Hendricks v. Decker, 35 Barb. 298, and cas. cit.; Bowen v. Fenner, 40 Id. 383; Paddon v. Williams, 1 Robt. 340, s. c. 2 Abb. Pr. N. S. 88.

[12] Beach v. Raritan, &c. R. R. Co. 37 N. Y. 457.

[13] Rand v. Freeman, 1 Allen, 517.

[14] Perry v. Graham, 18 Ala. 822, 825.

[15] Dunn v. Hewitt, 2 Den. 637; King v. Randlett, 33 Cal. 318.

[16] Page 287 of this vol.

[17] Sanders v. Stokes, 30 Ala. 432.

An invoice is not alone evidence of a sale.[1] A bill of lading is presumptive evidence of title in the consignee.[2]

The registry is not the exclusive evidence of the title to a vessel.[3]

If plaintiff's right to claim possession is by virtue of his purchase at an execution sale, the execution is sufficient evidence of the judgment, as against the debtor in the execution; but as against a third person other than the officer, he must prove the judgment.[4] If the levy was valid only as to part of the property, plaintiff must identify the part.[5] A return stating that legal notice was given is presumptive, but not conclusive evidence of regularity in the notice.[6] Against one who shows himself a purchaser in good faith, evidence that an execution against the seller's property was in the sheriff's hands very shortly before the purchase, will not raise a presumption of actual levy made before the sale.[7]

Other rules as to the mode of proving sales have been already stated.[8]

For the purpose of proving ownership of crops, timber, etc., the ownership of the soil may be shown by producing the deed to plaintiff, and possession under it, without showing title in the grantor.[9] As between the parties to the deed, parol evidence that things not included in its terms were intended to pass by it is incompetent.[10] Declarations of either the owner or the occupant of the land, made in connection with and characterizing the possession and the dominion over the crops, are competent in favor of the other on the question of his ownership of the crops.[11]

The main tests on a question of fixtures are, permanent character; adaptation to freehold; and intent of parties.[12] On the question of intent, declarations made by the person in possession of the soil, who annexed the fixture, and at the time of so doing, are competent.[13]

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[1] Dows v. Nat. Exchange Bank of Milwaukee, 91 U. S. (1 Otto), 618.

[2] Id.; Halliday v. Hamilton, 11 Wall. 560; Rawls v. Deshler, 4 Abb. Ct. App. Dec. 12.

[3] United States v. Jones, 3 Wash. C. Ct. 209; Sutton v. Buck, 2 Taunton, 302.

[4] Yates v. St. John, 12 Wend. 74; Dane v. Mallory, 16 Barb. 46.

[5] Brown v. Pratt, 4 Wis. 513.

[6] Drake v. Mooney, 31 Vt. 617.

[7] Millspaugh v. Mitchell, 8 Barb. 333; but see Williams v. Shelly, 37 N. Y. 375; Bond v. Willett, 1 Abb. Ct. App. Dec. 165.

[8] Chapter XVI.

[9] Grant v. Smith, 26 Mich. 201.

[10] Ripley v. Paige, 12 Vt. 353. Compare Flynt v. Conrad, 1 Phil. L. R. (N. C.) 190; Simpkins v. Rogers, 15 Ill. 397.

[11] Woods v. Blodgett, 18 N. H. 249; White v. Morton, 22 Vt. 15. Compare Ekins v. Hamilton, 20 Vt. 627. The declarations of servants removing the products away from the land, as to what lot they were brought from, are not part of the *res gestæ*, nor within the scope of their agency. Woods v. Banks, 14 N. H. 101.

[12] Abb. N. Y. Dig. new ed. tit. Fixt.; Meig's Appeal, 62 Pa. 28, s. c. 1 Am. R. 372; Seeger v. Pettit, 77 Penn. St. 437, s. c. 18 Am. R. 452; and see 13 Am. L. Rev. 45.

[13] Kelley v. Kelley, 20 Wis. 443.

7. *Title by mortgage.*]—If plaintiff is a mortgagee and relies on the mortgage as evidence of his title, he must produce it,[1] with the note or other written obligation, if any, to which it is collateral;[2] or account for non-production, and prove the contents. In either case he must prove execution.[3] A clerk's certified copy of the mortgage is not competent evidence of execution or contents.[4] Unless there is actual change of possession, filing must be proved, as against judgment creditors, etc., but need not against wrong-doers.[5] Oral evidence is not competent to vary the terms of the mortgage.[6] Against a wrong-doer, plaintiff is not bound to account for other property covered by the mortgage, but the burden is on defendant to show plaintiff's interest reduced thereby.[7] A mortgagee who took possession under the danger clause, may testify as a witness whether he deemed himself unsafe.[8] An agreement to allow the mortgagee to sell and use proceeds may be proved by extrinsic evidence.[9]

8. *Equitable title: Lien.*]—Plaintiff may prove an equitable title to meet a common law defense impeaching the legal title.[10]

Under allegations showing a pledge or other lien, the evidence may be confined to the debt alleged and admitted.[11] Evidence that the thing was pledged to defendant or held by him under a lien, throws on plaintiff the burden of proving an extinguishment of the lien,[12] or other right of present possession, unless actual conversion, in violation of the lienor's duty, is shown.[13] For this purpose, evidence of payment of the debt, and a demand for a return of the thing pledged, is sufficient.

9. *Plaintiff owner, notwithstanding void sale.*]—Delivery on a sale is presumed absolute, and the burden is on the seller reclaiming the goods, to show the condition or the fraud on which he relies.[14] Where fraud is not imputed, the buyer's intent not to pay is irrelevant on the question of breach of condition.[15]

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[1] Bissell v. Pearce, 28 N. Y. 252.
[2] Flynn v. Hathaway, 65 Ill. 462.
[3] See, for mode of proof, pp. 504–8 of this vol.
[4] Bissell v. Pearce (above); Sunderlin v. Wyman, 10 Hun, 493.
[5] Porter v. Parmley, 14 Abb. Pr. N. S. 16, s. c. 52 N.Y. 185, rev'g 34 Super. Ct. (J. & S.) 398, s. c. 43 How. Pr. 445; Moses v. Walker, 2 Hilt. 536.
[6] Baltes v. Ripp, 1 Abb. Ct. App. Dec. 78; Clark v. Houghton, 12 Gray, 38.
[7] Bailey v. Godfrey, 54 Ill. 507, s. c. 5 Am. R. 157. Compare pp. 444, 445 of this vol.
[8] Huggans v. Fryer, 1 Lans. 276.
[9] Southard v. Pinckney, 5 Abb. New Cas. 184, and cas. cit.
[10] Woodworth v. Sweet, 51 N. Y. 8, aff'g 44 Barb. 268.
[11] Luckey v. Gannon, 6 Abb. Pr. N. S. 209, s. c. 37 How. Pr. 134, 1 Sweeny, 12.
[12] Bush v Lyon, 9 Cow. 52.
[13] Mulliner v. Florence, 38 L. T. R. N. S. 167, and cas. cit.; Luckey v. Gannon, 37 How. Pr. 134, s. c. 6 Abb. Pr. N. S. 209, and cas. cit.
[14] Nelson, J., Furniss v. Hone, 8 Wend. 256.
[15] Jessop v. Miller, 2 Abb. Ct. App. Dec. 449.

The buyer's undisclosed knowledge that he was insolvent is competent on the question of fraud,[1] without evidence of direct representation; but is not conclusive—nor necessarily sufficient.[2] If the buyer gave his notes, it is enough to tender them in return at the trial.[3] Other similar fraudulent transactions by the same buyer, at about the same time, are competent on the question of scienter and intent.[4]

10. *The conversion.*]—Conversion may be proved under an allegation that defendant took and carried away.[5] An allegation of conversion is not sustained by mere proof of a contract and breach.[6] It is not necessary to show a manual taking of the thing, nor that defendant has applied it to his own use;[7] but it must be shown that the defendant either did some positive wrongful act with the intention to appropriate the property to himself, or to deprive the rightful owner of it, or destroyed the property.[8] Evidence that plaintiff was the true owner, and that the thing was wrongfully taken from his possession by a third person, and was afterwards in defendant's possession, throws on defendant the burden of accounting for the possession.[9]

A refusal to deliver may be with such circumstances of defiance of plaintiff's title, or of appropriation, as in itself to be a conversion. Where this is not the case, a demand and refusal, if unqualified and unexplained, is usually conclusive evidence of conversion,[10] if ability to comply is shown; otherwise, not.[11] If

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[1] Johnson v. Monell, 2 Abb. Ct. App. Dec. 470.

[2] Byrd v. Hall, 1 Abb. Ct. App. Dec. 285; Biggs v. Barry, 2 Curt. C. Ct. 259. For other rules, see Chapter XXXIV, on actions for DECEIT or FRAUD.

[3] King v. Fitch, 2 Abb. Ct. App. Dec. 508.

[4] Allison v. Matthieu, 3 Johns. 235; Van Kirk v. Wilds, 11 Barb. 520. Compare Booth v. Powers, 56 N. Y. 22, rev'g Flint v. Craig, 59 Barb. 319. On the question of a fraudulent combination between several to buy in the name of one for the benefit of another, the declarations of either forming part of the *res gestæ*, and evidence of the means of the pretended buyer at the time when the confederate represented him to the seller to be wealthy, are competent. Rea v. Missouri, 17 Wall. 544. Compare Moore v. Meacham, 10 N. Y. 207.

[5] Hutchings v. Castle, 48 Cal. 152. Compare Eldridge v. Adams, 54 Barb. 417; Van Valkenburgh v. Thayer, 57 Barb. 196; Read v. Lambert, 10 Abb. Pr. N. S. 428.

[6] Walter v. Bennett, 16 N. Y. 250; Whitcomb v. Hungerford, 42 Barb. 177. Compare Frost v. McCargar, 29 Barb. 617, and paragraph 1.

[7] Bristol v. Burt, 7 Johns. 254, and cases cited; Murray v. Burling, 10 Id. 172; Reynolds v. Shuler, 5 Cow. 323; Connah v. Hale, 23 Wend. 462.

[8] Spooner v. Holmes, 102 Mass. 503, s. c. 3 Am. R. 491, and cases cited; McMorris v. Simpson, 21 Wend. 610, and cases cited. When the question of conversion depends on the question of assent by plaintiff, the plaintiff cannot be asked on his own behalf, "did you ever assent?" The question is whether his acts manifested assent, or justified the defendant in believing he assented. Stanton v. Crispell, 9 Hun, 502.

[9] Paragraph 15. Edw. on Bailm. § 109.

[10] Holbrook v. Wight, 24 Wend. 169, 178. Compare Huntington v. Douglas, 1 Robt. 204, and cases cited; Hill v. Govell, 1 N. Y. 522; Mount v. Derick, 5 Hill, 455; Storm v. Livingston, 6 Johns. 44; Jackson v. Pixley, 9 Cush. 490; Roberts v. Berdell, 15 Abb. Pr. N. S. 177.

[11] Bowman v. Eaton, 24 Barb. 528, and cases cited.

accompanied by a reasonable and truthful qualification, it is not evidence of conversion.[1] Where mere words are relied on as evidence of conversion, the circumstances must show a defiance of plaintiff's right. Mere refusal to act when plaintiff might take possession, without act of defendant, is not enough.[2]

Proof of intent is not necessary.[3]

11. *Demand.*]—Demand before suit if necessary may be proved, though not alleged.[4] An oral demand, if sufficient in itself, may be proved without producing a demand in writing made at the same time.[5]

12. *Value.*]—Plaintiff must give some evidence of value, though his allegation of value be not denied.[6] The mode of proving the value of chattels has been already stated.[7] As to the value of a thing in action—such as a promissory note—opinions of witnesses are not competent. The proper inquiry is as to the solvency of the debtor.[8] Evidence of the neglect or refusal of the debtor, being a business man, to pay it according to its terms, is competent, as tending to show inability to pay.[9] Defendant may show the true value, though he has not denied plaintiff's allegation of value.[10]

Where there is ground for presuming fraud, defendant may be held liable in the highest amount, if he will not produce the article or disclose its actual value.[11]

13. *Declarations of former owner.*]—The competency of evidence of the declarations and admissions of a former owner of the property is stated in the chapter on actions by and against assignees.[12]

14. *Title in defense.*]—When title and right of possession in plaintiff are in issue, defendant may show them to have been in a third person.[13] Otherwise, in an action for forcible and wrongful taking from plaintiff's possession.[14] The burden is on defendant to show such title in the person through whom he claims, as will

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[1] Holbrook v. Wight (above); Hagar v. Randall, 62 Me. 439.

[2] Gillet v. Roberts, 57 N. Y. 33.

[3] Laverty v. Snethen, 68 N. Y. 522; Dudley v. Hawley, 40 Barb. 397, aff'd as Spraights v. Hawley, 39 N. Y. 441; Boyce v. Brockway, 31 N. Y. 490, and cases cited.

[4] Simser v. Cowan, 56 Barb. 395; and see Fullerton v. Dalton, 58 Barb. 236.

[5] Smith v. Young, 1 Campb. 439.

[6] Connors v. Meir, 2 E. D. Smith, 314.

[7] Pages 306–12 of this vol.

[8] Potter v. Merchants' Bank, 28 N. Y. 641. Compare Outhouse v. Outhouse, 13 Hun, 130, 132.

[9] Booth v. Powers, 56 N. Y. 22, rev'g Flint v. Craig, 59 Barb. 319.

[10] Chicago, &c. R. R. Co. v. Northwestern Union Packet Co. 38 Iowa, 377, 382.

[11] Armory v. Delamire, 1 Sm. L. Cas. 153; and see 10 H. L. Cas. 589; and Preston v. Leighton, 6 Md. 88.

[12] Page 11 of this vol.

[13] Davis v. Hoppock, 6 Duer, 254; Jackson v. Pixley, 9 Cush. 490.

[14] Kissam v. Roberts, 6 Bosw. 154.

sustain his defense.[1] A general denial admits any evidence going to controvert the facts which plaintiff is bound to establish.[2] A subsequently derived title, if relied on as a bar,[3] must be specially pleaded.[4]

15. *Title derived through wrong-doer.*]—If the true owner, by his own act and consent, has given to another the written evidence or indicia[5] of ownership, and the apparent right of disposal of the property, a *bona fide* purchaser from the apparent owner, or one who advances money, or incurs responsibility on the faith of the title, will be protected.[6] But if the party dealing with the apparent owner, had actual notice of the rights of the true owner, he acquires no better title than the transferor or apparent owner could lawfully convey.[7] In the case of securities, the word "trustee" or its equivalent, on the face of the paper, is notice of the trust.[8] Evidence of oral notice to the defendant, that the wrong-doer was acting as agent, lets in evidence of his actual authority.[9] When plaintiff's title and an original tortious taking is shown, the burden is on the purchaser to show that he is free from fault, and lawfully came to the possession in good faith.[10]

16. *Illegality.*]—Evidence that defendant received possession from plaintiff under an illegal contract, does not necessarily defeat the action, for it is not founded on the contract.[11] Illegality in the contract set up by defendant as a justification of his detention, may be proved by plaintiff in rebuttal, though not alleged in pleading,[12] unless the contract is pleaded as a counterclaim.

17. *Mitigation of damages.*]—A general denial admits any matter competent in reduction of damages.[13] An agreement giving defendant a lien, if proved without objection may avail, though not alleged.[14]

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[1] Brower v. Peabody, 13 N. Y. 121, s. c. 2 Abb. Pr. 211, 11 How. Pr. 492.
[2] Andrews v. Bond, 16 Barb. 633, 642.
[3] Jacobs v. Remsen, 12 Abb. Pr. 390, s. c. 35 Barb. 384.
[4] Wehle v. Butler, 12 Abb. Pr. N. S. 139. And see Bryant v. Bryant, 2 Robt. 612.
[5] Mere possession is not enough. Penfield v. Dunbar, 64 Barb. 239.
[6] Bay v. Coddington, 5 Johns. Ch. 54; Porter v. Parks, 49 N. Y. 564, and cas. cit.
[7] Porter v. Parks (above).
[8] Shaw v. Spencer, 100 Mass. 382; 1 Am. R. 115; Duncan v. Jaudon, 15 Wall. 175. One who purchases public stocks from an agent, under a mere general power to do and transact all manner of business, must prove, as against the principal, that he bought in good faith and paid a fair consideration. Hodge v. Combs, 1 Black, 192.
[9] Merchants Bank v. Livingston, 74 N. Y. 223.
[10] Cormier v. Batty, 41 Super. Ct. (J. & S.) 79; except in case of negotiable paper, 2 Pars. on Pr. N. 264.
[11] Frost v. Plumb, 40 Conn. 111, s. c. 16 Am. R. 18; Woodman v. Hubbard, 25 N. H. 67; Hall v. Corcoran, 107 Mass. 251, s. c. 9 Am. R. 30. *Contra*, Smith v. Rollins, 11 R. I. 464, s. c. 23 Am. R. 509, 510, 515, and cases cited; and 60 Me. 528, s. c. 11 Am. R. 210.
[12] Williams v. Tilt, 36 N. Y. 319.
[13] Booth v. Powers, 56 N. Y. 22, rev'g Flint v. Craig, 59 Barb. 319.
[14] Townsend v. Bargy, 57 N. Y. 666.

CHAPTER XXXVI.

ACTIONS FOR TRESPASS TO PERSONAL PROPERTY.

1. Plaintiff's title or possession.
2. The act of trespass.
3. Value and damages.
4. Admissions and declarations.
5. Character.
6. Action for wrongful levy.
7. — defendant's sanction.
8. — justification.
9. — exemption from execution.
10. Justification by tax collector.

1. *Plaintiff's title or possession.*]—If plaintiff shows that he had actual possession, and defendant's forcible taking, plaintiff need not prove his title,[1] even though it be in issue.[2] If he does not prove possession, actual or constructive, he must prove title.[3] If he relies on title under an execution sale, he must give *prima facie* evidence of the validity of the sale.[4] The mode of proof of title or possession is stated in the last chapter.

2. *The act of trespass.*]—Evidence of any unlawful interference with plaintiff's personal property, or exercise of dominion over it, by which plaintiff is damnified—such as a wrongful levy—though without sale or removal, is enough.[5] Evidence of mere non-feasance does not make a trespasser *ab initio*. There must be a positive act, such as if done without authority would be a trespass.[6]

3. *Value and damages.*]—The value of the property destroyed need not be proven in order to sustain the action;[7] but must be, to sustain a verdict for substantial damages for the destruction.[8] Defendant may controvert the value although he has not denied it in pleading.[9] The mode of proving value and damage has already been stated.[10]

Willful wrong or malice may be shown as a ground for exemplary damages,[11] even though actual damage was nominal.[12]

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[1] Hoyt v. Van Alstyne, 15 Barb. 568; Hurd v. West, 7 Cow. 752.
[2] Kissam v. Roberts, 6 Bosw. 124, and cases cited.
[3] Carter v. Simpson, 7 Johns. 535. Compare Bas v. Steele, 3 Wash. C. Ct. 381.
[4] Id.
[5] Stewart v. Wells, 6 Barb. 79, and cases cited.
[6] Averell v. Smith, 17 Wall. 82; Spencer's Case, 1 Smith's L. Cas. 137, 221. Whether a criminal act requires proof beyond a reasonable doubt, is not fully settled. See p. 495 of this vol., and Thayer v. Boyle, 30 Me. 475; Paul v. Currier, 53 Id. 526 (deemed overruled in Ellis v. Buzzell, 60 Id. 209); Wells v. Head, 17 Ill. 204.
[7] Brent v. Kimball, 60 Ill. 35, s. c. 14 Am. R. 35.
[8] Kenny v. Planer, 3 Daly, 131.
[9] Dunlap v. Snyder, 17 Barb. 561.
[10] Pages 306, 348 and 598 of this vol.; Nellis v. McCarn, 35 Barb. 115, 118.
[11] See Lewis v. Bulkley, 4 Daly, 156.
[12] Allabach v. Ult, 51 N. Y. 651.

Express or actual malice may be inferred from a mischievous intent, or inexcusable recklessness.[1] But malicious intent is not conclusively inferred from the act.[2] It is only a presumption that one intends the ordinary and probable consequences of his act, and this presumption may be rebutted by competent evidence.[3] When competent to show malice in an officer's act, a witness may testify that it was done in an offensive and insulting manner.[4] Proof or admission that defendant acted without malice, precludes exemplary damages; and evidence, in the nature of a justification, is admissible in mitigation.[5]

4. *Admissions and declarations.*]—In corroboration of circumstantial evidence that defendant or his agent did the act, evidence of his previous declarations of intent to do it is competent.[6] A proposal from defendant for settlement is competent, leaving it to the jury, if ambiguous, to determine whether it was an admission of trespass, or a proposition to buy peace.[7] The party against whom an admission is proved may prove, on his part, the whole of the conversation at that time, so far as it qualifies the admission, but no further. His declarations at the time, upon the general merits of the case, cannot be proved in his favor.[8] Where a combination of design is shown, the acts and declarations of either of those engaged in it are competent against the others, within limits already stated.[9]

5. *Character.*]—Though willful injury be alleged, character is not in issue.[10]

6. *Action for wrongful levy.*[11]]—In an action for a wrongful levy, the plaintiff proves the act of taking, &c., and the damage, and rests. Defendant then proves his allegations [12] that he, or one of several defendants, was a public officer,[13] and that he acted under process,[14] or under process and judgment.[15] Plaintiff may then prove whatever new matter he relies on in avoidance—such as exemption—although not pleaded.[16]

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[1] Etchberry v. Levielle, 2 Hilt. 40, and cas. cit.; State v. Hessencamp, 17 Iowa, 25.
[2] Filkins v. People, &c. of N. Y. 69 N. Y. 106, rev'g 1 Buffalo Super. Ct. (Sheldon), 504.
[3] Id.
[4] Raisler v. Springer, 38 Ala. 703. Compare cases cited in note 10 on p. 599 of this vol.
[5] Gelston v. Hoyt, 13 Johns. 561, affi'g Id. 141.
[6] See Dodge v. Bache, 57 Penn. St. 421; Smith v. Causey, 28 Ala. 655.
[7] Prussel v. Knowles, 5 Miss. (4 How.) 90.
[8] Garey v. Nicholson, 24 Wend. 350; Rouse v. Whited, 25 N. Y. 170.
[9] Page 190 of this vol.; Colt v. Eves, 12 Conn. 243.
[10] Thayer v. Boyle, 30 Me. 475.
[11] Justification must be alleged. Graham v. Hanover, 18 How. Pr. 144; Root v. Chandler, 10 Wend. 110.
[12] See, also, page 193 of this vol.
[13] Page 198.
[14] Page 201; Werner v. Waters, 55 Barb. 591.
[15] Page 535.
[16] Dennis v. Snell, 54 Barb. 415.

7. — *defendant's sanction.*]—For the purpose of charging the creditor in process against a third person, with trespass by its wrongful levy on plaintiff's property, there is no presumption that he authorized such levy,[1] and evidence that his attorney did so is not alone enough against him.[2] But evidence that he referred the officer to his attorney for instructions, and the latter sanctioned the levy, to the knowledge of defendant;[3] or that after the taking he induced the officer to detain and sell the property;[4] or evidence that he received the proceeds, together with evidence that he admitted he had attached the goods,[5] or that on learning the facts he affirmed his claim,[6] or even omitted to repudiate the trespass,[7] is enough. Evidence that one partner directed a levy of an execution for a partnership debt, raises a presumption that the other partners assented.[8] Corporate authority is not presumed.[9] If defendant's instructions are relied on, and they were exclusively in writing, they should be produced or accounted for as the best evidence.[10]

Defendant's responsibility for the officer's act being thus shown, the officer's declarations in following the instructions are competent against him.[11]

8. — *justification.*]—Justification is not admissible under a general denial,[12] except by a public officer, or one acting under statute, in a case within the Revised Statutes.[13] Justification by proof of ownership in a third person, cannot be proved unless the answer not only alleges such property in the third person, but also connects defendant with such owner by averring that the taking was by his authority, or by virtue of process or right against such owner.[14] If defendant acted under authority of a court, the record appointing him is competent, though made in a proceeding in which the parties were not the same.[15] The general rules as to official justification have been already stated.[16] Evi-

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[1] The law will not presume any one to be a wrong-doer. Averill v. Williams, 1 Den. 501. *Contra*, Newberry v. Lee, 3 Hill, 523; compare Copley v. Rose, 2 N. Y. 115.

[2] Averill v. Williams, 4 Den. 295. Compare Judson v. Cook, 11 Barb. 642.

[3] Armstrong v. Dubois, 1 Abb. Ct. App. Dec. 8.

[4] Root v. Chandler, 10 Wend. 110.

[5] Halliday v. Hamilton, 11 Wall. 560, 566.

[6] Herrman v. Gilbert, 8 Hun, 253.

[7] Murray v. Bininger, 3 Abb. Ct. App. Dec. 336.

[8] Chambers v. Clearwater, 1 Abb. Ct. App. Dec. 341, aff'g Schoonmaker v. Clearwater, 41 Barb. 200.

[9] Watson v. Bennett, 12 Barb. 196.

[10] Stebbins v. Cooper, 4 Den. 191.

[11] Raisler v. Springer, 38 Ala. 703.

[12] Root v. Chandler, 10 Wend. 110; Butterworth v. Soper, 13 Johns. 443.

[13] Page 201 of this vol. For short mode of pleading in action for doing an official act or an act by statutory authority, see 2 N. Y. R. S. 353 (3 Id. 6th ed. 614), §§ 16, 17.

[14] Kissam v. Roberts, 6 Bosw. 154.

[15] State v. Hyde, 29 Conn. 564; and see Plummer v. Harbut, 5 Iowa, 308.

[16] Pages 198–202 of this vol.

dence that defendant professed at the time of the alleged trespass to act under warrant, does not raise a presumption of authority.[1]

An officer sued for executing regular process is not bound to prove the judgment,[2] except, perhaps, where it is a judgment of a justice's court or like inferior jurisdiction,[3] or unless he relies on facts established by it, as, for instance, to negative a claim of exemption,[4] or as a foundation for impeaching a transfer as fraudulent.[5] But a party to the process must prove not only the execution, but also the judgment on which it issued;[6] and jurisdiction must affirmatively appear,[7] if not presumable.[8] If the levy was under attachment, judgment in the attachment suit, though recovered after the present action had been brought, is conclusive evidence of the debt.[9]

Return of the execution need not be shown; and the want of an indorsement on the execution, of the time it was received by the officer, does not affect its competency; and the time of receiving it may be shown by parol.[10] The want of a return may be explained by parol.[11] Formal evidence of absolute vacatur, proves the party, but not the officer, to be a trespasser *ab initio*.[12]

Evidence of plaintiff's oral admission of the validity of the process, &c., is not competent,[13] unless acted on so as to raise an estoppel.[14]

If the thing was levied on while in possession of a third person, the burden of proof as to title is upon the officer.[15] The inquisition of a sheriff's jury against the plaintiff, on his claim to the property levied on, is not competent evidence in the plaintiff's favor and against the officer.[16] Even though the levy was under attachment before judgment, defendant may show that plaintiff's claim of title was fraudulent as against the attaching creditors;[17]

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[1] Brachett v. Hayden, 15 Me. 347; and see pp. 198–202 of this vol.

[2] Sheldon v. Van Buskirk, 2 N. Y. 473; Shaw v. Davis, 55 Barb. 389; Holmes v. Nuncaster, 12 Johns. 395. *Contra*, Underhill v. Reinor, 2 Hilt. 319.

[3] Cleveland v. Rogers, 6 Wend. 438.

[4] Dennis v. Snell, 54 Barb. 411.

[5] Sheldon v. Van Buskirk, 2 N. Y. 473.

[6] Newberry v. Lee, 3 Hill, 523, s. p. Simpson v. Watrus, Id. 619; Gelhaar v. Ross, 1 Hilt. 117.

[7] See Walker v. Mosely, 5 Den. 102.

[8] See page 544 of this vol.

[9] Rinchey v. Stryker, 28 N. Y. 45, s. c. 26 How. Pr. 75; and less fully, 31 N. Y. 140.

[10] Bealls v. Guernsey, 8 Johns. 52.

[11] Bealls v. Guernsey, 8 Johns. 52; Frost v. Shapleigh, 7 Greenl. 236. Compare Gault v. Woodbridge, 4 McLean, 329.

[12] Kerr v. Mount, 28 N. Y. 659. Compare Newberry v. Lee 3 Hill, 523.

[13] Bush v. Hewett, 4 N. Y. Leg. Obs. 384; Moore v. Hitchcock, 4 Wend. 292. Compare Smith v. Hill. 22 Barb. 656.

[14] Price v. Harwood, 3 Campb. 108.

[15] Merritt v. Lyon, 3 Barb. 110. For the distinction in this respect between process against property of a debtor, generally, and that against specific things, see Foster v. Pettibone, 20 Barb. 350; Buck v. Colbath, 3 Wall. 343.

[16] Townsend v. Phillips, 10 Johns. 98; Sheldon v. Loomis, 28 Cal. 122

[17] Rinchey v. Stryker, 28 N. Y. 45; s. c. 26 How. Pr. 75; Hall v. Stryker, 27 N. Y. 596, rev'g 29 Barb. 105, s. c. 9 Abb. Pr. 342; Pierce v. Hill, 35 Mich. 194.

and this he may show under an issue as to ownership, without express allegation of fraud.[1]

9. — *exemption from execution.*]—Plaintiff may prove his property exempt from execution, under a general allegation of wrongful taking.[2] One claiming an exemption must show the facts making it out;[3] the necessity of the articles;[4] and the value, in its relation to the statute limit.[5] The fact of being a householder cannot be proved by general reputation;[6] but a witness may testify directly to the fact in the first instance, subject to cross-examination as to details; but cannot testify to his opinion on that question;[7] nor on the necessity of the articles.[8] The evidence of necessity must be directed to the character of the property in its relation to the vocation, not to the sufficiency or insufficiency of plaintiff's other property.[9]

10. *Justification by tax collector.*]—A collector of taxes sued for a levy has the burden of showing that the tax was exacted by authority of law;[10] but proving a warrant and assessment roll which are regular on their face, is *prima facie* enough,[11] without proving the proceedings by which the tax was laid.[12]

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[1] Deitsch v. Wiggins, 15 Wall. 539; Adler v. Cole, 12 Wis. 188; Chamberlain v. Stern, 11 Nev. 268. *Contra*, see Demick v. Chapman, 11 Johns. 132.

[2] Stevens v. Somerindyke, 4 E. D. Smith, 418.

[3] Griffin v. Sutherland, 14 Barb. 456; Carnrick v. Myers, Id. 9; Clapp v. Thomas, 5 Allen, 158.

[4] Van Sickler v. Jacobs, 14 Johns. 434.

[5] Chambers v. Halstead, Hill & D. Supp. 384.

[6] Eastman v. Caswell, 8 How. Pr. 75.

[7] See pages 103–7 of this vol.

[8] Whitmarsh v. Angle, 3 Code R. 53, s. c. 3 Mo. Law R. N. S. 595

[9] Wilcox v. Hawley, 31 N. Y. 648; Smith v. Slade, 57 Barb. 637; Whitmarsh v. Angle, 3 Code R. 53, s. c. 3 Mo. Law R. N. S. 595. As to what shows professional vocation, see Sutton v. Facey, 1 Mich. 243, 247.

[10] Wilkinson v. Greely, 1 Curt. C. Ct. 439.

[11] Johnson v. Learn, 30 Barb. 616.

[12] Sheldon v. Van Buskirk, 2 N. Y. 473.

CHAPTER XXXVII.

ACTIONS FOR TRESPASS TO REAL PROPERTY.

1. Plaintiff's title.
2. Possession.
3. Acts of trespass.
4. The purpose of an act.
5. Damages.
6. *Defense;* Disproof of the trespass.
7. Justification.
8. Defendant's title and possession.
9. Easements, ways, &c.
10. License.

1. *Plaintiff's title.*]—The usual mode of proving plaintiff's title is to produce and prove the deed[1] or will,[2] or other instrument under which plaintiff holds (or that under which his ancestor held, coupled with proof of inheritance), and to give oral evidence of his possession under it. It is enough for either party to show title to that part where the trespass was committed.[3] Paper title is not enough, without any evidence that plaintiff, or those under whom he derives such title, have ever had possession.[4] Possession in fact,[5] or legal right to immediate possession,[6] must be shown, or else a right in reversion or remainder,[7] coupled with injury to the inheritance.[8] A title alleged, which the answer does not deny,[9] or expressly admits and claims under,[10] plaintiff need not prove, even though the possession be vacant.[11] Evidence of usage is competent in aid of the interpretation of a deed, if it be ambiguous;[12] but not if it be unambiguous.[13] Bare possession, if exclusive and peaceable, is enough to show title,[14] if no para-

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[1] See Chapter XXVII. A breach of condition in plaintiff's deed does not avail a defendant who is a stranger to the title. Robie v. Sedgwick, 4 Abb. Ct. App. Dec. 73.

[2] See Chapter V.

[3] King v. Dunn, 21 Wend. 253; Rich v. Rich, 16 Id. 663.

[4] Gardner v. Heartt, 1 N. Y. 528, rev'g 2 Barb. 165.

[5] Frost v. Duncan, 19 Barb. 560, and cases cited.

[6] Adams v. Farr, 2 Hun, 473, s. c. 5 Supm. Ct. (T. & C.) 59; and see Starr v. Jackson, 11 Mass. 574, and cases cited.

[7] For this purpose bare possession by the tenant is not enough. Wickham v. Freeman, 12 Johns. 183.

[8] 1 N. Y. R. S. 750, § 8; Van Deusen v. Young, 29 N. Y. 9; 29 Barb. 9; Wood v. City of Williamsburgh, 46 Id. 601.

[9] O'Reilly v. Davies, 4 Sandf. 722.

[10] McBurney v. Cutler, 18 Barb. 203.

[11] O'Reilly v. Davies (above).

[12] Livingston v. Ten Broeck, 16 Johns. 14.

[13] Parsons v. Miller, 15 Wend. 561. On this subject, see pp. 294–7 of this vol.

[14] 1 Sedgw. on Dam. 7th ed. 270; Palmer v. Aldridge, 16 Barb. 131; Bogert v. Haight, 20 Barb. 251; and see Jones v. Williams, 2 Mees. & W. 326; Corporation of Hastings v. Ivall, L. R. 19 Eq. Cas. 558, s. c. 13 Moak's Eng. R. 501. Proof that the wife put her husband in possession, and that he built and occupied with her, is sufficient evidence of possession in him as against a third person. Alexander v. Hard, 64 N. Y. 228. Compare Chapter VI.

mount possession or other right appears.[1] Even if it appear that plaintiff holds under a written instrument, such as a lease, the instrument need not be produced as against a stranger and wrong-doer.[2] If objected to, a witness should not be allowed to testify that one person was a tenant of another; but should state the facts.[3] Oral evidence is competent to show whether certain parts are or are not parcel of the premises ambiguously described in the instrument.[4]

2. *Possession.*]—Possession may be shown by acts of ownership;[5] and evidence of these is not ordinarily confined to the precise spot on which the alleged trespass may have been committed; acts done on other parts of the same holding or inclosure, may be shown if the common character of locality raises a reasonable inference that the place in dispute belonged to the plaintiff if the other parts did.[6] A witness having testified to acts of ownership on the part of one party, may be asked if the other directed him to do them.[7] A witness may testify directly to the fact of possession, if he can do so positively and not as matter of opinion or inference; but subject, of course, to cross-examination as to details.[8]

If plaintiff does not show title, and relies on a possession which is constructive as to a part of the premises, he should prove that he claimed title to the whole lot under a written instrument purporting to give him title to the whole, and hence sufficient to give color of title to the whole, and that he was in actual possession of a part.[9]

3. *Acts of trespass.*]—The allegation of unlawful entry on the premises, and of unlawful removal or injury of property there, are to be distinguished; and an allegation of one of these facts only, will not admit evidence of the other.[10] If both are alleged, taking issue as to one only, admits the other;[11] but if both are in

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[1] Kellogg v. Vollentine, 21 How. Pr. 226.

[2] Walker v. Wilson, 8 Bosw. 586; Althouse v. Rice, 4 E. D. Smith, 347. But a bald allegation that plaintiff, by virtue of a contract with one A., was entitled to the exclusive possession of the premises, without any facts to support the conclusion, is not enough. Garner v. McCullough, 48 Mo. 318.

[3] Parker v. Haggerty, 1 Ala. 632, 634.

[4] Cary v. Thompson, 1 Daly, 35; Crawford v. Morris, 5 Gratt. 90; and see p. 527 of this vol.

[5] Such as paying rents. Arden v. Kermit, Anth. N. P. 112; cutting wood, Stanley v. White, 14 East, 332; or giving leave to cut wood, Hager v. Hager, 38 Barb. 92.

[6] Jones v. Williams, 2 Mees. & W. 326; 1 Tayl. Ev. § 303; 1 Whart. Ev. 59, § 45. The making of payments of taxes, rents, and the like, as acts of ownership, may be proved by parol, without producing or accounting for the payee's receipts. Hinchman v. Whetstone, 23 Ill. 185, 187; Dennett v. Crocker, 8 Me. 239.

[7] Houghtaling v. Houghtaling, 56 Barb. 194.

[8] Harlenburgh v. Crary, 50 Barb. 32; and see p. 623 of this vol. Compare Jones v. Merrimack River Lumber Co. 31 N. H. 381, 385.

[9] Edwards v. Noyes, 65 N. Y. 125. Compare Bynum v. Thompson, 3 Ired. N. C. (L.) 578, 581.

[10] Kenny v. Planer, 3 Daly, 131; Turner v. McCarthy, 4 E. D. Smith, 247.

[11] Knapp v. Slocomb, 9 Gray, 73.

issue, failure to prove either is a variance,[1] though not necessarily fatal.[2]

Plaintiff is not obliged to prove trespass on the whole of the close alleged, but he may prove one on any part.[3] Evidence of a wrongful intrusion, however slight, is evidence of a trespass.[4]

Under an allegation of a trespass on a day named, and on divers other times between it and another day, plaintiff may prove any number of trespasses committed between the times specified;[5] and he may properly be allowed to prove another act anterior to the earlier day, if it does not appear that defendant is misled.[6]

Against a co-tenant in common, it is necessary to prove a case of ouster.[7]

4. *The purpose of an act.*[8]]—The purpose of an act, if relevant, may be shown by proving declarations characterizing the act,[9] if made at the time.[10] A question calling for mere intention uncommunicated may be objectionable, when a question as to the act accomplished, the manner, &c., would be proper.[11]

5. *Damages.*]—To entitle to nominal damages, it is enough to prove an unlawful entry.[12] Plaintiff may recover on proving his right to single damages, although his complaint be framed by reference to the statute giving treble damages.[13] In an action by the reversioner or remainder-man, injury to the inheritance sustains the action, although an allegation of disturbance in enjoyment be unproved.[14] Distinct and unconnected acts of some of several joint defendants are not competent, in aggravation, as against the others.[15] On questions of value and damage, the opinions of witnesses are competent, within limits already stated.[16] It is not ordinarily allowable to prove the amount of damage by the

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[1] Howe v. Willson, 1 Den. 181.

[2] Colton v. Jones, 7 Robt. 164. As to trespass for forcible disseizin, 2 N. Y. R. S. 338 (3 Id. 6th ed. 602), § 4; see Willard v. Warren, 17 Wend. 257.

[3] Rich v. Rich, 16 Wend. 674; Stewart v. Wallis, 30 Barb. 344.

[4] Ellis v. Loftus Iron Co. L. R. 10 C. P. 10, s. c. 11 Moak's Eng. 214. In determining the question of trespass or no trespass, the court cannot measure the amount of the alleged trespass; if the defendant place a part of his foot on the plaintiff's land unlawfully, it is in law as much a trespass as if he had walked half a mile on it. Id.

[5] Richardson v. Northrup, 66 Barb. 85.

[6] Dubois v. Beaver, 25 N. Y. 123, affi'g Relyea v. Beaver, 34 Barb. 547. Compare United States v. Kennedy, 3 McLean, 175; Joralimon v. Pierpont, Anth. N. P. 59.

[7] Dubois v. Beaver (above); Jacobs v. Seward, L. R. H. of L. Cases, 464, s. c. 2 Moak's Eng. 496. Compare Wood v. Phillips, 43 N. Y. 152, overruling King v. Phillips, 1 Lans. 421.

[8] See, on this question, pages 618, 620 of this vol.

[9] Stephens v. McCloy, 36 Iowa, 659; Welch v. Louis, 31 Ill. 446; Sears v. Hoyt, 37 Conn. 406.

[10] See Noyes v. Ward, 19 Conn. 250; and pp. 587–9, and 648 of this vol.

[11] Niles v. Patch, 13 Gray, 254, 258.

[12] Dixon v. Clow, 24 Wend. 190; 1 Sedgw. on Dam. 7th ed. 266.

[13] Starkweather v. Quigley, 7 Hun, 26.

[14] Eno v. Del Vecchio, 6 Duer, 17.

[15] Higby v. Williams, 16 Johns. 215.

[16] Honsee v. Hammond, 39 Barb. 89. Pages 306–12 of this vol.

direct statement of a witness, for this would be to substitute his conclusion for that of the jury;[1] but a qualified witness may state the value of property before the injury and after it; and, if he states the facts, his conclusion as to the pecuniary injury to a specific thing having a market value is competent,[2] and is not made incompetent by the circumstance that, assuming the truth of his conclusion, it is the sum for which the jury should give a verdict.[3] A qualified witness may state how much the land would have produced but for the injury, and how much less in consequence of the injury, and the like; and the market value of the crops had they not been injured.[4] So far as his opinion depends on an ordinary computation which a jury may as well make as the witness, he cannot substitute the results of his estimate for theirs.[5]

6. *Defense; Disproof of trespass.*]—Under a denial, the defendant's evidence in disproof of trespass need only be directed to the part of the close to which plaintiff's evidence of trespass was directed.[6]

7. *Justification.*]—Defendant may prove title to a part of the alleged close, and show that the alleged trespass was committed there. He need not disprove trespass on the other part. The burden, then, is thrown on plaintiff to show that trespass was committed on the part not covered by the justification.[7] A defendant who relies on necessity as a justification must show it clearly.[8] Witnesses having no special or peculiar experience or knowledge of the subject are not ordinarily competent to express an opinion on the necessity.[9]

8. *Defendant's title and possession.*]—Under an allegation of title in, and license from, a third person, evidence of title in defendant is not admissible.[10] If plaintiff relies on evidence of possession in himself, defendant may, under a denial, prove possession, even in a stranger with whom defendant shows no connection.[11]

As to the mode of proving defendant's title and possession, the same rules apply as in proving those of plaintiff.[12] Defendant

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[1] Richardson v. Northrup, 66 Barb. 85; Dolittle v. Eddy, 7 Barb. 74; and see cases collected in 3 Abb. N. Y. Dig. new ed. pp. 79, 195.

[2] Id.

[3] Pages 306–12 of this vol.

[4] Armstrong v. Smith, 44 Barb. 120, and cases cited. Compare Seamans v. Smith, 46 Id. 320.

[5] Hollis v. Wagar, 1 Lans. 4.

[6] Rich v. Rich, 16 Wend. 674.

[7] Rich v. Rich, 16 Wend. 674. In other words, the plaintiff must always locate the trespass, in order to show it wrongful (COWEN, J.). Id.

[8] Hicks v. Dorn, 42 N. Y. 47, s. c. 9 Abb. Pr. N. S. 47, affi'g 1 Lans. 81, s. c. 54 Barb. 174.

[9] See Mayor, &c. of N. Y. v. Pentz, 24 Wend. 668; and pages 178, 310 of this vol.

[10] Coan v. Osgood, 15 Barb. 583.

[11] Miller v. Decker, 40 Barb. 228, and cases cited.

[12] Paragraphs 1 and 2.

may put in evidence deeds, to show possession under *bona fide* claim of title.[1] A prescriptive right, if relied on, should be pleaded to be admissible in evidence.[2] The designation of land taken by a railway company, filed by the company under the statute, is conclusive evidence of the land taken, and cannot be controlled by extrinsic evidence.[3]

9. *Easements.*]—The rules for proving the existence of an easement in justification, are the same as those stated in the next chapter for proving it in an action for obstructing its enjoyment.

10. *License.*]—License must be pleaded; it is not admissible under a general denial.[4] An oral license, acted out before revocation, may be proved notwithstanding the statute of frauds,[5] and notwithstanding a written agreement of the parties requiring a writing.[6] License by an agent cannot be proved by evidence of the subsequent admissions of the agent.[7] A license may be inferred from the acts of the parties in connection with the silent acquiescence of the plaintiff; and such acquiescence may inure as a license[8] by estoppel, when the other requisites to create an estoppel *in pais* concur.[9] A license to enter plaintiff's premises is not necessarily implied from the fact that defendant's goods, to which he had legal right of immediate possession, were there.[10]

If a writing is apparently a mere license, the burden is on defendant to show that it was part of a contract, and, therefore, not revocable, if he relies on that fact.[11] An intent to exclude the grantor, though not expressed in the body of a license, may be implied from the nature and extent of the consideration.[12]

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[1] Wood v. Lafayette, 68 N. Y. 181, 190.

[2] Sale v. Pratt, 19 Pick. 191; and see Cortelyou v. Van Brundt, 2 Johns. 357; Kent v. Waite, 10 Pick. 138. Existence for sixty years, with nothing to show commencement, is admissible under an allegation of existence from time immemorial. Odiorne v. Wade, 5 Pick. 421.

[3] 1 Redf. Ry. 260 (6, 7).

[4] Haight v. Badgeley, 15 Barb. 499. Except where the action is not for an ordinary trespass, but for a special wrong—such as injury to the highway adjoining plaintiff—when a highway surveyor's license is admissible under the general issue. Munson v. Mallory, 36 Conn. 165.

[5] See Babcock v. Utter, 1 Abb. Ct. App. Dec. 27.

[6] Pierrepont v. Barnard, 6 N. Y. 279, rev'g 5 Barb. 364.

[7] Hubbard v. Elmer, 7 Wend. 446. 448, s. p. 2 Wheat. 360. For the principle applicable on this point, see page 44 of this vol.

[8] Martin v. Houghton, 1 Abb. Pr. N. S. 339, s. c. 45 Barb. 258, and 31 How. Pr. 82. Compare Babcock v. Utter (above).

[9] Walter v. Post, 6 Duer, 368, s. c. 4 Abb. Pr. 382.

[10] McLeod v. Jones, 105 Mass. 403.

[11] Tillotson v. Preston, 7 Johns. 285.

[12] Massot v. Moses, 3 S. C. 168, s. c. 16 Am. R. 697. WILLARD, J., says: The proper conclusion from the cases would seem to be, that grants of a right to enter the lands of the grantor, and sever therefrom and appropriate its products or mineral contents, are subject to a presumption, not applicable to the case of a sale of personalty, that the grantor did not intend to exclude his own proprietary right to a concurrent enjoyment with the licensee of the power granted. If this view is correct, any words evidencing an intent on the part of the grantor to part with his proprie-

Oral evidence to explain a license is competent within general limits already stated.[1]

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tary rights over the subject-matter to which the grant relates, would tend to rebut such presumption. To words tending to evidence an intent on the part of the grantor to exclude himself from the enjoyment concurrently with the grantee of the right conferred, the same force in respect to such presumption should be given that would be given had the subject-matter been other than realty. The presumption, indeed, demands some positive evidence of an exclusive intent, but does not influence the force of the evidence of such intent. Id.

[1] Pages 294–8, 483, 508, 524 and 525 of this vol. And see Goodrich v. Longley, 4 Gray, 379, 383. Thus, under a license to defendants to take "all the stone of whatever description they may require in the enlargement of the Old Compensation Reservoir": extrinsic evidence is competent to show what particular scheme of enlargement was contemplated by the parties at the date of the contract, but not to limit the quantity which might be taken for that purpose. Chadwick v. Burnley, 12 W. R. 1077.

CHAPTER XXXVIII.

ACTIONS FOR NUISANCE.

1. Plaintiff's title and possession.
2. Easements.
3. Highway.
4. Defendant's title.
5. The nuisance.
6. The injury.
7. Cause and effect.
8. Notice and request to abate.
9. Damages.
10. Former abjudication.
11. *Defendant's* right or title.
12. Reasonable care, &c.

1. *Plaintiff's title and possession.*]—The mode of proving title and possession of land have been stated in the last chapter.[1] Although possession may be *prima facie* evidence of title, plaintiff cannot recover if his own evidence shows the paramount title to be in another.[2]

2. *Easements.*]—An allegation of prescriptive right is not sustained by proof of a conventional right,[3] but is sustained by proof of adverse user for sufficient length of time,[4] where there is no evidence of a license or agreement.[5]

The grant of an easement with real property, or the reservation of one in real property conveyed, is not implied from its existence at the time of the conveyance, and the silence of the parties, unless it is necessary to the enjoyment, so that the grant or reservation may be presumed to have been intended by the parties.[6]

To establish an easement by presumption of a grant on the ground of necessity, the claimant must show that without it, he will be subjected to an expense excessive and disproportioned to the value of his estate, or that his estate clearly depends on it for appropriate enjoyment, or that some conclusive indication of his grantor's intention exists in the circumstances of his estate.[7]

Evidence of user for a sufficient period,[8] if continuous, adverse, and uninterrupted, raises a presumption of a lost grant from some one authorized to make it.[9] An isolated instance of

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[1] Paragraphs 1, 2, and 8. See also Wilson v. Hinsley, 13 Md. 64; Brown v. Bowen, 30 N. Y. 519.

[2] Morris v. McCarney, 9 Geo. 160.

[3] Rudd v. Williams, 43 Ill. 385. But the word "ancient" is not alone enough to exclude all but prescriptive right. Ward v. Neal, 35 Ala. 602.

[4] Kent v. Waite, 10 Pick. 138.

[5] Steffy v. Carpenter, 37 Penn. St. 41.

[6] See the conflicting authorities in 4 Am. L. Rev. 40; Keats v. Hugo, 115 Mass. 205, s. c. 15 Am. R. 80; Shipman v. Beers, 2 Abb. New Cas. 435.

[7] O'Rorke v. Smith, 11 R. I. 259, s. c. 23 Am. R. 440; Powell v. Sims, 5 W. Va. 1, s. c. 13 Am. R. 629.

[8] Varying in different jurisdictions. In New York, twenty years.

[9] Tyler v. Wilkinson, 4 Mass. 397; compare Connor v. Sullivan, 40 Conn. 26, s. c. 16 Am. R. 10; Vooght v. Winch, 2 B. & A. 662.

an unsuccessful attempt at interruption is not enough to prevent a finding of such grant.[1] In the absence of other evidence, the adverse character of the enjoyment,[2] and the fact that it was under a claim of right,[3] may be inferred from evidence that it was exclusive and uninterrupted. The acts and declarations of an occupant or tenant are not competent to affect the title of the owner; but on the question whether the right has been lost or abandoned, the demand of it by plaintiff, and the yielding of it by the occupant, may be shown.[4] The easement or use must be shown to have continued substantially the same;[5] but slight variation will not defeat it.[6] Evidence of a private way does not support an allegation of a highway.[7]

3. *Highway.*]—To prove a public way, plaintiff must establish: a legal dedication, as provided by statute, if any; or condemnation by some public authority competent for the purpose; or a dedication implied from acts of the owner, not amounting to a statutory dedication, but indicating the purpose to make a public way; or, a continuous and adverse possession and user on the part of the public for a sufficient period.[8] Evidence of the fact of highway at a given time raises a presumption, that it continued and still exists.[9] Special damage must be proved;[10] otherwise of a private way.[11]

4. *Defendant's title.*]—Evidence that defendant was in possession,[12] or that he leased the premises to others,[13] raises a presumption against him that he was owner.

5. *The nuisance.*]—A substantial variance between the evidence and the allegation of the facts constituting the nuisance is material, and may be fatal.[14] A nuisance is presumed created by the owner of the premises whence it proceeded.[15] An allegation that defendant constructed the nuisance, admits evidence that he

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[1] Connor v. Sullivan (above). Nor is evidence that no such grant was ever made, if the owner were capable of making such a grant. Angus v. Dalton, 27 Weekly R. 623 (BRETT, J., dissented). Nor that there was a public way nearer and more convenient. Blake v. Everett, 1 Allen, 248.

[2] Hart v. Vose, 19 Wend. 365.

[3] Hammond v. Zehner, 23 Barb. 473; Polly v. McCall, 37 Ala. 20.

[4] Lindeman v. Lindsey, 69 Penn. St. 93, s. c. 8 Am. R. 219.

[5] Ball v. Ray, L. R. 8 Ch. App. 467, s. c. 6 Moak's Eng. 435.

[6] Harvey v. Walters, L. R. 8 C. P. 162, s. c. 4 Moak's Eng. 392.

[7] Satchell v. Doram, 4 Ohio St. 542.

[8] Satchell v. Doram, 4 Ohio St. 542. For the details of the mode of proving these facts, see Grinnell v. Kirtland, 2 Abb. New Cas. 386, 400 n.

[9] Satchell v. Doram, 4 Ohio St. 542.

[10] Lansing v. Wiswall, 5 Den. 213; Winterbottom v. Lord Derby, Law Rep. 2 Ex. 316.

[11] Lansing v. Wiswall (above).

[12] Blunt v. Aikin, 15 Wend. 522; and see Waggoner v. Jermaine, 3 Den. 306.

[13] Conhocton Stone Road Co. v. Buffalo, N. Y. & E. R. R. Co. 3 Hun, 523.

[14] Hill v. Supervisor, 10 Ohio St. 621; Dickinson v. City of Worcester, 7 Allen, 19; Pickett v. Congdon, 18 Md. 412; Brown v. Woodworth, 5 Barb. 550.

[15] Francis v. Schoellkopf, 53 N. Y. 152.

merely continued it.[1] The determination of a board of health that a nuisance exists, made without notice to or hearing of the person on whose premises it is alleged, is not competent evidence.[2] Evidence of negligence is not usually necessary.[3] Evidence of malice is not necessary, even if alleged.[4] Malice may be inferred from acts; and the law presumes it from acts designed to injure the plaintiff.[5]

6. *The injury.*]—The evidence as to the nature of the injury should substantially correspond with the allegation.[6] But if the cause is truly alleged, details of the mode may be proved, though not alleged.[7] Evidence of like injury to other persons not connected with plaintiff is not competent,[8] unless for the purpose of showing the relation of cause and effect, under the same conditions; but for this purpose general similarity of the conditions is not enough.[9]

7. *Cause and effect.*]—If the subject is one not familiar to men in general, and the jurors cannot be presumed familiar with it,[10] the fact that the injury complained of resulted from the conduct of defendant, or the condition of his property, may be shown by the opinions of witnesses shown to be sufficiently skilled in the subject in question,[11] not by those of others.[12] The mode of calling for the opinion of skilled witnesses has been already stated.[13]

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[1] Conhocton Stone Road Co. v. Buffalo, N. Y. & E. R. R. Co. 3 Hun, 523; compare Lansing v. Smith, 4 Wend. 24.

[2] Hutton v. City of Camden, 10 Vroom, 122 (39 N. J.), s. c. 23 Am. R. 203.

[3] Cahill v. Eastman, 18 Minn. 324, s. c. 10 Am. R. 184.

[4] Panton v. Holland, 17 Johns. 92; Timm v. Bear, 29 Wis. 254.

[5] McCord v. High, 24 Iowa, 336, 347. See, further, page 629 of this volume.

[6] Ellicott v. Lambourne, 2 Md. 131; People v. Townsend, 3 Hill, 479; Wilson v. Hinsley, 13 Md. 64.

[7] Thus, under an allegation that the defendant had diverted the water, and prevented it from flowing to the plaintiff's mill, evidence that the trough by which the defendant conveyed the water from the flume to his mill was leaky, and wasted the water; and that his water-wheel was out of repair, and required more water than it would if in order, is admissible. Wier v. Covell, 29 Conn. 197.

So, under an allegation that plaintiff's house had been rendered unhealthy and incommodious by defendant's horses constantly standing by his door, evidence of the bad smells from the staling of the horses is admissible. Benjamin v. Storr, L. R. 9 Com. Pl. 400, s. c. 10 Moak's Eng. R. 231.

As to mode of proving injury by noise, see Gaunt v. Fynney, L. R. 8 Ch. App. 8, s. c. 4 Moak's Eng. 718; Wesson v. Washburn Iron Co. 13 Allen, 95:—by obstruction of light, see City of London Brewery Co. v. Tennant, L. R. 9 Ch. App. 212, s. c. 8 Moak's Eng. 827; Aynsley v. Glover, L. R. 18 Eq. Cas. 544, s. c. 11 Moak's Eng. 521.

Whether the annoyance may be proved by evidence of declarations made by persons when suffering therefrom, compare Kearney v. Farrell, 28 Conn. 317; Wesson v. Washburn Iron Co. 13 Allen, 95.

[8] Emerson v. Lowell Gas-Light Co. 6 Allen, 146; Tyler v. Mather, 9 Gray, 177; Pettingill v. Porter, 3 Allen, 349, s. p. Concord R. R. Co. v. Greely, 3 Fost. 237.

[9] Hawks v. Inhabitants of Charlemont, 110 Mass. 110.

[10] Clinton v. Howard, 42 Conn. 294; Concord R. R. Co. v. Greely, 23 N. H. 237; page 310 of this volume.

[11] Clark v. Willett, 35 Cal. 534.

[12] Emerson v. Lowell Gas-Light Co. 6 Allen, 146. See, also, on this subject, pages 586, 591 of this volume. Benkard v. Babcock, 2 Robt. 175, s. c. 17 Abb. Pr. 421; 27 How. Pr. 391.

[13] Page 117 of this volume; Luning v. State, 1 Chandl. (Wis.) 178; Hunt v Lowell Gas-Light Co. 8 Allen, 169, 172.

8. *Notice and request to abate.*]—As against the mere continuer of a private nuisance created by a previous owner before conveyance to defendant, it must be shown that before the commencement of the action he had notice or knowledge of the existence of the nuisance; but a request to abate it need not be proved.[1] If no question arises on the terms of the notice, oral evidence is competent to prove notice given in writing, without producing or accounting for the writing.[2]

9. *Damages.*]—If unlawful injury to plaintiff's private property be shown, special damage need not be shown.[3] Otherwise, if it be to his enjoyment of a public or common right. In either case, evidence of special damage not alleged may be excluded.[4] Evidence of rental value is competent under allegations that the injury interfered with the letting.[5]

The rules as to the mode of proving damages have been already stated.[6]

The fact that part of the injury results from the acts of one not a defendant, is available to defendant on the question of damages,[7] but not otherwise.[8]

10. *Former adjudication.*]—A criminal conviction of nuisance, founded on the same facts,[9] or a judgment in an action of trespass for attempt to abate the same nuisance,[10] is competent against the same party if both actions involve the same issues.

11. *Defendant's right or title.*]—If the defendant relies upon a prescriptive right, he must prove affirmatively its enjoyment for a sufficient length of time.[11] In justifying under statute

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[1] Conhocton Stone Road v. B., N. Y. & E. R. R. Co. 5 N. Y. 573, rev'g 52 Barb. 390.

[2] Polly v. McCall, 37 Ala. 20, s. c. 1 Ala. Sel. Cas. 246.

[3] Plumleigh v. Dawson, 6 Ill. 544; Blanchard v. Baker, 8 Me. 253; Chatfield v. Wilson, 27 Vt. 670.

[4] So held of private right. McTavish v. Carroll, 13 Md. 429; Solms v. Lias, 16 Abb. Pr. 311; Hallock v. Belcher, 42 Barb. 199. So held of public right. See Wetmore v. Story, 22 Barb. 414, s. c. 3 Abb. Pr. 262.

[5] Jutte v. Hughes, 67 N. Y. 267, rev'g 40 Super. Ct. (J. & S.) 126; and see Cropsey v. Murphy, 1 Hilt. 126.

[6] Page 30, of this volume. As to opinions of witnesses, see also Fish v. Dodge, 4 Den. 311, 318; Sinclair v. Rorish, 14 Ind. 450; *contra*, Rochester & Syracuse R. R. Co. v. Budlong, 10 How. Pr. 289, s. c. 12 N. Y. Leg. Obs. 46; Vaudine v. Burpee, 13 Metc. 288; Sedgw. on D. 591.

[7] Wallace v. Drew, 59 Barb. 413.

[8] Wheeler v. City of Worcester, 10 Allen, 591.

[9] Peck v. Elder, 3 Sandf. 126; compare Queen v. Fairie, 8 E. & B. 485, s. c. 8 Cox Cr. C. 66.

[10] Bowyer v. Schofield, 1 Abb. Ct. App. Dec. 177. For the rules applicable to a former recovery between the same parties, for nuisance, see Richardson v. City of Boston, 19 How. U. S. 263; The Same v. The Same, 24 Id. 188; Fowle v. New Haven & N. Co. 107 Mass. 352; Vooght v. Winch, 2 B. & A. 662; Feversham v. Emerson, 11 Ex. 391; Plate v. N. Y. Central R. R. Co. 37 N. Y. 472; Avon Manuf. Co. v. Andrews, 30 Conn. 476; Connery v. Brooke, 73 Penn. St. 80; Potter v. Burden, 38 Ala. 651.

[11] Neale v. Seeley, 47 Barb. 314.

authority, the burden is on defendant to show that the statute power or duty could not reasonably well be executed without causing the annoyance complained of.[1]

12. *Reasonable care, etc.*]—A nuisance being shown, it is not competent for defendant, unless exemplary damages are claimed, to show that the work or structure constituting it was made in the best and most careful manner,[2] nor that all usual precautions were taken,[3] nor that others were not injured.[4] Where reasonable use is the measure of the right of a party, evidence of the general usage of the country in similar cases is competent.[5]

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[1] Hull v. Managers of Metrop. Asylum Dist. 40 Law Times R. N. S. 497.
[2] 1 Sedgw. on Dam. 7 ed. 284.
[3] Temperance Hall Ass. v. Giles, 4 Vroom, 260. See, to the contrary, Smith v. Fletcher, L. R. 9 Ex. 64, s. c. 8 Moak's Eng. 510, rev'g 8 Moak's Eng. 422.
[4] Temperance Hall Ass. v. Giles (above).
[5] Dumont v. Kellogg, 29 Mich. 420, s. c. 18 Am. R. 102; compare Timm v. Bear, 29 Wis. 254.

CHAPTER XXXIX.

ACTIONS FOR INJURIES BY ANIMALS.

1. Wild beasts. 2. Dangerous character. 3. Notice to keeper.

1. *Wild beasts.*]—Injury to a person or personal property by a wild beast of a nature fierce and dangerous,[1] or any injury by any animal trespassing,[2] is sufficient evidence of negligence.

2. *Dangerous character.*]—In case of an animal not trespassing, dangerous character, and notice of it to defendant, must be shown.[3] A single act, though not resulting in injury,[4] and though not known to defendant,[5] may go to the jury as evidence of vicious character. If vicious character and notice are proved, negligence need not be.[6] If negligence is, a vicious act need not.[7]

3. *Notice.*]—An owner is presumed to know the generic nature of the animal; but to charge him for injury resulting from peculiar characteristics of a particular domestic animal, some notice of them must be shown.[8] It is sufficient if he has seen or heard enough to convince a man of ordinary prudence of its disposition to commit injuries substantially like those complained of.[9] Proof of savage and ferocious nature proves notice.[10] Evidence that he had chained it and warned persons of it,[11] or procured or kept it to guard his premises,[12] is competent to show notice. General bad reputation is not evidence of bad character, but may be admitted with other circumstances tending to show notice.[13] Notice need not be personal. Notice to one to whom he had delegated the management of his business, or the care and control of the animal, and who was for this purpose put in defendant's place, is sufficient.[14] Evidence of notice, even if not necessary, is competent in aggravation. So is reckless conduct.[15]

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[1] Scribner v. Kelly, 38 Barb. 14; Spaulding v. Oakes, 42 Vt. 343.

[2] Shearm. & R. § 186. This rule is subject to much modification by statute.

[3] Van Leuven v. Lyke, 1 N. Y. 515, affi'g 4 Den. 127. Previous injury to others need not. Reider v. White, 65 N. Y. 54; Worth v. Gilling, L. R. 2 C. P. 1. The statutes sometimes dispense with notice. 51 N. H. 110; 63 Penn. St. 346; 49 Barb. 41.

[4] Cockerham v. Nixon, 11 Ired. L. 270.

[5] See Whittier v. Franklin, 46 N. H. 26.

[6] Kelly v. Tilton, 3 Abb. Ct. App. Dec. 495. And defendant's care is no bar. Id. But see 38 Wis. 300, s. c. 20 Am. R. 6. Nor is contributory negligence, unless amounting to voluntary bringing the injury upon himself. Lynch v. McNally, 73 N. Y. 347.

[7] Dickson v. McCoy, 39 N. Y. 400.

[8] Whart. Neg. § 922; Shearm. & R. § 188, and cases cited.

[9] Shearm. & R. §§ 189, 190, 191. Applebee v. Percy, L. R. 9 Com. Pl. 647.

[10] Muller v. McKesson, 73 N. Y. 195, 199.

[11] Reider v. White, 65 N. Y. 54; Kittredge v. Elliott, 16 N. H. 80.

[12] Worth v. Gilling, L. R. 2 C. P. 1; see Blackman v. Simmons, 3 Carr. & P. 138.

[13] Keenan v. Hayden, 39 Wis. 558.

[14] Applebee v. Percy (above); Baldwin v. Casella, L. R. 7 Ex. 325, s. c. 3 Moak, 434.

[15] Swift v. Applebone, 23 Mich. 252.

CHAPTER XL.

ACTIONS FOR ASSAULT AND BATTERY.

1. Assault, by whom committed.
2. By servant, &c.
3. Manner and circumstances.
4. Plaintiff the aggressor.
5. Intent or motive.
6. The *res gestæ* of an assault.
7. Criminal conviction.
8. Admissions and declarations.
9. Requisite cogency of evidence.
10. The injury, and damages.
11. *Defense*:—Justification.
12. Plaintiff the aggressor.
13. Provocation.
14. Character.
15. Previous punishment.

1. *Assault, by whom committed.*]—A witness may state his belief as to the identity of a person he saw, although unable to speak positively,[1] if his belief be in the nature of an impression of the fact, not an inference or opinion.[2] Evidence of declarations made by the plaintiff is competent for the purpose of showing who did the act, if made as part of the *res gestæ*, within the rule below stated;[3] otherwise not,[4] even though there was no witness of the act,[5] or though the declarations were dying declarations.[6]

2. *By servant, &c.*]—To charge defendants for their servant's assault, it is enough to show that they gave the servant authority, or made it his duty, to act in respect to the business he was engaged in when the wrong was committed, and that the act complained of was done in the course of his employment;[7] and if this be shown, it is not material that the servant's act was willful.[8] Without such evidence, it is not enough to show approval by their general agent.[9] If it be shown that it was necessary for the defendants to have a person at a certain place to act in case of emergency,—for instance, the station-master of a railroad company,—the fact that he was there, acting in a matter which the company may perform,—for instance, in ordering the arrest of

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[1] Beverly v. Williams, 4 Dev. & B. (N. C.) L. 236.
[2] 2 Abb. New Cas. 232, note.
[3] King v. Foster, 6 Carr. & P. 325; paragraph 6.
[4] Morrissey v. Ingraham, 111 Mass. 63; People v. Graham, 21 Cal. 261; Denton v. State, 1 Swan (Tenn.), 279.
[5] State v. Davidson, 30 Vt. 377, 383.
[6] Spatz v. Lyons, 55 Barb. 476.
[7] Rounds v. Del. Lack. & W. R. R. Co. 64 N. Y. 129, 136.
[8] Mott v. Consumers' Ice Co. 73 N. Y. 543; Rounds v. Del. Lack. & W. R. It. Co. (above). As to the allegation of malice,—see Shea v. Sixth Ave. R. R. Co. 62 N. Y. 180, affi'g 5 Daly, 221.
[9] Vanderbilt v. Richmond Turnpike Co. 2 N. Y. 479; 2 Greenl. Ev. 13th ed. 55, § 68.

one charged with penal offense against the company,—as if he had authority, is *prima facie* evidence that he had authority, and the presumption must be overthrown by the company.[1] But if the act was one which the company had no power to perform, such as a charge of what was no offense,—the presumption does not apply.[2]

In the absence of direct evidence of authority to interfere, slight evidence that the authority was exclusively in other servants is sufficient to repel the inference of authority in the one who did the act.[3]

3. *Manner and circumstances.*]—If defendant admits the injury to have been inflicted by him, it is presumed to have been done wrongfully, and the burden is on him to show his justification or excuse.[4]

If the wrong was the use of excessive force in an act otherwise lawful, the burden of proof is upon plaintiff to show that the force was excessive.[5]

Witnesses may describe the manner, and testify to the tone of voice, language, &c.;[6] but the feeling or expectation aroused in the witness is not generally competent on direct examination, unless as explanatory of his own conduct testified to by him.[7] Evidence of declarations of the injured person as to the manner in which, or the means with which, the injury was done, is not competent, unless the declarations were made as part of the *res gestæ*.[8] It makes no difference that they were made to a medical attendant,[9] or as dying declarations.[10] The opinion of an expert as to the manner or mode of the assault, or the resulting wounds, is competent,[11] but only so far as the question requires professional knowledge or special skill.[12]

4. *Plaintiff the aggressor.*]—If defendant has pleaded that plaintiff was the aggressor, without setting up a counter-claim, and without requiring a reply, plaintiff may prove a justification though not alleged.[13] To show who was the aggressor, previous difficulties and ill will may be proved, in connection with threats.[14]

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[1] Moore v. Metropolitan Ry. Co. L. R. 8 Q. B. 36, s. c. 4 Moak's Eng. 203. Compare Priest v. Hudson River R. R. Co. 65 N. Y. 589.

[2] Poulton v. London, &c. Ry. Co. L. R. 2 Q. B. 534, and cases cited. Compare p. 44 of this vol.

[3] Towanda Coal Co. v. Heeman, 86 Penn. St. 418.

[4] Harvey v. Dunlop, Hill & D. Supp. 193.

[5] Henry v. Lowell, 16 Barb. 268.

[6] Kerner v. State, 18 Geo. 194, 218; but, according to Messner v. People (45 N. Y. 1), cannot express an opinion of the passions expressed in outcries. See p. 599 of this vol.

[7] Keener v. State, 18 Geo. 194, 218.

[8] Collins v. Waters, 54 Ill. 485.

[9] Collins v. Waters (above).

[10] Denton v. State, 1 Swan (Tenn.), 279.

[11] Fort v. Brown, 46 Barb. 366; and see pages 594 and 599 of this vol.

[12] Cook v. State, 24 N. J. L. (4 Zabr.) 843, 852; Cooper v. State, 23 Tex. 331.

[13] N. Y. Code Civ. Pro. §§ 515, 522, compared with Brown v. Bennett, 5 Cow. 181; Collier v. Moulton, 7 Johns. 109; Wilmarth v. Babcock, 2 Hill, 194.

[14] Murphy v. Dart, 42 How. Pr. 31; Jewett v. Banning, 21 N. Y. 27, affi'g 23

5. *Intent or motive.*]—As a general rule, plaintiff must be prepared with evidence either that the intention was unlawful, or that defendant was in fault.[1] But the unlawfulness may have been unknown to defendant.[2] Declarations by the one who committed the assault, if forming part of the *res gestæ*, are competent for this purpose.[3] So are his previous threats,[4] but subsequent threats are not competent.[5]

6. *The res gestæ of an assault.*]—In the case of bodily injury the *res gestæ* include the statements of the cause of injury made immediately upon and in view of its occurrence, and the sufferer's expressions of feeling made while the consequences were subsisting and in progress. It is not essential that the main fact to which they relate should be instantly contemporaneous with the declarations. It is enough that the two were so intimately connected in point of time and by the circumstances of mental excitement or bodily suffering, that it cannot be presumed that the speaker had time to contrive or devise anything for his own advantage.[6]

On the other hand, if there has been lapse of time,[7] or change of place and of interlocutors,[8] and particularly if some other incident has intervened,[9] subsequent declarations, though connected in subject and apparently following as the effect upon its cause, are not competent, except as against the declarant.

Acts and declarations of bystanders called forth by the principal fact in evidence, are competent, upon the same principle and within the same limits.[10]

Barb. 13. As to the competency of evidence of previous exhibitions of strength by the wrong-doer, see Darling v. Westmoreland, 52 N. H. 401, s. c. 13 Am. R. 55, and cases cited.

[1] Breese, J., Paxton v. Boyer, 67 Ill. 132, s. c. 16 Am. R. 615.

[2] See, for instance, Elder v. Morrison, 10 Wend. 128.

[3] United States v. Omeara, 1 Cranch C. Ct. 165.

[4] See pp. 630, 535 of this vol.

[5] Newman v. Goddard, 3 Hun, 70; Handy v. Johnson, 5 Md. 450, 463.

[6] As, for instance, what a wife said, immediately after a battery and wounding of her. Thompson v. Trevanion, Skinner, 402. Or that a man found injured and groaning in the street, said he had just been run over by a cab which the witness saw driving rapidly away. King v. Foster, 6 Carr. & P. 325. Or that a man returning to his bed-room at night, said he had fallen down stairs when alone. Ins. Co. v. Mosley, 8 Wall. 405. Or that a wife who ran from her room in the night wounded and bleeding, said, on taking refuge in another room, that her husband had stabbed her. Comm. v. M'Pike, 3 Cush. 181; Sherley v. Billings, 8 Bush. 147, s. c. 8 Am. R. 451; Castner v. Sliker, 33 N. J. L. 95. Otherwise of conversation after the combat was over. Halloway v. Halloway, 1 Monr. 132. For other illustrations, see Stone v. Segur, 11 Allen, 568; Norwich Transportation Co. v. Flint, 13 Wall. 3, affi'g 7 Blatchf. 536.

[7] As where a night has intervened; Spatz v. Lyons, 55 Barb. 476; or some hours of the day-time. Rosenbaum v. The State, 33 Ala. 354, 361.

[8] As where after an assault, and after obtaining a warrant, plaintiff met witness to whom the declarations were made at a different spot from that of assault. Cherry v. McCall, 23 Geo. 193. Or where after the assault the witness followed defendant from the room, and reproached him out of doors, where the declarations were made. Handy v. Johnson, 5 Md. 450, 463.

[9] See pages 588, 589 of this vol.

[10] Norwich Transportation Co. v. Flint, 13 Wall. 9, affi'g 7 Blatchf. 536.

But in admitting declarations under the rule of the *res gestæ*, narratives of past facts are excluded.[1]

7. *Criminal conviction.*]—The conviction of defendant on a criminal prosecution for the same assault, if founded on a plea of guilty, is competent to show guilt.[2] So is such a plea, with only the indictment to which it was pleaded.[3] But a conviction not founded on such a plea is not competent.[4]

8. *Admissions and declarations.*]—Defendant's silence, when charged with the wrong, is competent against him.[5] The fact that declarations were dying declarations is not ground of admitting them in a civil action.[6]

The rule as to admitting the declarations and admissions of one wrong-doer, as evidence against another, has already been stated.[7]

When evidence has been given that a party to the action once attributed the injury to another cause than that to which he has testified, it is competent to show, in corroboration of his testimony, that no such other cause ever existed.[8]

9. *Requisite cogency of evidence.*]—The weight of American authority is that plaintiff is not required to prove the charge beyond a reasonable doubt.[9] A seaman suing his officer must make out a clear case, by credible and consistent proof.[10]

10. *The injury and damages.*]—The opinions of witnesses as to the extent of the injury are competent, within limits already stated.[11] So, also, of the declarations of the plaintiff as to suffering.[12]

If exemplary damages are claimed, all the circumstances immediately connected with the transaction, tending to exhibit or explain the motive of the defendant, are admissible in evidence.[13]

Special damages should be alleged in order to be proved, and

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[1] This is the New York rule. More latitude is given in some other jurisdictions, upon the principle that what characterizes the act with motive and purpose, should not be excluded merely because it states that which is past.

[2] 2 Whart. Ev. § 783; Green v. Bedell, 48 N. H. 546.

[3] Corwin v. Walton, 18 Mo. 71; Birchard v. Booth, 4 Wis. 67.

[4] Rosc. N. P. 221. It may sometimes be admissible as evidence of reputation. Id. 221, citing Petrie v. Nuttall, 11 Exch. 569. For the mode of proving the conviction, see Chapters XXIX and XLI.

[5] Jewett v. Banning, 21 N. Y. 27, affi'g 23 Barb. 13; Kelly v. People, 55 N. Y. 565. Even though it appear that on a previous occasion he denied it. Jewett v. Banning (above).

[6] Spatz v. Lyons, 55 Barb. 476.

[7] Page 190 of this vol.

[8] Melhuish v. Collier, 15 Q. B. 878; s. p. Wrege v. Westcott, 30 N. J. L. 212.

[9] Page 495 of this vol.; Elliott v. Van Buren, 33 Mich. 49, s. c. 20 Am. R. 668. Whether, as held in this case, a preponderance of evidence is sufficient, see note on p. 495 of this vol.

[10] Benton v. Whitney, Crabbe, 417.

[11] Page 600 of this vol.; Anthony v. Smith, 4 Bosw. 503.

[12] Page 599 of this vol.; Elliott v. Van Buren, 33 Mich. 49; Towle v. Blake, 48 N. H. 92; Earl v. Tupper, 45 Vt. 275; Aveson v. Kinnaird, 6 East, 191, approved in 8 Wall. 406. As to mental suffering, compare Ford v. Jones, 62 Barb. 484.

[13] Voltz v. Blackmar, 64 N. Y. 440; Sampson v. Henry, 11 Pick. 379.

are not admitted by failure to deny.[1] Circumstances of aggravation known to defendant, and indicating malice,—such as plaintiff's illness at the time,—are competent for the purpose of aggravating the damages, though not alleged as special damages.[2]

11. *Defense:—Justification.*]—Justification must be specially pleaded.[3] In justifying under a reasonable regulation of a corporation who employed defendant, it is not necessary for the defendant to give positive proof that the regulation was made by the directors, or the general superintendent. Proof of the existence of the regulation is enough in the first instance.[4] The mode of proving possession of property,[5] and of justifying under legal process,[6] has already been stated. Plaintiff's threats, while resisting the execution of process, are competent against him.[7]

12. *Plaintiff the aggressor.*]—The fact that plaintiff was the aggressor must be proved by the defendant if relied on by him.[8] The fact that the assault was committed in defending himself or his property, or that of others intrusted to him, against plaintiff as a trespasser seeking forcible possession, is relevant, both on the question of intent to do bodily harm, and on the question of the degree of force justifiable.[9]

13. *Provocation.*]—Defendant may show, in mitigation or bar of exemplary damages, but not in bar of the action,[10] that the plaintiff provoked the assault;[11] but not unless the provocation was so recent, or continued to so recent a time,[12] or had so recently come to defendant's knowledge,[13] as to induce the presumption that the violence was committed under the immediate influence of the passion thus wrongfully excited.[14] The fact that plaintiff and defendant fought by agreement, or mutual consent, is not a bar to the action, but may be proved in mitigation.[15] For the same purpose defendant may show that he acted under an honest belief that he was justified in doing the act complained of, or under the impulse of sudden passion or alarm excited by the conduct of the plaintiff.[16]

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[1] Molony v. Dows, 15 How. Pr. 261, and cases cited.
[2] Sampson v. Henry, 11 Pick. 379.
[3] Coats v. Darby, 2 N. Y. 517; Foland v. Johnson, 16 Abb. Pr. 235.
[4] Vedder v. Fellows, 20 N. Y. 126.
[5] Pages 623 and 635 of this vol.
[6] Page 631.
[7] Fulton v. Staats, 41 N. Y. 498.
[8] Stevens v. Lloyd, 1 Cranch C. Ct. 124.
[9] Filkins v. People, &c. of N. Y. 69 N. Y. 101, rev'g 1 Buff. Super. Ct. (Sheldon), 505.
[10] Cushman v. Waddell, Baldw. 58; Prentiss v. Shaw, 56 Me. 427.
[11] Voltz v. Blackmar, 64 N. Y. 440.
[12] Stetlar v. Nellis, 60 Barb. 524; 42 How. Pr. 163.
[13] Willis v. Forrest, 2 Duer, 310. Compare Vedder v. Fellows, 20 N. Y. 126.
[14] Corning v. Corning, 6 N. Y. 97.
[15] Adams v. Waggoner, 33 Ind. 531, s. c. 5 Am. R. 230.
[16] Voltz v. Blackmar, 64 N. Y. 440.

14. *Character.*]—Evidence as to the plaintiff's character is not admissible either in aggravation [1] or in mitigation [2] of damages, unless in cases of indecent assault or attempt to ravish.[3]

15. *Previous punishment.*]—The criminal conviction and punishment of defendant cannot be proved to mitigate damages.[4]

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[1] Givens v. Bradley, 3 Bibb, 192, 195.

[2] Corning v. Corning, 6 N. Y. 97. So of his intemperance, unless that be shown to have contributed to his injury. 1 Whart. Ev. 62, § 47, citing Drohn v. Brewer, 77 Ill. 280.

[3] Crossman v. Bradley, 53 Barb. 125; Ford v. Jones, 62 Barb. 484.

[4] Cook v. Ellis, 6 Hill, 466; Hoadley v. Watson, 45 Vt. 289, s. c. 12 Am. R. 197. *Contra*, Smithwick v. Ward, 7 Jones (N. C.) L. 64.

CHAPTER XLI.

ACTIONS FOR MALICIOUS PROSECUTION.

1. Grounds of action.
2. The prosecution.
3. Defendant's agency.
4. Several co-defendants.
5. Plaintiff's innocence.
6. Want of probable cause.
7. Malice.
8. Termination of the prosecution.
9. Damages.
10. *Defense;* Truth of the charge.
11. Probable cause.
12. Freedom from malice.
13. Advice of counsel.

1. *Grounds of Action.*[1]—The essential facts are that defendant maliciously,[2] and also without reasonable or probable cause,[3] prosecuted or instigated[4] an unfounded[5] proceeding against plaintiff, to his injury, and which terminated in his favor.[6]

2. *The prosecution.*]—Before malice or want of cause is shown, plaintiff should prove the prosecution complained of; and for this purpose the record, if any, of the proceeding is competent.[7] The mode of proving a record has been already stated.[8] If the record contain improper matter, it is not to be excluded on that ground, but defendant may ask the court to instruct the jury to disregard such matter.[9] Where the parts for which defendant may be responsible are separable,—as in case of a witness sued for maliciously promoting an unfounded charge,—or a complainant who made one of several affidavits before a magistrate,—the other parts of the proceedings are not evidence in favor of defendant.[10] An indictment, if the final record has not been made up, may be proved by producing the original and calling the clerk to prove that it is a record of his court.[11] A variance between the allegation and the proof of the former proceeding is

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[1] See, generally, Wheeler v. Nesbit, 24 How. U. S. 544. For the distinction, in pleading and evidence, between an action for illegal arrest or false imprisonment, and one for malicious prosecution, see Burns v. Erben, 40 N. Y. 463, affi'g 1 Robt. 555. As to defamation, see Sheldon v. Carpenter, 4 N. Y. 579; Perkins v. Mitchell, 31 Barb. 461.

[2] Blunt v. Little, 3 Mas. 102. Equally in the case of a civil as a criminal prosecution. Stewart v. Sonneborn, 98 U. S. (8 Otto), 187.

[3] See paragraphs 6, 11.

[4] See Miller v. Milligan, 48 Barb. 30; Thompson v. Lumley, 1 Abb. New Cas. 254.

[5] Paragraph 5.

[6] Moulton v. Beecher, 1 Abb. New Cas. 193, and cases cited. Or, that such termination was wrongfully prevented by plaintiff. Burt v. Place, 4 Wend. 591.

[7] Granger v. Warrington, 8 Ill. (3 Gilm.) 299.

[8] See Chapter on JUDGMENTS.

[9] Granger v. Warrington (above).

[10] See Burt v. Place, 4 Wend. 591; Hankinson v. Giles, 17 Abb. Pr, 251, s. c. 29 How. Pr. 478.

[11] Watts v. Clegg, 48 Ala. N. S. 561. Compare People v. Poyllon, 2 Cal. 202.

not to be regarded unless raising a strong probability that the proceeding is not the same.[1] To show how far the prosecution was pressed by defendant, plaintiff may prove acts or documents proceeding from third persons, though wholly unconnected with defendant, to have been the occasion of its termination, and for this purpose a writing—for instance, a letter to the magistrate—may be proved by parol.

3. *Defendant's agency.*]—Slight evidence that defendant was the instigator is sufficient to go to the jury.[2] If the prosecution was instituted by defendants' officer or agent, plaintiff should show that it was an act within the general or special authority of the agent or officer. A general authority to prosecute may be inferred from the nature of the employment, and the usual course of business.[3]

4. *Several co-defendants.*]—Separate acts and declarations of one defendant ought not to be admitted in evidence, to charge another, not present, unless there is independent proof of a conspiracy.[4]

5. *Plaintiff's innocence.*]—There must be other evidence of the unfounded nature of the charge, than the plaintiff's acquittal.[5] For this purpose a judgment in another civil action between the parties, determining the very point in issue,—such as replevin for a thing charged to have been stolen,—is competent.[6]

6. *Want of probable cause.*]—The question of probable cause depends on evidence of the facts appearing to defendant,[7] or which he ought to have ascertained,[8] at the time he acted; and want of probable cause cannot be shown by facts not appearing till subsequently.[9] Slighter evidence will suffice to prove want of probable cause than is necessary to prove an affirmative;[10] but it must be substantially shown.[11] It can not be inferred from evidence even of express malice,[12] nor from the mere fact of the unsuccessful termination of the proceeding.[13]

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[1] Leidig v. Rawson, 2 Ill. 272; and see Mills v. McCoy, 4 Cow. 406.

[2] Miller v. Milligan, 48 Barb. 30.

[3] Bank of New South Wales v. Owston, 40 L. T. R. N. S. 500; Walker v. Eastern Counties Ry. Co. L. R. 5 C. P. 640; pages 44, 647 of this vol.

[4] Carpenter v. Shelden, 5 Sandf. 77; Snydacker v. Brosse, 51 Ill. 357. Compare page 190 of this vol.

[5] Skidmore v. Bricker, 77 Ill. 164. The prosecution complained of being an arrest for assault, if plaintiff gives evidence that defendant was the aggressor, defendant may show the nature of the difficulty, and plaintiff's threats. Carpenter v. Halsey, 57 N. Y. 657, aff'g, it seems, 60 Barb. 45.

[6] Ewing v. Sandford, 21 Ala. 157, 165. As to evidence of compounding the felony prosecuted for, see Fagan v. Knox, 1 Abb New. Cas. 246, s. c. 66 N.Y. 525; Van Vorhes v. Leonard, 1 Supm. Ct. (T. & C.) 148.

[7] Stewart v. Sonneborn, 98 U. S. (8 Otto), 187.

[8] Grinnell v. Stewart, 32 Barb. 544, s. c. 12 Abb. Pr. 220, 20 How. Pr. 478.

[9] Stewart v. Sonneborn (above).

[10] Haupt v. Pohlmann, 1 Robt. 121, s. c. 16 Abb. Pr. 301.

[11] Gorton v. De Angelis, 6 Wend. 418; Murray v. Long, 1 Id. 140.

[12] Stewart v. Sonneborn, 98 U. S. (8 Otto), 187, and cases cited; Besson v. Southard, 10 N. Y. 236.

[13] Stewart v. Sonneborn (above); Gordon v. Upham, 4 E. D. Smith, 9; Baboo

If the prosecution was a criminal charge, so that character would have been relevant to the issue, plaintiff's good character, with defendant's knowledge of it, are competent as tending to show want of probable cause.[1]

7. *Malice.*]—Actual malice must be shown,[2] but it is not necessary to show angry feeling or vindictive motive.[3] It may be shown by circumstances not alleged.[4] It may be inferred by the jury,[5] but is not presumed by the law,[6] from want of probable cause. It cannot be proved by the mere fact of the unsuccessful termination of the prosecution,[7] nor from mere omission to prosecute; but a voluntary discontinuance is *prima facie* sufficient evidence of it.[8] It may be inferred from an intention to use criminal process as a means of extorting payment of a debt.[9]

8. *Termination of the proceeding.*]—A record showing acquittal[10] is sufficient evidence of termination favorable to plaintiff.[11] If a formal record has not been made up, the acquittal may be proved by reading the minute entry, with testimony of the clerk to its being a record of his court.[12]

It is not enough to show a compromise,[13] nor that the prosecuting officer refused to proceed to trial.[14] Evidence that the jury hesitated by reason of doubt as to guilt is not competent.[15]

9. *Damages.*]—The process and proceedings thereon by which the injury to plaintiff and his property and repute were done, are competent for the purpose of showing the damages.[16] The officer's return, that the process was not levied, is not conclusive against plaintiff.[17] Special damages cannot be proved unless

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Guneeh Dutt v. Mugneeram Chowdry, 11 Beng. L. R. 321. Compare Palmer v. Avery, 41 Barb. 290; Scott v. Simpson, 1 Sandf. 601; Vanderbilt v. Mathis, 5 Duer, 304; Whitfield v. Westbrook, 40 Miss. 311.

[1] Blizzard v. Hays, 46 Ind. 166, s. c. 15 Am. R. 291; Israel v. Brooks, 23 Ill. 575.

[2] Bulkeley v. Smith, 2 Duer, 261, s. c. 11 N. Y. Leg. Obs. 300; and see Farnam v. Feeley, 56 N. Y. 451.

[3] (Bronson, J.) Burhans v. Sanford, 19 Wend. 417.

[4] Solis v. Manning, 37 How. Pr. 13.

[5] Blunt v. Little, 3 Mas. 102, and cases cited.

[6] Stewart v. Sonneborn, 98 U. S. (8 Otto), 187, and cases cited; Jennings v. Davidson, 13 Hun, 393.

[7] Stewart v. Sonneborn, 98 U. S. (8 Otto), 187.

[8] Burhans v. Sanford, 19 Wend. 417, and cases cited; Garrison v. Pearce, 3 E. D. Smith, 255.

[9] Grinnell v. Stewart, 32 Barb. 544, s. c. 12 Abb. Pr. 220, 20 How. Pr. 478. Arrest in an action on one side of an account only, by one having knowledge of the other side, is presumptive evidence of malice. (Shaw, Ch. J.) Briggs v. Richmond, 10 Pick. 391, 395.

[10] Mills v. McCoy, 4 Cow. 406.

[11] That it is conclusive, see Steph. Ev. 48, citing Leggatt v. Tollervey, 14 Ex. 301; and see Caddy v. Barlow, 1 Man. & Ry. 277.

[12] Watts v. Clegg, 48 Ala. N. S. 561.

[13] McCormick v. Sisson, 7 Cow. 715.

[14] Thomason v. Demotte, 9 Abb. Pr. 242, s. c. 18 How. Pr. 529.

[15] Scott v. Sheelor, 28 Gratt. 891.

[16] Donnell v. Jones, 13 Ala. 490; 17 Id. 689.

[17] Mott v. Smith, 2 Cranch C. Ct. 33.

alleged.[1] Opinions of witnesses are not competent directly to the amount of damage to credit or business standing.[2] Evidence of defendant's wealth is competent to enhance damages.[3]

10. *Defense; Truth of the charge.*]—Truth is a justification without denial of malice.[4]

11. *Probable cause.*]—Probable cause may be shown under a general denial.[5] Belief of probable cause does not alone amount to probable cause; reasonable grounds for belief must be shown.[6] The fact that the prosecution terminated in convicting plaintiff, is conclusive evidence of probable cause, and is only rebutted by evidence that his conviction was fraudulently procured by defendant by means which prevented plaintiff from setting up his defense.[7] A decision or order against him *pendente lite* is competent,[8] but not conclusive.[9] Evidence that defendant acted in good faith is competent, but not alone enough to show probable cause.[10] Plaintiff's bad character is not primarily competent as evidence of probable cause,[11] though it may be shown, if plaintiff has given evidence to the contrary.[12] It may also be shown in mitigation of damages.[13]

12. *Freedom from malice.*]—To disprove malice in making a criminal charge, defendant may be asked, as a witness in his own behalf, whether, when he made the charge, he believed that plaintiff had been guilty of the offense.[14] The declarations of the defendant, made as part of the *res gestæ*, of an act in the proceedings alleged to be malicious, are competent in his own favor to negative malice.[15] But the declarations of his agent or attorney, unless brought home to him, are not.[16]

13. *Advice of counsel.*]—The fact that defendant acted under advice of counsel is relevant, both to show probable cause[17] and

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[1] Strang v. Whitehead, 12 Wend. 64; Vanderslice v. Newton, 4 N. Y. 130. Compare Lawrence v. Hagerman, 56 Ill. 68, s. c. 8 Am. R. 674.

[2] Donnell v. Jones, 13 Ala. 490. Compare p. 616 of this vol.

[3] Whitfield v. Westbrook, 40 Miss. 311.

[4] Bank of British North America v. Strong, L. R. 1 App. Cas. 307, 317, s. c. 16 Moak's Eng. 24, 33.

[5] Simpson v. McArthur, 16 Abb. Pr. 302, note.

[6] Whitfield v. Westbrook, 40 Miss. 311.

[7] Miller v. Deere, 2 Abb. Pr. 1; Burt v. Place, 4 Wend. 591.

[8] Zantzinger v. Weightman, 2 Cranch C. Ct. 478.

[9] Haupt v. Pohlmann, 1 Robt. 121, s. c. 16 Abb. Pr. 301.

[10] Shafer v. Loucks, 58 Barb. 426.

[11] 1 Whart. Ev. 62, § 47; and see Hickman v. Jones, 9 Wall. 197.

[12] See Paragraph 6.

[13] 1 Whart. (above).

[14] McKown v. Hunter, 30 N. Y. 625. And see Goodman v. Stroheim, 36 Super. Ct. (4 J. & S.) 216. That he cannot be asked if he acted without malice, see Lawyer v. Loomis, 3 Supm. Ct. (T. & C.) 393. Compare p. 620 of this vol.

[15] Wood v. Barker, 37 Ala. 60.

[16] Floyd v. Hamilton, 33 Ala. 235.

[17] Hall v. Suydam, 6 Barb. 83.

absence of malice.[1] To render the opinion or advice competent, it must appear that it was given before defendant proceeded,[2] and the statement of facts was which was laid before the attorney or counsel must be shown.[3] Defendant need not show the ability or learning of the attorney, as this is presumed from evidence that he was a duly licensed practitioner.[4] If defendant shows a full and fair statement made by him to a respectable attorney, and that he acted on his advice, strong evidence that defendant did not believe there was probable cause is necessary.[5]

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[1] Jackson v. Mather, 7 Cow. 301.
[2] Blunt v. Little, 3 Mas. 102.
[3] Id.; and see Laird v. Taylor, 66 Barb. 132.
[4] Horne v. Sullivan, 83 Ill. 32.
[5] Skidmore v. Bricker, 77 Ill. 164.

CHAPTER XLII.

ACTIONS FOR FALSE IMPRISONMENT.

1. General rules.
2. Grounds of action.
3. Legal process, &c.
4. Damages.
5. Justification.

1. *General rules.*]—The reader should consult the fuller statement of the rules applicable to the mode of proof, given in the chapters on ASSAULT AND BATTERY and MALICIOUS PROSECUTION.

2. *Grounds of action.*[1]]—Evidence of malice is not essential;[2] want of probable cause is.[3]

3. *Legal process, &c.*]—The appropriate recitals in process put in evidence by plaintiff as the instrument of his arrest, are *prima facie* evidence against him, of the facts recited.[4] If plaintiff relies upon the failure of the judgment to support the process against him, he must show that the process by defendant was issued on the particular judgment; also the defect or vacatur relied on.[5] The police records, if not kept pursuant to a requirement of law, are not competent as evidence of the injury and indignity to plaintiff resulting from defendant's charge against him, unless it be shown that defendant knew that it was the custom to make such a record.[6]

4. *Damages.*]—Matters of aggravation,[7] as distinguished from grounds of special damages, may be proved though not pleaded.

5. *Justification and mitigation.*]—Under a denial of an allegation that the imprisonment was without warrant, defendant may justify under legal process.[8] A justification which is not in issue is not admissible in bar under a denial,[9] unless the facts may

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[1] For the distinction between this action and malicious prosecution, see Chapter XLI, and Sleight v. Ogle, 4 E. D. Smith, 445; Ackroyd v. Ackroyd 3 Daly, 38; Von Latham v. Libby, 38 Barb. 339, s. c. 17 Abb. Pr. 237; Brown v. Chadsey, 39 Barb. 253.

[2] Platt v. Niles, 1 Edm. 230.

[3] Id.; Hawley v. Butler, 54 Barb. 490, disapproving a previous decision in 48 Id. 101; and see Carl v. Ayres, 53 N. Y. 14; Farnham v. Feeley, 56 N. Y. 451.

[4] (WALWORTH, Chan.) Bradstreet v. Furgeson, 23 Wend. 638, affi'g 17 Id. 181, and cases cited; Scott v. Ely, 4 Wend. 555.

[5] See Brown v. Demont, 9 Cow. 263; Barhydt v. Valk, 12 Wend. 145.

[6] Garvey v. Wayson, 42 Md. 178, 187; 1 Whart. Ev. § 639.

[7] Stanton v. Seymour, 5 McLean, 267.

[8] Boynton v. Tidwell, 19 Tex. 118.

[9] Brown v. Chadsey, 39 Barb. 253.

be available if offered solely in mitigation of damages. In justifying under process, a defendant other than the officer who executed it need not prove its return.[1] Evidence that a party meaning to influence the other's conduct, made representations or admissions (even as to the nature or contents of a record) having that effect, will estop him from showing the contrary to the prejudice of the latter.[2]

To show good faith in his conduct defendant may give in evidence any communication actually made to him before he acted, and which influenced his action; but not so even of a record which was not communicated to him, and to which plaintiff was neither party nor privy.[3]

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[1] Plummer v. Dennett, 6 Greenl. (Me.) 421.

[2] Howard v. Hudson, 2 Ell. & B. 1. Compare McMasters v. Ins. Co. of N. Am. 55 N. Y. 222, 227.

[3] Thomas v. Russell, 9 Ex. 764.

CHAPTER XLIII.

ACTIONS FOR SLANDER OR LIBEL.

1. Order of proof.
2. Inducement.
3. Plaintiff's vocation, &c.
4. Good repute.
5. Slander.
6. — its utterance.
7. Publication of libel.
8. — its place and time.
9. — contents.
10. Meaning of the words.
11. Their application to the plaintiff.
12. Circulation.
13. Falsity.
14. Malice.
15. Action on privileged communication.
16. Slander of title.
17. Damages.
18. *Defense.* Explaining the words.
19. Privileged communication.
20. Justification.
21. Former recovery.
22. Mitigation.
23. Plaintiff's character.
24. Mode of proving character.
25. *Rebuttal.*

1. *Order of proof.*]—The usual order of proof is: 1. Plaintiff's vocation, if involved; 2. Other extrinsic facts in the inducement, if any are material; 3. The utterance or publication; 4. Facts essential to the colloquium or innuendoes; 5. Extrinsic evidence of malice; 6. Damages.

2. *Inducement.*]—Matter alleged by way of inducement, if not material to the cause of action, is not in issue, and is not admitted by failure to deny, nor need it be proved if denied; but if material, it is admitted or must be proved.[1] Matter of inducement wholly collateral to the issue, may be proved by parol, without producing existing record evidence.[2]

3. *Plaintiff's vocation, &c.*]—Plaintiff's vocation or official character need not be proved, even though alleged,[3] if the words are actionable apart from that; but it may be proved, even though not alleged, if the words directly tend to injure him in it.[4] If the actionableness of the words depends upon injury in vocation[5] (and the vocation is in issue), plaintiff must prove that he was in the vocation alleged[6] at the time of the publication;[7] but evi-

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[1] Coleman v. Southwick, 9 Johns. 45, s. c. 6 Am. Dec. 253; May v. Brown, 3 B. & C. 122; Folk. Stark. 555, § 525; Towns. 653, § 385; Kinney v. Nash, 3 N. Y. 177.

[2] Southwick v. Stevens, 10 Johns. 443.

[3] Lewis v. Walter, 3 B. & C. 138.

[4] Sanderson v. Caldwell, 45 N. Y. 398.

[5] See Miller v. David, L. R. 9 C. P. 118, s. c. 8 Moak's Eng. 434; Tobias v. Harland, 4 Wend. 537.

[6] Manning v. Clement, 7 Bing. 362.

[7] Harris v. Burley, 8 N. H. 216; Forward v. Adams, 7 Wend. 204. Compare Cramer v. Riggs, 17 Id. 209.

dence of appointment just before may be sufficient *prima facie* evidence of continuance.[1]

The defamatory matter itself, if it admits that defendant had a particular official character or vocation, is *prima facie* evidence for plaintiff on that point.[2] The holding an office which is not matter of documentary appointment, may be shown by evidence of acting in it.[3] If documentary, the original appointment should be proved, or its absence accounted for and secondary evidence given.[4] If the business is one for which a license is required by law, plaintiff need not prove a license,[5] unless the imputation of pursuing it without a license is involved in the defamation.[6]

4. *Good repute.*]—Plaintiff need not, in the first instance, give any evidence of his good name.[7]

5. *Slander.*]—Although plaintiff's allegation sets forth the words of the alleged slander (as the rules of pleading now usually require), he need not prove the utterance of those precise words,[8] nor necessarily all of them, even in substance;[9] but he must prove the utterance of substantially the words alleged,[10] or of a sufficient part of them to sustain an action.[11] Substantially different words, though imputing the same charge, are not enough;[12]

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[1] Rosc. N. P. 36.

[2] Yrisarri v. Clement, 3 Bing. 432; 2 Whart. Ev. § 1153.

[3] Cannell v. Curtis, 2 Bing. N. C. 228; 2 Stark. Ev. 3 ed. 627; and see page 193 of this vol.; Brown v. Mims, 2 M'Ill's Const. (S. C.) 235.

[4] Folk. Stark. 552 [411], § 520. Otherwise, where the office is not material to the cause of action.

[5] Fry v. Bennett, 28 N. Y. 324, affi'g 3 Bosw. 200. Compare pp. 287, 358 of this vol.

[6] See Pickford v. Gutch, 8 T. R. 305, n.; Collins v. Carnegie, 1 Ad. & E. 695.

[7] Cox v. Thomason, 2 C. & J. 361. Whether he may do so before it has been impugned by defendant's evidence is disputed. For the *affirmative*, see Williams v. Greenwade, 3 Dana, 432; Bennett v. Hyde, 6 Conn. 24, 27; King v. Waring, 5 Esp. 14. For the *negative*, see Cornwall v. Richardson, R. & M. 305; Inman v. Foster, 8 Wend. 602; Shipman v. Burrows, 1 Hall, 399, and cases cited.

[8] Desmond v. Brown, 29 Iowa, 53, s. c. 4 Am. R. 194; Hersh v. Ringwalt, 3 Yates (Pa.), 508, s. c. 2 Am Dec. 392. *Contra*, Towns. 622, § 365. "There is nothing more difficult than for a witness to recollect the exact language used by another; and to require this would be to defeat the recoveries in actions for verbal slander, in almost every instance." CHURCH, Ch. J., Williams v. Miner, 18 Conn. 464, 474. If the precise words are important, and the witness, though confident, is not positive in his testimony, the jury may find the words not proved. Harding v. Brooks, 5 Pick. 244, 249. See 3 Abb. New Cas. 233, n. The rules as to a witness refreshing his memory by memoranda, have been already stated, page 320 of this vol.

[9] Purple v. Horton, 13 Wend. 9; Nestle v. Van Slyck, 2 Hill, 282; Olmsted v. Brown, 12 Barb. 657. Even though the words unproved qualify those proved. Folk. Stark. 461, § 429. *Contra*, Towns. 622, § 365.

[10] Estes v. Antrobus, 1 Mo. 197, s. c. 13 Am. Dec. 496, and n. cit.; Bundy v. Hart, 46 Mo. 460, s. c. 2 Am. R. 525. And in the tongue or language alleged. Keenholts v. Becker, 3 Den. 346; Wormouth v. Cramer, 3 Wend. 394. But a variance in this respect, as in others, may be cured by amendment. Lettman v. Ritz, 3 Sandf. 734.

[11] Hume v. Arrasmith, 1 Bibb (Ky.), 165, s. c. 4 Am. Dec. 626.

[12] Wheeler v. Robb, 1 Blackf. 330, s. c. 12 Am. Dec. 245, and n. *Contra*, Williams v. Miner, 18 Conn. 464, 474, and cases cited. The object of this rule is to give notice to defendant, not merely of the nature of the charge, but the language in which it was uttered. Doherty v. Brown, 10 Gray, 250.

but substantially the same words, though varying in form of expression, are admissible.[1] If the charge alleged was a specific one, evidence that defendant made a general charge is a variance.[2]

Under the new procedure, a variance that has not misled defendant to his prejudice, may be cured by amendment or disregarded.[3]

If the pleading states only the substance (where this is allowed), it is enough to prove the substance.[4]

Words alleged, though not slanderous, may be proved by plaintiff, to show the intent with which slanderous words, alleged in the same count, were spoken.[5]

Utterances not included in those alleged,[6] cannot be proved as a cause of action; but may be proved to show meaning and intent, within limits stated below.

The result of the rules on this point, shortly stated, is that: Where the allegation and proof vary as to the words, it is enough if plaintiff proves that a distinct slanderous charge alleged, which is separable from any other unproven words alleged, was uttered in substantially the words alleged, it not appearing to have been materially qualified by other words not alleged.

6. — *its utterance.*]—Utterance of the words denied in one plea or defense, may be proved by a plea or defense confessing utterance,[7] but not by one avoiding without confessing. The utterance may be proved by plaintiff's testimony, though other persons not produced as witnesses were present.

There must be some evidence that the words were heard and understood by some person other than plaintiff, to whom they were addressed.[8]

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[1] Smith v. Hollister, 32 Vt. 695.

[2] Aldrich v. Brown, 11 Wend. 596; Emery v. Miller, 1 Den. 208; Coons v. Robinson, 3 Barb. 625. As a general rule, the evidence substantially varies from the allegation, when it proves a charge of an offense not identically the same with that alleged, though of the same species. Payson v. Macomber, 3 Allen, 69, 72.

[3] N. Y. Code Civ. Pro. § 539; Coleman v. Playsted, 36 Barb. 26.

[4] Nye v. Otis, 8 Mass. 121, s. c. 5 Am. Dec. 79; Whiting v. Smith, 13 Pick. 364. Or even equivocal or apparently innocuous words, with extrinsic evidence of manner, circumstances, &c., giving them the meaning of the general allegation. Pond v. Hartwell, 17 Pick. 269, 270, SHAW, C. J.

[5] Dioyt v. Tanner, 20 Wend. 190.

[6] Whether those of defendant (Camfield v. Bird, 3 Carr. & K. 56); or those of another person, alleged to have been adopted by defendant (Blessing v. Davis, 24 Wend. 100).

[7] Alderman v. French, 1 Pick. 1, s. c. 11 Am. Dec. 114. *Contra*, Wheeler v. Robb, 1 Blackf. (Ind.), 330, s. c. 12 Am. Dec. 245. Under the new procedure, which allows the joining of defenses not necessarily inconsistent, the question is, whether the special plea or answer expressly, or by necessary implication, admits or does not admit the publication. A justification may or may not. Under proper pleadings, a defendant may show both that he never published the defamatory matter, and that, whoever may have done so, it was true. Denial of publication, and averment of truth, are not inconsistent; (Payson v. Macomber, 3 Allen, 69, 73;) unless pleaded in such a way as to be inconsistent. Jackson v. Stetson, 15 Mass. 48, 52.

[8] Broderick v. James, 3 Daly, 481; Haile v. Fuller, 2 Hun, 519. Compare Phil-

A variance as to the person is not necessarily fatal.[1] The moral or intellectual character of the hearer is not relevant.[2] The time of utterance must be proved to have been before action; and if the only witness cannot swear to this, his testimony is irrelevant.[3] But a variance in respect to the time is immaterial.[4]

7. *Publication of libel.*]—Publication by defendant should be proved before reading the contents.[5] An allegation of publication by defendant admits proof of publication by his authorized agent or servant.[6] If joint publication is alleged, it must be proved to have been joint.[7] Under either an allegation of printing or one of writing, the other form of publication may be proved, unless defendant is misled.[8] The rules for proving handwriting have been already stated.[9]

Publication may be proved by plaintiff's testimony; but not by that of defendant, if he claims his privilege. It may be proved by evidence of defendant's declarations and admissions out of court,[10] and if his admission was qualified by suggesting that there were errors in the printing, the burden is on him to show material errors.[11] It may be proved by the one who read it, notwithstanding he did it under a pledge of secrecy.[12]

Proof that a newspaper or periodical came from defendant's office, and was one copy of an edition of the same date, and alleging on its face that he is the proprietor, is evidence of publication by defendant.[13] One proved to have been proprietor of a journal two or three years previously, may be presumed to have continued proprietor.[14] Evidence of delivery by defendant, whether in way of circulation among readers,[15] or by way of deposit in a public office,[16]

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lips v. Barber, 7 Wend. 439. Words spoken in a foreign language must be proved to have been spoken in the hearing of one who understood them. Bac. Abr. Slander (D. 3).

[1] Goodrich v. Warner, 21 Conn. 432, 443.

[2] Sheffill v. Van Deusen, 15 Gray, 485.

[3] Scovell v. Kingsley, 7 Conn. 284.

[4] Potter v. Thompson, 22 Barb. 87. Even though the evidence is of an utterance more than two years before suit (Birchett v. Davis, 21 Pick. 404); in which case, however, defendant should be allowed to amend by pleading the statute of limitations. Id.

[5] Folk. Stark. 556, § 526.

[6] Folk. Stark. 571 [427], § 538.

[7] Johnson v. Hudson, 7 Ad. & E. 233, n.

[8] Trumbull v. Gibbons, 3 City H. Rec. 97.

[9] Pages 392 to 398 of this vol.; and see Cochrane v. Butterfield, 18 N. H. 115. Compare U. S. v. Chamberlain, 12 Blatchf. 390.

[10] Lewis v. Few, 5 Johns. 1, 33; Burt v. McBain, 29 Mich. 260. As to allegation of truth, coupled with admissions, see Rice v. Withers, 9 Wend. 138; Rouse v. White, 25 N. Y. 170.

[11] Rex v. Hall, 1 Str. 416.

[12] Towns. 650, § 384.

[13] Towns. 644, § 379.

[14] Fry v. Bennett, 28 N. Y. 324, aff'g 3 Bosw. 200.

[15] Respublica v. Davis, 3 Yates (Pa.), 128, s. c. 2 Am. Dec. 366.

[16] King v. Amphlit, 4 B. & C. 35.

is *prima facie* evidence of publication. Sale by a clerk or agent in a shop, in the usual course of business, is *prima facie* evidence of publication by the principal.[1] Evidence of sale of a single copy, though to plaintiff's agent, shows publication.[2]

An open libel, with proof that it is written or signed in the hand of defendant, is *prima facie* evidence of publication by him.[3] Evidence that a manuscript in defendant's handwriting was printed and published, is evidence from which the jury may infer printing and publication by direction of defendant.[4] Publication of a handbill or *affiche* is *prima facie* shown by evidence that it was posted, so that it might have been seen and read, without anything to indicate that it was not.[5]

Publication of a letter addressed to a third person is *prima facie* shown by the fact that it passed through the mail, in course, and is produced unsealed on the trial.[6] Publication of a letter addressed to plaintiff himself may be *prima facie* shown by evidence that defendant read it to another.[7]

8. *Place and time of publication.*]—Designation of a place, in the date of a libellous writing, is *prima facie* evidence that it was written there, as against the writer. Publication by defendant in a journal, wherever printed, and circulation at a place within the State, is evidence of publication at the latter place.[8] A variance in the date of publication is not material,[9] if defendant is not misled.

9. — *contents.*]—The libellous document must be produced, as the primary evidence of its contents. If it has been lost or destroyed, without the plaintiff's fault, it may be accounted for, and secondary evidence of the contents given,[10] unless it was a privileged communication.[11]

Publication in a book or newspaper having been brought home to defendant, any copy of the impression may be read in evidence; it is not necessary to produce or account for the identical copy referred to in the evidence of publication.[12] As against one liable merely as the writer of an article printed, the original copy must be produced or accounted for.[13]

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[1] Folk. Stark. 573 [429], § 538.
[2] Duke of Brunswick v. Harmer, 14 Q. B. 185.
[3] Folk. Stark. 559 [417], § 530.
[4] Folk. Stark. 560 [418], § 531; Tarpley v. Blabey, 2 Bing. New Cas. 437.
[5] Towns. 639, § 372. And see Rice v. Withers, 9 Wend. 138.
[6] Warren v. Warren, 1 Cr., M. & R. 250; Towns. 639, § 374. See page 291 of this vol.; Shipley v. Todhunter, 7 Carr. & P. 680.
[7] McCoombs v. Tuttle, 5 Blackf. (Ind.) 431.
[8] Commonwealth v. Blanding, 3 Pick. 304.
[9] Gates v. Bowker, 18 Vt. 23.
[10] Gates v. Bowker, 18 Vt. 23, 26; Rainy v. Bravo, L. R. 4 P. C. 287, s. c. 3 Moak's Eng. 194.
[11] Dawkins v. Rokeby, L. R. 8 Q. B. 255.
[12] See Southwick v. Stevens, 10 Johns. 443; Huff v. Bennett, 4 Sandf. 120, aff'd in 6 N. Y. 337; Simmons v. Holster, 13 Minn. 249.
[13] Adams v. Kelly, Ry. & M. 157. So of one who published by reading or singing the particular copy. Johnson v. Hudson, 7 Ad. & E. 238.

Secondary evidence must reproduce the words. The witness' conception of their effect, or the substance of the charge, is not sufficient.[1] But the witness may state the substance of the words, as far as he can recollect them.[2] If a copy is produced, evidence reasonably identifying it as corresponding to the one brought home to defendant, and published by him, is enough.[3]

Plaintiff may, either orally or in writing, abandon at the trial part of the libellous matter, provided the part remaining is actionable;[4] and may read the part remaining to show the meaning of the part relied on.[5]

Where only part of the libel is alleged, the fact that the part not alleged materially qualifies that alleged, although as qualified it is still libellous, is a variance.[6]

10. *Meaning of ambiguous words.*]—Unless the court holds that the words are not capable of bearing the meaning assigned, extrinsic evidence is competent, and necessary, to show that on the occasion in question they did bear that meaning.[7] Plaintiff must satisfy the jury either that, under the circumstances, the words themselves fairly bore that meaning, or that the speaker intended, and the hearers understood, that meaning to be conveyed. For this purpose dictionaries and other such books of authority may be used;[8] evidence of defendant's known usages of speech[9] may be given; the sense commonly attached to foreign, or cant, or slang phrases may be shown by the testimony of witnesses;[10] papers referred to in the words proved may be read;[11] and, in the case of slander, all the conversation of the party at the time is admissible.[12]

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[1] Rainy v. Bravo (above).

[2] Id. It will be for the jury to say whether his recollection can be trusted. Id.; see paragraph 8. The rules as to refreshing memory have already been stated. Page 320 of this vol.; Huff v. Bennett, 6 N. Y. 337.

[3] Johnson v. Hudson, 7 Ad. & E. 233; and see Southwick v. Stevens, 10 Johns. 443.

[4] Genet v. Mitchell, 7 Johns. 120; Gould v. Weed, 12 Wend. 12; Stow v. Converse, 4 Conn. 17, 28. According to some authorities, this cannot be done if the additional words change the meaning of those alleged. Towns. 622, § 365; Rutherford v. Evans, 6 Bing. 458.

[5] Genet v. Mitchell (above).

[6] Rainy v. Bravo, L. R. 4 P. C. 287, s. c. 3 Moak's Eng. 194.

[7] Rosc. N. P. 829, and cases cited. And see Wolcott v. Goodrich, 5 Cow. 714; Bullock v. Koon, 9 Id. 30; Sanderson v. Caldwell, 45 N. Y. 398.

The court is not bound to take notice whether words spoken in a foreign country are slanderous there. Plaintiff should be prepared to prove the foreign law. Langdon v. Young, 33 Vt. 136; Bundy v. Hart, 46 Mo. 460, s. c. 2 Am. R. 525.

[8] Pow. Ev. 105.

[9] See, on this subject, page 132 of this vol.

[10] Wachter v. Quenzer, 29 N. Y. 547.

[11] Nash v. Benedict, 25 Wend. 645.

[12] Coleman v. Playsted, 36 Barb. 26. See Smith v. Miles, 15 Vt. 245, 249. The better opinion under the free rules of evidence now followed is, that a witness who heard the conversation, and who testifies to all the circumstances, may, in case of ambiguous words, be permitted to state the impression they made upon his mind at the time he heard them; but this impression is not sufficient to determine their mean-

If plaintiff relies on extrinsic circumstances as putting the sting of a charge of crime into words not necessarily actionable in themselves, he must prove sufficient of those circumstances to raise a fair presumption that the conduct imputed might have been a criminal offense; but he need not show that it necessarily would have been.[1]

11. *Their application to the plaintiff.*]—If the defamatory matter does not name plaintiff, extrinsic evidence is competent[2] and necessary[3] to supply the designation. For this purpose a subsequent publication by the defendant, in which the plaintiff's name is mentioned, may be shown.[4]

12. *Circulation.*]—Production and proof of one copy of a publication is not necessarily evidence that others were circulated.[5] But plaintiff may prove the circulation[6] or degree of notoriety given to defendant's print.[7] The fact of circulation of the report may be proved by producing a writing, or a publication of it made by a third person, provided there is evidence competent against defendant to connect him with it; otherwise not.[8]

13. *Falsity.*]—If defendant relies on justification, plaintiff may show all the circumstances of the transaction charged, relevant to the question of his innocence;[9] including his own declarations made as part of the *res gestæ*.[10] The record of plaintiff's acquittal on a criminal prosecution for the same charge is not competent against defendant, if he was not privy to the prosecution.[11]

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ing, unless the jury find that defendant intended them to be so understood. Compare Towns. 650, § 384; note in 3 Abb. New Cas. 233; Smith v. Miles, 15 Vt. 245, 249, REDFIELD, J. *Contra*, Pow. Ev. 100; Duke of Brunswick v. Harmer, 3 Carr. & K. 10; Weed v. Bibbins, 32 Barb. 315, and cases cited.

[1] See, for instance, Wilbur v. Ostrom, 1 Abb. Pr. N. S. 275; Case v. Buckley, 15 Wend. 327; Alexander v. Alexander, 9 Id. 141.

[2] Mix v. Woodward, 12 Conn. 262, 287; Parker v. Raymond, 3 Abb. Pr. N. S. 343; N. Y. Code Civ. Pro. § 535.

[3] Id.; Miller v. Maxwell, 16 Wend. 9. Whether this may be done by the testimony of those to whose knowledge it came, that they at the time understood defendant to be meant, is disputed. For the *negative*, see Gibson v. Williams, 4 Wend. 320; Van Vechten v. Hopkins, 5 Johns. 211, s. c. 4 Am. Dec. 339, and n.; Maynard v. Beardsley, 7 Wend. 560. For the *affirmative*, see Russell v. Kelly, 44 Cal. 641, s. c. 13 Am. R. 169; 2 Whart. Ev. § 975. Compare paragraph 10, note. Where the publication was a picture proved by secondary evidence, the declarations of spectators made while looking at it, were held admissible to show whose portrait it was. Du Bost v. Beresford, 2 Camp. 511.

[4] Russell v. Kelly, 44 Cal. 641, s. c. 13 Am. R. 169.

[5] Watts v. Fraser, 7 Ad. & E. 223.

[6] Fry v. Bennett, 28 N. Y. 324, aff'g 3 Bosw. 200. And an article in defendant's paper stating its average circulation, is competent against him. Fry v. Bennett, 1 Abb. Pr. 289, s. c. 4 Duer, 247, 651.

[7] Rice v. Withers, 9 Wend. 138.

[8] Schwartz v. Thomas, 1 Am. Dec. 479, s. c. 2 Wash. 167; Robertson v. Bennett, 44 Super. Ct. (J. & S.) 66, 71.

[9] See Palmer v. Haight, 2 Barb. 210.

[10] Gandy v. Humphries, 35 Ala. 617; 2 Whart. Ev. § 1102.

[11] Corbley v. Wilson, 71 Ill. 209, s. c. 22 Am. R. 98.

14. *Malice.*]—The difference between what is called express or actual malice, and implied malice, is only a distinction of evidence. "Express malice" is malice shown by some affirmative proof beyond that afforded by the falsity of defamatory words; "implied malice" is that which is naturally inferred as a presumption of fact drawn by the law from the proof of the falsity of defamatory words uttered without privilege.[1] Where there is no privilege, this presumption conclusively dispenses with the necessity of extrinsic evidence of malice to sustain the action.[2] But evidence of express malice is competent, whether the communication be privileged or not.[3] For this purpose any act or language of the defendant (before suit brought), tending to prove malice on his part, in respect to the particular publication complained of, as distinguished from general ill will, is competent.[4] The fact that the false charges were published as true of defendant's own knowledge, is evidence of malice.[5] Animosity by or against a parent or guardian, or next friend, is not alone competent to show malice by or against the child or ward.[6]

To show malice evidence is competent[7] that defendant repeated substantially the same charge, to any person[8] and at any time before suit brought, even though statute barred by the lapse of time;[9] but not evidence of actionable words,[10] not statute barred,[11] imputing a substantially different charge[12] (unless they so refer to the charge in suit as to express direct evidence of the meaning and malice of defendant in making it);[13] nor of any words after suit brought.[14] A charge proved under this rule is not available

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[1] Huson v. Dale, 19 Mich. 17, s. c. 2 Am. R. 66; Viele v. Gray, 10 Abb. Pr. 1, s. c. 18 How. Pr. 550.

[2] King v. Root, 4 Wend. 113; Klinck v. Colby, 46 N. Y. 427, 431; White v. Nichols, 3 How. U. S. 266; Fry v. Bennett, 5 Sandf. 54, s. c. 9 N. Y. Leg. Obs. 330. Malice in publishing a newspaper report of judicial, legislative, or other official proceedings, is in no case implied from the fact of publication. N. Y. L. 1854, p. 314, c. 130, § 1.

[3] Fry v. Bennett, 28 N. Y. 324.

[4] Id.; Rosc. N. P. 832; Littlejohn v. Greeley, 13 Abb. Pr. 41; further decisions, Id. 311, s. c. 22 How. Pr. 345.

[5] Rosc. N. P. 830.

[6] York v. Pease, 2 Gray, 282, 284. So, a city editor's refusal to publish a retraction is not evidence of malice on the part of the proprietors. Edsall v. Brooks, 2 Robt. 414, s. c. 33 How. Pr. 191.

[7] This I understand to be the present rule in the courts of New York, and one well sustained by the object of all the rules that have been asserted on this subject, when we make due allowance for the new canons of pleading. But the authorities are very conflicting, the line of decision has constantly wavered, and well considered decisions may be found to the contrary of almost every clause in the rule stated in the text.

[8] Root v. Lowndes, 6 Hill, 519; Bassell v. Elmore, 48 N. Y. 561; affi'g 65 Barb. 627.

[9] Titus v. Sumner, 44 N. Y. 266; Distin v. Rose, 69 N. Y. 122, 124.

[10] Rundell v. Butler, 7 Barb. 260.

[11] Root v. Lowndes (above).

[12] Howard v. Sexton, 4 N. Y. 157, 161; Titus v. Sumner, 44 Id. 266, 270; Distin v. Rose, 69 Id. 122, 124; Taylor v. Kneeland, 1 Dougl. (Mich.) 67, 76.

[13] Finnerty v. Tipper, 2 Camp. 72. For instance, a subsequent publication which identifies plaintiff. Mix v. Woodward, 12 Conn. 262, 287.

[14] Frazier v. McCloskey, 60 N. Y. 337, rev'g 2 Supm. Ct. (T. & C.) 266; Distin v.

as a ground of recovery, any further than, by showing malice, it enhances exemplary damages for the publication alleged.[1]

Insulting acts, preceding or accompanying a defamatory publication, are competent on the question, and can be put in evidence of motive.[2] So are subsequent insulting acts relating to the same charge.[3]

A communication of the defamation to a third person, made by the hearer, if the natural and probably intended consequence of defendant's act, is competent to show the injury; and with it the damage caused by it may be shown.[4]

An answer of justification, though withdrawn,[5] or unsustained by proof, is not evidence of malice unless bad faith is shown.[6]

15. *Action on privileged communication.*]—Where the communication, if made in good faith, is privileged, the burden is on plaintiff to show express malice, that is, actual wrongful motive. To carry this question to the jury it is not enough that the representations are consistent with malice;[7] the evidence must raise a probability of malice; and be more consistent with it than with the non-existence of it.[8] But slight evidence is sufficient.[9] It is not necessary to prove it by extrinsic evidence. It may be inferred from the relation of the parties, the circumstances attending the publication, and even from the terms of the publication itself.[10] It cannot be inferred from its mere falsity,[11] unless there is evidence that defendant knew it to be false.[12] Nor is it necessarily inferred from severe denunciation in the words;[13] nor from circulating to obtain privileged signatures.[14]

If the privileged communication was a charge preferred for official action of a judicial nature, before any municipal, parochial,

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Rose, 69 N. Y. 122, 124. *Contra*, Miller v. Kerr, 2 McCord (S. C.) 285, s. c. 13 Am. Dec. 722; Johnson v. Brown, 57 Barb. 118; 1 Whart. Ev. 44, § 32.

[1] Williams v. Miner, 18 Conn. 464, 472, and cases cited.

[2] 1 Whart. Ev. 44, § 32; Bond v. Douglas, 7 C. & P. 626; Kean v. McLaughlin, 2 S. & R. 469. See C. v. A. B. 2 Weekly Notes, 291.

[3] Tate v. Humphrey, 2 Campb. 73 n.; 1 Whart. Ev. 43, § 32.

[4] Fowles v. Bowen, 30 N. Y. 20. And see paragraphs 3 and 17.

[5] Wilson v. Robinson, 7 Q. B. (Ad. & E. N. S.) 68.

[6] Klinck v. Colby, 46 N. Y. 427, 437; 69 Id. 127. Otherwise at common law.

[7] Hart v. Gumpach, L. R. 4 P. C. 439, 460, s. c. 4 Moak's Eng. 138, 156.

[8] Laughton v. Bishop of Sodor and Man, L. R. 4 P. C. 495, s. c. 4 Moak's Eng. 162, 174, and cases cited.

[9] Fowles v. Bowen, 30 N. Y. 20.

[10] Gassett v. Gilbert, 6 Gray (Mass.), 94, 98.

[11] Lewis v. Chapman, 16 N. Y. 369, rev'g 19 Barb. 252.

[12] Fowles v. Bowen, 30 N. Y. 20.

[13] Klinck v. Colby, 46 N. Y. 427. Nor from the act of sending a report to a newspaper of a privileged communication elsewhere delivered, as a public reply made in good faith to a public attack. Laughton v. Bishop, &c. L. R. 4 C. P. 495, 510, s. c. 4 Moak's Eng. 162, 175, and cases cited. If there were other evidence of malice, it would be proper to submit to the jury the question, whether sending the report to the papers was in good faith or malicious. Id. Nor from defendant's advocate objecting at the trial to plaintiff proving facts material to him; nor from endeavoring to prove plaintiff's misconduct. Id.

[14] Vanderzee v. M'Gregor, 12 Wend. 545; Streety v. Wood, 15 Barb. 105.

professional or other public body,[1] having authority to act upon the application,[2] plaintiff must show want of probable cause as well as malice.[3]

16. *Slander of title.*]—To sustain an action for slander of title, whether of real[4] or personal[5] property, express malice must be shown. This is not proved by the falsity of injurious statements;[6] but there need not be direct proof of intention to injure. The intention may be inferred by the jury, from false statements, exceeding the limits of fair and reasonable criticism, and recklessly uttered in disregard of the rights of those who might be affected by them.[7] If the words were used in the course of asserting defendant's claim of title, it is competent for him to show advice of counsel, as in case of an action for malicious prosecution.[8]

Special damage must be proved,[9] and must be alleged to be admissible.[10]

17. *Damages.*]—A witness cannot be asked whether plaintiff has not sustained a general loss of reputation and suffered material injury in credit, in consequence of the words complained of.[11] Injury to feelings is a proper subject of consideration if other damages have been shown.[12] Alone it will not sustain an action.[13]

Actual damage need not be shown to sustain a verdict for exemplary damages.[14]

In *aggravation* of actual damages, plaintiff may give in evidence his own rank and condition in life, if in issue;[15] and for actual or exemplary damages, defendant's wealth and standing.[16] An unsuccessful plea of justification is not competent in aggravation, unless shown to have been made in bad faith;[17] nor is an un-

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[1] Barrows v. Bell, 7 Gray, 301, 313; Remington v. Congdon, 2 Pick. 310, s. c. 13 Am. Dec. 431, and note.

[2] Hosmer v. Loveland, 19 Barb. 111.

[3] Howard v. Thompson, 21 Wend. 319; Viele v. Gray, 10 Abb. Pr. 1, 11, s. c. 18 How. Pr. 550; Streety v. Wood, 15 Barb. 105.

[4] Kendall v. Stone, 5 N. Y. 14.

[5] Like v. McKinstry, 3 Abb. Ct. App. Dec. 62, s. c. 4 Keyes, 397, affi'g 41 Barb. 186.

[6] Like v. McKinstry (above).

[7] Gott v. Pulsifer, 122 Mass. 235, s. c. 23 Am. R. 322, 325.

[8] See Like v. McKinstry (above); Bailey v. Dean, 5 Barb. 297.

[9] Kendall v. Stone, 5 N. Y. 14, rev'g 2 Sandf. 269; Bailey v. Dean, 5 Barb. 297.

[10] Gott v. Pulsifer, 122 Mass. 235, s. c. 23 Am. R. 322.

[11] Herrick v. Lapham, 10 Johns. 281. And see p. 655 of this vol.

[12] Hamilton v. Eno, 16 Hun, 599, 601.

[13] Samuels v. Evening Mail Association, 6 Hun, 5.

[14] Fry v. Bennett, 9 Abb. Pr. 45, affi'd in 28 N. Y. 324.

[15] Larned v. Buffinton, 3 Mass. 546, s. c. 3 Am. Dec. 185. And see Eastland v. Caldwell, 2 Bibb (Ky.), 21, s. c. 4 Am. Dec. 668.

[16] Hayner v. Cowden, 27 Ohio St. 292, s. c. 22 Am. R. 303; Bennett v. Hyde, 6 Conn. 24, 27; Lewis v. Chapman, 19 Barb. 252, rev'd, on other grounds, in 16 N. Y. 369. Whether the evidence of wealth, &c., is to be directed to the time of the wrong or the time of the trial may, perhaps, depend on whether the true ground of allowing such evidence is punitory, or because of the influence supposed to attach to the utterance. See Bennett v. Hyde, 6 Conn. 24, 28.

[17] Distin v. Rose, 69 N. Y. 122, affi'g 7 Hun, 83. Compare Fero v. Ruscoe, 4 N. Y. 162.

successful effort to procure testimony in justification, unless shown to have been done in a manner aggravating the wrong.[1]

Special damage should be alleged in order to be proved;[2] and must be proved in case the words are not actionable *per se*.[3] The effect of the defamation on the conduct of a third person, may be proved by his own testimony,[4] but not by evidence of his declarations of his reason for an act, though made at the time.[5] The report causing special damage, must be connected with defendant by other evidence than its mere identity in substance with that which he published.[6]

18. *Defense: Explaining the words.*]—Defendant is entitled to have the whole of the alleged conversation or article put in evidence, and any document referred to in it.[7] If the article is in a newspaper, he is entitled to have read (as part of plaintiff's case) another part of the same newspaper, referred to in the article.[8] So defendant may show that, after uttering the words, he retracted or explained them in the same conversation, so as not to amount to slander, or that he adopted explanations made by another person, having the same effect.[9] If an apparent slander expressly refers to circumstances which show that no charge of crime was intended, defendant may prove those facts as giving the true import of the words as they were or ought to have been understood by the hearers;[10] but if the words were unequivocal, and intended and received as a charge of crime, evidence of facts which deprive the charge of that character, but which do not appear to have been known to the hearers, is not competent.[11] A previous article of plaintiff's, to which the matter complained of was an an-

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[1] Ormsby v. Douglass, 37 N. Y. 477.

[2] Backus v. Richardson, 5 Johns. 476; Tobias v. Harland, 4 Wend. 537; Rosc. N. P. 832.

[3] Brooker v. Coffin, 5 Johns. 188; Miller v. David, L. R. 9 C. P. 118, s. c. 43 L. J. C. P. 84; Shipman v. Burrows, 1 Hall, 399; Hallock v. Miller, 2 Barb. 630. And in that case must be shown to have occurred before suit brought. Keenholts v. Becker, 3 Den. 346.

[4] Law v. Scott, 5 Harr. & J. (Md.) 438.

[5] Ashley v. Harrison, 1 Esp. 48; Tilk v. Parsons, 2 C. & P. 201 (Best, C. J.). Whether loss of custom may be proved by general evidence of a falling off, without proof of loss of particular customers, compare Backus v. Richardson, 5 Johns. 476; Hartley v. Herring, 8 T. R. 130; Hallock v. Miller, 2 Barb. 630; Riding v. Smith, L. R. 1 Exch. Div. 91, 95, s. c. 16 Moak's Eng. 547.

[6] Sewall v. Catlin, 3 Wend. 291; 1 Sedgw. on D. 7th ed. 148. See Miller v. David, L. R. 9 C. P. 118, s. c. 43 L. J. C. P. 84.

[7] Folk. Stark. 720 [548], § 725; Morehead v. Jones, 2 B. Monr. 210.

[8] Folk. Stark. 720 [548], § 725. It is a rule of law essential to the liberty of the press, that in all actions for libel, every part of the paper must be read in order to collect its meaning. Best, C. J., Yrisarri v. Clement, 3 Bing. 432, 440.

[9] Trabue v. Mays, 3 Dana, 138.

[10] Williams v. Miner, 18 Conn. 464, 473; Smith v. Miles, 15 Vt. 245, Redfield, J. Compare Dorland v. Patterson, 23 Wend. 422. But he must show that the facts *could* not have amounted to a crime. It is not enough to show a doubt. Laine v. Wells, 7 Wend. 175; Case v. Buckley, 15 Id. 327.

[11] Williams v. Miner (above); Dempsey v. Paige, 4 E. D. Smith, 218; Van Akin v. Caler, 48 Barb. 58; Stone v. Clark, 21 Pick. 51, 54.

swer, may be put in evidence as explanatory of the subject, occasion, and intent of defendant's publication, although it be not legally a provocation or justification.[1]

19. *Privileged communication.*]—The relations between the parties to the communication may be shown by testimony or by their written contract, as most appropriate, without calling them as witnesses.[2] The manner as well as the occasion of the publication is admissible.[3] Where the privilege depends on the fairness of a report,[4] or relevancy of the communication to the proceeding,[5] the burden to show these facts is on defendant. If belief is relevant, defendant may testify to what was his belief at the time,[6] and to the communication previously made to him,[7] or to the conduct of plaintiff known to him,[8] which induced belief.

20. *Justification.*]—Truth is a complete bar,[9] but to be admissible as a bar, it must be pleaded in some form,[10] so that plaintiff may have notice of what he has to meet; if not pleaded, truth is admissible, if at all, only in mitigation, as repelling the inference of malice.[11]

If plaintiff has proved only a part of the words alleged, defendant may, if he choose,[12] confine his justification to such part,[13] but he may read the part abandoned by plaintiff to show the meaning of the part relied on.[14]

The justification must establish the substance of the charge justified,[15] though it need not be identical in letter and

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[1] Hotchkiss v. Lathrop, 1 Johns. 286.

[2] See Ormsby v. Douglass, 37 N. Y. 477.

[3] Folk. Stark. 684 [522], § 685.

[4] 1 Whart. Ev. 330, § 369.

[5] Marsh v. Ellsworth, 36 How. Pr. 532, s. c. 1 Sweeny, 52. And see Marsh v. Ellsworth, 50 N. Y. 309, affi'g 2 Sweeny, 589; Spooner v. Keeler, 51 N. Y. 527.

[6] See cases on page 620 of this vol.

[7] Lawler v. Earle, 5 Allen, 22.

[8] Bradley v. Heath, 12 Pick. (Mass.) 163.

[9] George v. Jennings, 4 Hun, 66. Otherwise, at common law, except in case of public officer or candidate. Commonwealth v. Morris, 1 Va. Cas. 175, s. c. 5 Am. Dec. 515.

[10] Huson v. Dale, 19 Mich. 17, s. c. 2 Am. R. 66; N. Y. Code Civ. Pro. § 536; Baker v. Wilkins, 3 Barb. 220.

[11] Huson v. Dale (above). For the conflicting views on this question, see Treat v. Browning, 4 Conn. 408, s. c. 10 Am. Dec. 156, and cas. cit.; Alderman v. French, 1 Pick. 1, s. c. 11 Am. Dec. 114, 127, and n.

[12] According to Palmer v. Haight, 2 Barb. 210, he must. If plaintiff has proved other words not alleged, defendant may justify those. Warne v. Chadwell, 2 Stark. 457.

[13] Stow v. Converse, 4 Conn. 17, 28.

[14] Gould v. Weed, 12 Wend. 12. See paragraphs 9 and 10.

[15] Whether proof beyond a reasonable doubt is required to justify a charge of crime is disputed: see cases collected on p. 495 of this vol. Also in the affirmative, Woodbeck v. Keller, 6 Cow. 118; Chalmers v. Shackell, 6 Carr. & P. 475; Dwinells v. Aikin, 2 Ty. Vt. 75; Mix v. Woodward, 12 Conn. 262, 288; Lanter v. M'Ewen, 8 Blackf. (Ind.) 495; Tucker v. Call, 45 Ind. 31. The just rule in cases of justification of ordinary charges of crime is that thirdly stated on p. 495. Greater cogency of proof is requisite to justify punishment than to justify accusation, unless the accu-

form.[1] The justification must be as broad as the charge, and if a statement of facts of aggravation[2] as distinguished from matter of opinion, is part of the charge,[3] the justification must include them. If a slander charged that an act was done in another jurisdiction, which is not a crime at common law, defendant should be prepared with evidence of the laws of the place where it was done.[4]

The record of plaintiff's conviction for the crime charged, if not appearing to be based at all on defendant's testimony, is presumptive evidence in support of a justification,[5] but not conclusive.[6] Evidence of plaintiff's declarations tending to show his disposition to an offense of a particular kind is not competent to show that a specific offense of that kind was committed.[7]

In justifying a charge of perjury, the proceedings, if matter of record, must be proved by producing the record.[8] A variance in the date is not material.[9] The fact that the witness testified is *prima facie* evidence that he was sworn.[10] Materiality of the testimony may be presumed where the charge implied it and was so understood.[11] The allegation of knowledge of falsity is material.[12]

To justify a charge merely of bad repute, it is not necessary to prove the existence of grounds for such repute.[13]

21. *Former adjudication.*]—A judgment in malicious prosecution is admissible as a bar to an action for defamation in the

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sation was made with actual malice, or was accompanied with a declaration of having proof. But, in those courts where proof beyond reasonable doubt is required, evidence falling short of that will avail in mitigation.

[1] Andrews v. Vanduzer, 11 Johns. 38; Stow v. Converse, 4 Conn. 17, 33. Thus, under a charge of stealing a thing specified, evidence of stealing an entirely different article is not admissible. Eastland v. Caldwell, 2 Bibb, 21. But a charge of stealing "hogs" is justified by proof of stealing a hog, for here would be no surprise. Barr v. Gaines, 3 Dana, 258. Adultery with A. cannot be proved under justification alleging adultery with B. (Mathews v. Davis, 4 Bibb, 173); and illicit intercourse with a lover before marriage cannot be proved under justification of charge of being a "whore." Sheehey v. Cokley, 43 Iowa, 183, s. c. 22 Am. R. 236. So evidence of an attempt to commit a crime is not competent in proof of justification alleging the committing of the crime. Chapman v. Ordway, 5 Allen, 593; Fero v. Ruscoe, 4 N. Y. 162.

[2] Helsham v. Blackwood, 11 C. B. 111.

[3] See Baker v. Wilkins, 3 Barb. 220.

[4] Bundy v. Hart, 46 Mo. 460, s. c. 2 Am. R. 525. Compare Langdon v. Young, 33 Vt. 136; Van Anken v. Westfall, 14 Johns. 233.

[5] Maybee v. Avery, 18 Johns. 352.

[6] Id.

[7] Gillis v. Peck, 20 Conn. 228; and see Barthelemy v. People, 2 Hill, 248.

[8] Dwinells v. Aiken, 2 Tyler (Vt.), 75. As to the mode of proof, see chapter XXIX. If before arbitrators, the submission is the best evidence of the jurisdiction of the arbitrators. Bullock v. Koon, 9 Cow. 30.

[9] Brooks v. Bemiss, 8 Johns. 455.

[10] Cass v. Anderson, 33 Vt. 182.

[11] Butterfield v. Buffum, 9 N. H. 156, 163.

[12] Spooner v. Keeler, 51 N. Y. 527. As to proof of the corrupt intent, see M'Kinly v. Rob, 20 Johns. 351; Hopkins v. Smith, 3 Barb. 599.

[13] Cooper v. Greeley, 1 Den. 347; compare Stone v. Cooper, 2 Id. 293.

same making of the charge,[1] but not to an action for repeating it after the termination of the prosecution.[2]

22. *Mitigation.*]—Under the new procedure, defendant may prove, in mitigation, facts which tend to disprove malice, although they do tend to prove the truth of the charge, and although he has not alleged the truth of the charge in his answer.[3] Circumstances in mitigation must be pleaded in order to be admissible.[4] Facts and circumstances which induced defendant to suppose the charge true when he made it, he may prove for the purpose of showing the absence of actual malice, provided they were actually known to him when he made the charge,[5] otherwise not.[6] The terms and conditions on which defendant directed the libellous matter to be published, are admissible in evidence on his behalf, as part of the *res gestæ*, showing his motives.[7] But evidence of confidential publication, though thus admissible, in mitigation, does not repel the legal presumption of malice.[8]

If the defamation only purported to be a publication of rumors, defendant may show in mitigation that such rumors really existed.[9] It is competent to show in mitigation, that the article complained of was copied, and published as copied, from another

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[1] Sheldon v. Carpenter, 4 N. Y. 579.

[2] Rockwell v. Brown, 36 N. Y. 207. See, also, page 652 of this vol.

[3] Bush v. Prosser, 11 N. Y. 347, rev'g 13 Barb. 221; Bisbey v. Shaw, 12 N. Y. 67. This is the New York Rule. N. Y. Code Civ. Pro. § 535. In some other jurisdictions the rule formerly contended for by part of the authorities is still followed, viz., that where a defendant does not justify he may mitigate damages in two ways only; first, by showing the general bad character of the plaintiff; and, second, by showing any circumstances which tend to disprove malice, but do not tend to prove the truth of the charge. Sheahan v. Collins, 20 Ill. 325, 328.

[4] Willover v. Hill, 72 N. Y. 36, 38. Compare Hotchkiss v. Porter, 30 Conn. 414, 420.

[5] Even though not legal evidence of its truth. Gilman v. Lowell, 8 Wend. 573.

[6] King v. Root, 4 Wend. 113, affi'g 7 Cow. 613. Notoriety can raise a presumption that he knew them. *Per* LEARNED, P. J. Hatfield v. Lasher, 17 Hun, 23, 27.

[7] Taylor v. Church, 8 N. Y. (4 Seld.) 452. So of his declarations to bystanders accompanying an act of defamation. Mezzara's Case, 2 City H. Rec. 113.

[8] Mason v. Mason, 4 N. H. 110.

[9] Skinner *ads.* Powers, 1 Wend. 451; Richards v. Richards, 2 M. & Rob. 557. But this does not repel the legal presumption of malice. Mason v. Mason, 4 N. H. 110.

For a convenient clue to the conflicting authorities on the admissibility of evidence of the previous existence of common report to the same effect as oral slander, see, in the *Negative*, Mapes v. Weeks, 4 Wend. 659; Graham v. Stone, 6 How. Pr. 15; Brown v. Orvis, Id. 376; Anthony v. Stephens, 1 Mo. 254, s. c. 13 Am. Dec. 497, and see note; Pease v. Shippen, 80 Penn. St. 513, s. c. 21 Am. R. 116, and cas. cit.; *Affirmative*, Case v. Marks, 20 Conn. 248, 251; Cook v. Barkley, 1 Pennington (N. J.), 169, s. c. 2 Am. Dec. 343; Calloway v. Middleton, 2 A. K. Marsh (Ky.), 372.

The admissibility of such evidence under these rulings, will often depend on whether it is offered to repel the legal implication of malice, or to rebut plaintiff's evidence of actual malice; whether it is offered in connection with other evidence tending to show that defendant in good faith published that which, upon reasonable grounds, he believed to be true; or whether it is offered on the issue of character; and whether the fact was specially pleaded, or the evidence offered under the general issue. In any case the evidence should show that this circulation was before defendant commenced the wrong. See Bailey v. Hyde, 3 Conn. 463, 466; Thompson v. Nye, 16 Q. B. 175.

paper,[1] or that defendant, before publication, had seen substantially the same matter in other newspapers, he believing it to be true;[2] but not another publication which did not influence his,[3] nor that plaintiff had recovered against another.[4]

Plaintiff's general character in the respect in which it was impugned by the charge, may be shown in mitigation of damages.[5] But if the words are actionable *per se*, and there is no attempt to prove special damage, it is not competent to show that plaintiff's reputation was not injured.[6]

When good faith is material, defendant may testify in his own behalf, to his knowledge or belief at the time,[7] and his intent in making the communication.[8]

The fact that slanderous words were spoken in the heat of passion, which was provoked by plaintiff, may be shown in mitigation,[9] but not in bar.[10] Neither the fact of defendant's enmity to plaintiff,[11] nor words and acts between one party and the father or guardian of the other, are alone competent evidence of provocation.[12]

A retraction, as distinguished from an attempt merely to construe in a different sense from that fairly imputable, is admissible in mitigation.[13]

23. *Plaintiff's character.*]—Defendant (although he may have pleaded[14] and given evidence in[15] justification) may show in mitigation,[16] that at and before the time of the defamation,[17] plaintiffs'

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[1] McDonald v. Woodruff, 2 Dill. C. Ct. 244; and the other paper will be admissible. Mullett v. Hulton, 4 Esp. 248.

[2] Hewett v. Pioneer-Press Company, 23 Minn. 178, s. c. 23 Am. R. 680. Compare Coleman v. Southwick, 9 Johns. 45, s. c. 6 Am. Dec. 253.

[3] Saunders v. Mills, 6 Bing. 213. Compare Talbutt v. Clark, 2 M. & Rob. 312.

[4] Creevy v. Carr, 7. Carr. & P. 64.

[5] Anthony v. Stephens, 1 Mo. 254, s. c. 13 Am. Dec. 497, and n.

[6] Titus v. Sumner, 44 N. Y. 266.

[7] Goodman v. Stroheim, 36 Super. Ct. (4 J. & S.) 216, s. p. 80 N. Y. 625. *Contra*, Lawyer v. Loomis, 3 Supm. Ct. (T. & C.) 393; (see 3 Id. 412).

[8] Compare pages 618, 620, 655 of this vol.

[9] Jauch v. Jauch, 50 Ind. 135, s. c. 19 Am. R. 699; Sheffill v. Van Deusen, 15 Gray, 485. For which see page 650 of this vol. For provocation of libel, see Child v. Homer, 13 Pick. 503; Laughton v. Bishop of Sodor, &c. L. R. 4 P. C. 495, s. c. 4 Moak's Eng. 162; Finnerty v. Tipper, 2 Camp. 72; Maynard v. Beardsley, 7 Wend. 560, affi'g 4 Id. 336.

[10] Mousler v. Harding, 33 Ind. 176, s. c. 5 Am. R. 195. The limits of evidence of provocation are the same as in case of assault.

[11] Craig v. Catlet, 5 Dana, 323.

[12] Underhill v. Taylor, 2 Barb. 348.

[13] Hotchkiss v. Oliphant, 2 Hill, 510.

[14] N. Y. Code Civ. Pro. § 535.

[15] Id.; Hamer v. McFarlin, 4 Den. 509.

[16] Whether this may be done unless bad character is pleaded, see *negative*, 1 Whart. Ev. 67, § 53; Willover v. Hill, 72 N. Y. 36, 38; *affirmative*, Anon. 8 How. Pr. 434; Parkhurst v. Ketchum, 6 Allen, 406.

The value, with the jury, of evidence of plaintiff's bad character is generally in its tending (with evidence indicating defendant's good faith), to show the absence of malice, rather than in tending to show that plaintiff has not been injured.

[17] Hamer v. McFarlin (above).

character was generally bad,[1] or was bad in respect to the general nature and subject-matter of the offense charged.[2]

24. *Mode of proving character.*]—The legal meaning of "character," as used in the law of defamation, is reputation. It is proved by a witness, who testifies (1) to a residence in the community or neighborhood of plaintiff, such as to satisfy the court that he has reasonable means of knowing plaintiff's character; (2) that he knows the general character of the plaintiff,[3] or that he knows his character in respect to the subject-matter involved; and (3) that such character is bad.

For this purpose neither particular reports,[4] nor the particulars giving rise to bad reputation,—such as a specific offense,[5] or consorting with criminals,[6]—are admissible except as brought out by cross-examination as showing foundation of bad character.[7] Bad character, subsequent to the defamation, is inadmissible.[8]

Character many years[9] before the time in question is not irrelevant, for shown once to exist it is presumed to continue;[10] but where the period is very remote, it is in the discretion of the court to require some connection to be shown between the present and former character.[11] The mode of proving business credit has already been stated.[12]

25. *Rebuttal.*]—If defendant has given evidence of plaintiff's bad character,[13] plaintiff may rebut with contrary evidence.[14] Evi-

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[1] Hamer v. McFarlin, 4 Den. 509; Paddock v. Salisbury, 2 Cow. 811; Eastland v. Caldwell, 2 Bibb (Ky.). 21.

[2] Treat v. Browning. 4 Conn. 403, s. c. 10 Am. Dec. 156, and cas. cit.; Clark v. Brown, 116 Mass. 504; REDFIELD, J. in 1 Am. L. Reg. N. S. 171, note. *Contra*, Hatfield v. Lasher, N. Y. Ct. of App. June, 1880. It is not necessary to show reputation of having committed the precise legal offense. Bridgman v. Hopkins, 34 Vt. 532, s. c. 1 Am. L. Reg. N. S. 168.

[3] See People v. Mather, 4 Wend. 229. The omission of this preliminary question is not fatal if objection is not made. Senter v. Carr, 15 N. H. 351. It is character in the neighborhood where the person resides. Conkey v. People, 1 Abb. Ct. App. Dec. 418.

[4] Wolcott v. Hall, 6 Mass. 514, s. c. 4 Am. Dec. 173.

[5] A party must defend his reputation in general, but not in detail; he cannot be expected to try particular facts not in issue. Peterson v. Morgan, 116 Mass. 350.

[6] Lamos v. Snell, 6 N. H. 413.

[7] Sawyer v. Eifert, 2 Nott & McCord (S. C.), 511, s. c. 10 Am. Dec. 633.

[8] Even though it could not have been caused by a belief of the charge made by defendant. Douglass v. Tousey, 2 Wend. 352.

[9] So held of the lapse of ten years. Parkhurst v. Ketchum, 6 Allen, 406. So held of twelve years. Tompkins v. Wadley, 3 Supm. Ct. (T. & C.) 424, 428.

[10] See Graham v. Chrystal, 2 Abb. Ct. App. Dec. 263.

[11] Tompkins v. Wadley (above); Lake v. People, 1 Park. Cr. 495.

[12] P. 617 of this vol.

[13] Inman v. Foster, 8 Wend. 602.

[14] According to some authorities he may do this when defendant, without giving evidence as to character, has given evidence of the truth of a charge of a criminal offense whether in mitigation, or in justification (Charlton v. Walton, 6 Carr. & P. 385; Harding v. Brooks, 5 Pick. 244; REDFIELD, J. in 1 Am. L. Reg. N. S. 171); at least if the evidence of truth has been only presumptive (Sheehey v. Cokley, 43 Iowa, 188, s. c. 22 Am. R. 236).

Contra, Houghtaling v. Kilderhouse, 1 N. Y. 530; Shipman v. Burrows, 1 Hall,

dence of bad character in rebuttal of evidence of good character is equally confined to reputation.[1] An attack by proof of specific acts, does not let in evidence of general good character.[2]

399; Matthews v. Huntley, 9 N. H. 146. Compare Sprague v. Craig, 51 Ill. 288, 294; Lecky v. Bloser, 24 Penn. 401, 407.

[1] Reg. v. Rowton, 11 Jur. N. S. 325.

[2] Ziter v. Merkel, 24 Penn. St. 408; Bamfield v. Massey, 1 Campb. 460; Pratt v. Andrews, 4 N. Y. 493.

CHAPTER XLIV.

ACTIONS FOR BREACH OF PROMISE OF MARRIAGE.

1. Mutual promises.
2. Letters.
3. Affection.
4. Breach.
5. Damages.
6. *Defense.*
7. — justification of breach.
8. — mitigation.

1. *Mutual Promises.*]—Plaintiff must show mutual promises,[1] but no particular form of words nor even any express promise is necessary.[2] A common intent, mutually accepted is enough; and this may be inferred from declarations and accepted attentions such as usually characterize an engagement of marriage.[3] Neither evidence of courtship[4] nor evidence of mutual attachment[5] is alone enough to prove mutual promise; but these facts are relevant, and, in connection with other evidence, may be enough.[6] The promise on the part of the woman may be inferred from slighter circumstances than would suffice to show that on the part of the man.[7]

The parties' conversations on the subject of marriage, though some time prior to the alleged promise, are admissible as tending to show their relation at the time of the promise.[8] So, defendant's declarations to plaintiff that he would make a good home for her, are admissible.[9]

Plaintiff's declarations to a third person, in the absence of defendant, that defendant had made a promise of marriage, are not competent in her favor[10] to prove defendant's promise, but they may be competent as tending to prove plaintiff's.[11] Plaintiff's

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[1] Kelly v. Riley, 106 Mass. 339, s. c. 8 Am. R. 336.

[2] Homan v. Earle, 53 N. Y. 267; affi'g 13 Abb. Pr. N. S. 402, and cases cited; Whightman v. Coates, 15 Mass. 1.

[3] Id.; Id.; Rosc. N. P. 468.

[4] Walmsley v. Robinson, 63 Ill. 41, s. c. 14 Am. R. 111; and see Cates v. McKinney, 48 Ind. 562, 567.

[5] Lecky v. Bloser, 24 Penn. St. 401.

[6] Southard v. Rexford, 6 Cow. 254; Hubbard v. Bonesteel, 16 Barb. 360; Hotchkiss v. Hodge, 38 Barb. 117, and cases cited.

[7] Such, for instance, as her making no objections at the time of the offer, and from her receiving defendant's visits as a suitor. Wells v. Padgett, 8 Barb. 323, and cases cited; Rosc. N. P. 468.

[8] Hook v. George, 108 Mass. 324, 331.

[9] Button v. McCauley, 1 Abb. Ct. App. Dec. 282, s. c. 5 Abb. Pr. N. S. 29, rev'g 38 Barb. 413.

[10] Walmsley v. Robinson, 63 Ill. 41, s. c. 14 Am. R. 111. Nor is that of her parent. Lawrence v. Cooke, 56 Me. 187, 195.

[11] See Cates v. McKinney, 48 Ind. 562, 566, s. c. 17 Am. R. 768.

acts of preparation for the wedding,[1] and her declarations made as part of the *res gestæ* of such acts, and showing the matrimonial intent, are competent in her favor.[2] Such declarations are competent evidence of a promise in her favor, although made in defendant's absence.[3]

The time of the promise is not material;[4] but the time fixed by the promise, if any, for its performance, is material.[5] A condition or contingency expressed is material;[6] unless it be such as is implied by law.[7]

2. *Letters.*]—The fact of correspondence is competent without producing the letters.[8] To prove the contents the originals must be produced, or be accounted for to let in secondary evidence. Destruction may be explained.[9] Plaintiff's putting in evidence one or more of defendant's letters does not require her to put in others;[10] and putting in evidence his letters does not require her to put in hers, nor raise a presumption that they contain evidence against her.[11] The other side may read the connected parts of the correspondence. But one who has put in evidence, properly, a letter of the other, which shows that it was written in answer to a previous letter, may also put in the previous one as tending to explain the answer.[12] A letter written by plaintiff's parent with her knowledge and without dissent, is competent against her, though she would not be answerable for particular expressions in it.[13]

The rules for proving handwriting have already been stated.[14]

3. *Affection.*]—Witnesses who are shown to have had sufficient opportunities of observation,[15] may testify whether or not in their opinion, one party was sincerely attached to the other.[16] The engagement having been proved, plaintiff's declarations of present emotion of affection and happiness, as distinguished from

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[1] Wilcox v. Green, 23 Barb. 639.

[2] Id.; unless made after rupture. Wetmore v. Mell, 1 Ohio St. 26.

[3] Lecky v. Bloser, 24 Penn. St. 401, 406.

[4] Fowler v. Martin, 1 Supm. Ct. (T. & C.) 377. A promise to marry generally is, in law, a promise to marry within a reasonable time; and although an admission of a special promise to marry at a particular time should be proved in evidence, it may be left to a jury to infer from the circumstances, a more general promise. Potter v. Deboos, 1 Stark. 82; Phillips v. Crutchley, 1 Moore & P. 239; Rosc. N. P. 468.

[5] Martin v. Patton, 1 Litt. (Ky.) 233.

[6] Conrad v. Williams, 6 Hill, 444; Rosc. N. P. 469.

[7] Waters v. Bristol, 26 Conn. 398, 403.

[8] Conaway v. Shelton, 3 Ind. 334.

[9] Fowler v. Martin, 1 Supm. Ct. (T. & C.) 377; and see p. 390 of this vol. note 2.

[10] Gray, J., Stone v. Sanborn, 104 Mass. 319, s. c. 6 Am. R. 238.

[11] Law v. Woodruff, 18 Ill. 399.

[12] Trischet v. Hamilton Ins. Co. 14 Gray, 456; Strong v. Strong, 1 Abb. Pr. N. S. 233.

[13] Rosc. N. P. 470.

[14] P. 393, &c. of this vol. Hoitt v. Moulton, 21 N. H. (1 Fost.) 586.

[15] This is essential. Tompkins v. Wadley, 3 Supm. Ct. (T. & C.) 424.

[16] M'Kee v. Nelson, 4 Cow. 355; Sprague v. Craig, 51 Ill. 288.

narratives of the past; and, its breach having been proved, her similar declarations of pain and distress; are competent in her favor upon principles already stated.[1]

4. *Breach.*]—Breach may be proved, either by evidence of another marriage by defendant, making performance impossible;[2] or by an express breaking off of the engagement;[3] or by circumstantial evidence.[4] Evidence of defendant's declarations, that he never intended to marry the plaintiff, is admissible.[5] Plaintiff need not prove a tender of marriage on her part.[6] Slight evidence of a request is sufficient,[7] when any is necessary.[8]

5. *Damages.*]—In enhancement of damages, the pecuniary circumstances of the defendant,[9] the announcement of engagement, and the advanced preparations for wedding at the time of breach, are competent;[10] and an unsuccessful attempt by defendant, either in pleading[11] or in evidence,[12] to rest his defense in whole or in part on charges of bad character or improper conduct on the part of plaintiff, is competent in aggravation.[13]

Seduction under the promise, if pleaded,[14] is competent in aggravation of damages.[15] Loss of health is special damage, not admissible unless alleged.[16]

6. *Defense.*[17]]—To invoke the statute of frauds,[18] it must appear that the terms of the promise were to the effect that the

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[1] P. 599 of this vol.; SWAYNE, J., in 9 Wall. 405.

[2] Sheahan v. Barry, 27 Mich. 217, 223; Rosc. N. P. 469; Frost v. Knight, L. R. 7 Ex. 111, rev'g L. R. 5 Ex. 322.

[3] Cherry v. Thompson, L. R. 7 Q. B. 573.

[4] Hubbard v. Bonesteel, 16 Barb. 360.

[5] Green v. Spencer, 3 Mo. 225, 227.

[6] Johnson v. Caulkins, 1 Johns. Cas. 116; Willard v. Stone, 7 Cow. 22.

[7] Kniffen v. McConnell, 30 N. Y. 285; Green v. Spencer, 3 Mo. 225, 228.

[8] Martin v. Patton, 1 Litt. (Ky.) 233.

[9] Lawrence v. Cooke, 56 Me. 187, 193; as distinguished from those of his family. Miller v. Rosier, 31 Mich. 475, 478.

[10] Reed v. Clark, 47 Cal. 194, 199.

[11] Thorn v. Knapp, 42 N. Y. 474.

[12] Kniffen v. McConnell, 30 N. Y. 285.

[13] To the contrary, unless bad faith is shown, are Powers v. Wheatley, 45 Cal. 113; Reed v. Clark, 47 Cal. 194, 203. And this is the rule now recognized in libel. Page 667 of this vol.

[14] Otherwise not admissible if the statute gives an action for seduction alone. Cates v. McKinney, 48 Ind. 562, s. c. 17 Am. R. 768.

[15] Kniffen v. McConnell, 30 N. Y. 285; Kelley v. Riley, 106 Mass. 339; Sheahan v. Barry, 27 Mich. 217; Green v. Spencer, 3 Mo. 225; Sauer v. Schulenberg, 33 Md. 288, s. c. 3 Am. R. 174, disapproving decisions in Pennsylvania and Kentucky; see Johnson v. Smith, 3 Pitts. 184.

[16] Bedell v. Powell, 13 Barb. 183.

[17] Infancy of defendant a defense. Fiebel v. Oberaky, 13 Abb. Pr. N. S. 402, n. Precontract of plaintiff no defense. Roscoe N. P. 470; Roper v. Clay, 18 Mo. 383. As to previous marriage of either party, see Paddock v. Robinson, 63 Ill. 99, s. c. 14 Am. R. 112; Cover v. Davenport, 1 Heisk. 368, s. c. 2 Am. R. 706; Kelley v. Riley, 106 Mass. 339, 342.

[18] 2 N. Y. R. S. 135, § 2; Nichols v. Weaver, 7 Kans. 373, 377.

marriage was not to be performed within one year.[1] A release or exoneration of defendant from his promise may be implied from the conduct and demeanor of the parties.[2]

7. —*justification of breach.*]—The presumption is that before engagement the parties satisfied themselves as to each other's character, and that all objection to previous loose conduct was waived.[3] Subsequent unchastity on plaintiff's part,[4] or previous unchastity affirmatively shown to have been unknown to plaintiff at the time of the engagement,[5] is competent. Otherwise of mere rumors or repute of unchastity.[6]

8. — *mitigation.*[7]]—Any misconduct of plaintiff after breach, showing that she would be an unfit companion in married life, is competent in mitigation.[8] The burden is on plaintiff to show defendant's connivance in such misconduct, if it be relied on.[9] To show defendant's good faith, he may prove the objection of parents as a ground of breach.[10] If plaintiff has given evidence of defendant's wealth, defendant may show that property imputed to him he had lost before the breach, or had lost by involuntary transfer after breach, upon contracts made before the breach.[11] Evidence of poverty at the time of trial is irrelevant.[12] If plaintiff has proved a reason assigned by defendant for breach, defendant may prove its truth if it tends to mitigate damages.[13] Declarations of plaintiff disavowing affection and all other than mercenary motives, are admissible, if made before the commencement of the action, though after breach,[14] but not if made after commencement of action.[15]

Plaintiff's general character (that is, reputation) as to virtue and sobriety, is relevant on the question of damages;[16] but evi-

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[1] Lawrence v. Cooke, 56 Me. 187, 193.

[2] Roscoe N. P. 470.

[3] Sprague v. Craig, 51 Ill. 288, 295.

[4] Id. Unless seduction by defendant has been shown, and breach without assigning just grounds, in which case other incontinence discovered after breach goes only in mitigation and not in bar. Sheahan v. Barry, 27 Mich. 217, 222. Bad character of a relative is no bar. Sherman v. Rawson, 102 Mass. 395, 400.

[5] Irving v. Greenwood, 1 Carr. & Payne, 350.

[6] Boies v. McAllister, 12 Me. (3 Fairf.) 308.

[7] According to Button v. McCauley, 1 Abb. Ct. App. Dec. 282, s. c. 5 Abb. Pr. N. S. 29, rev'g 38 Barb. 413, and Tompkins v. Wadley, 3 Supm. Ct. (T. & C.) 424, 430, mitigating circumstances may be proved without being pleaded. But compare the rule in slander and libel; p. 672 of this vol.

[8] Button v. McCauley, 1 Abb. Ct. App. Dec. 282, s. c. 2 Abb. Pr. N. S. 29, rev'g 38 Barb. 413; Palmer v. Andrews, 7 Wend. 142.

[9] Id.; Kniffen v. McConnell, 30 N. Y. 285.

[10] Irving v. Greenwood, 1 Carr. & Payne, 350; Johnson v. Jenkins, 24 N. Y. 252.

[11] Sprague v. Craig, 51 Ill. 288, 291.

[12] Id.

[13] Johnson v. Jenkins (above).

[14] Miller v. Rosier, 31 Mich. 475, 477.

[15] Miller v. Hayes, 34 Iowa, 496, s. c. 11 Am. R. 154.

[16] Johnson v. Caulkins, 1 Johns. Cas. 116; Willard v. Stone, 7 Cow. 22; Palmer v. Andrews, 7 Wend. 142. These cases allow evidence of bad repute after the

dence of bad character relied on in bar must show charges well founded,[1] and unknown to plaintiff when he made the engagement.

The mode of proving character has been already stated.[2]

Where chastity and not mere reputation is in issue, specific acts of unchastity may be proved.[3]

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breach, but it is certainly otherwise in case of seduction. Boynton v. Kellogg, 3 Mass. 189, 192. Compare the rule in slander and libel, p. 674 of this vol.

[1] Roscoe N. P. 470.

[2] See p. 674 of this vol.

[3] Ford v. Jones, 62 Barb. 484.

CHAPTER XLV.

ACTIONS FOR SEDUCTION OR ENTICING AWAY.

1. Husband's action for enticing.
2. Master's action.
3. Parent's action.
4. Seduction.
5. Loss of service.
6. Good faith.
7. Character.
8. *Defense.*

1. *Husband's action.*]—In a husband's action for enticing away, as distinguished from an action for criminal conversation,[1] direct proof of formal marriage is not necessary. Evidence of cohabitation and repute, and of defendant's admissions that plaintiff and his alleged wife were married, is sufficient.[2] If it appear that defendant aided her to leave, at her request, upon her complaint of ill-usage, the burden of proof is upon plaintiff to prove an unlawful motive or design on defendant's part.[3] If defendant is the father of the wife, the presumption is that he acted from paternal affection rather than from improper motives.[4]

2. *Master's action.*]—To recover for enticing from service, it must appear that the servant was at the time in plaintiff's actual service, and that defendant's inducement was the moving cause of desertion.[5] There must be some evidence of defendant's knowledge of the relation.[6]

3. *Parent's action.*]—The rules as to proving parentage are elsewhere stated.[7] Proof of the slightest degree of service is sufficient,[8] provided it included the time of the wrong,[9] or some part of it.[10] Where there is no evidence of actual service, evidence that the parent's marriage was void is competent, to rebut

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[1] See next chapter.

[2] Scherpf v. Szadeczky, 1 Abb. Pr. 366, s. c. 4 E. D. Smith, 110; see page 79 of this vol.

[3] Barnes v. Allen, 1 Abb. Ct. App. Dec. 111, s. c. 1 Keyes, 390, rev'g 30 Barb. 663; see, also, Bennett v. Smith, 21 Barb. 439; Schuneman v. Palmer, 4 Barb. 225.

[4] Hutcheson v. Peck, 5 Johns. 196.

[5] Caughey v. Smith, 47 N. Y. 244; and see Bixby v. Dunlap, 56 N. H. 456, s. c. 22 Am. R. 475, and note.

[6] Id.; and see Stuart v. Simpson, 1 Wend. 377.

[7] Pages 382 and 87 to 89 of this vol.

[8] Moran v. Dawes, 4 Cow. 412; Badgley v. Decker, 44 Barb. 577, and cases cited. Compare Blanchard v. Ilsley, 120 Mass. 487, s. c. 21 Am. R. 535; Kennedy v. Shea, 110 Mass. 147, s. c. 14 Am. R. 584.

[9] Hedges v. Tagg, L. R. 7 Ex. 283, s. c. 2 Moak's Eng. 679.

[10] See Evans v. Walton, L. R. 2 C. P. 615.

a presumption of actual service by showing that the plaintiff was not legally entitled to her services; and in mitigation of damages.[1]

4. *Seduction.*]—The circumstances under which the female was seduced, and the means used for effecting it, and corrupting her mind, may be shown.[2] But promise of marriage cannot be proven,[3] unless, perhaps, when offered for a special purpose,—as, for instance, to rebut evidence of a father's negligent exposure of his daughter.[4]

5. *Loss of service.*]—There must be some evidence from which loss of service may be inferred.[5] In the case of seduction, either pregnancy,[6] or impairment of health,[7] is enough. Procuring an abortion is competent in aggravation.[8]

6. *Good faith.*]—Defendant, to show good faith, want of knowledge, &c., may prove declarations made by the wife or servant at the time the defendant received him or her,[9] or at the time of alleged ill treatment,[10] stating apparent good cause for leaving plaintiff. The fact that he did not inquire of plaintiff as to the truth of the reports of cruelty on which he acted is only a circumstance for the jury.[11]

7. *Character.*]—The character of the parent,[12] and that of the house in which the child, being a minor, resided with her parent,[13] are irrelevant.

Evidence of the girl's previous good character for chastity is not competent in the first instance as part of plaintiff's case,[14] except as it may legitimately bear on the value of services.[15]

Defendant, in mitigation of damages, may show the girl's previous bad character for chastity,[16] and specific instances of previous lascivious conduct on her part;[17] but neither, subsequent to

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[1] Howland v. Howland, 114 Mass. 517, s. c. 19 Am. R. 381.
[2] Bracy v. Kibbe, 31 Barb. 273; Kennedy v. Shea, 110 Mass. 147, s. c. 14 Am. R. 584.
[3] Clark v. Fitch, 2 Wend. 459; Gillet v. Mead, 7 Id. 193; Brownell v. McEwen, 5 Den. 367. *Contra*, White v. Campbell, 13 Gratt. 573; Mudd v. Clements, 3 Cranch C. Ct. 3; and see Rosc. N. P. 576.
[4] Whitney v. Elmer, 60 Barb. 250.
[5] Hewit v. Prime, 21 Wend. 79, and cases cited.
[6] Id.; Ingerson v. Miller, 47 Barb. 47.
[7] Abrahams v. Kidney, 104 Mass. 222, s. c. 6 Am. R. 220; White v. Nellis, 31 N. Y. 405.
[8] White v. Murtland, 71 Ill. 250, s. c. 22 Am. R. 100.
[9] Caughey v. Smith, 47 N. Y. 244.
[10] Barnes v. Allen, 1 Abb. Ct. App. Dec. 111, s. c. 1 Keyes, 390, rev'g 30 Barb. 668.
[11] Smith v. Lyke, 13 Hun, 204.
[12] Dain v. Wyckoff, 18 N. Y. 45.
[13] Kenyon v. People, 26 N. Y. 203, aff'g People v. Kenyon, 5 Park. Cr. 254.
[14] Bracy v. Kibbe, 31 Barb. 273; 1 Whart. Ev. 65, § 50.
[15] 1 Whart. Ev. 65, § 51.
[16] 1 Whart. Ev. 65, § 51.
[17] Bracy v. Kibbe, 31 Barb. 273; Dodd v. Norris, 3 Campb. 519.

his seduction of her. Defendant is not bound by her answers as to such matters on cross-examination.[1] If defendant gives general evidence of bad character for chastity, before the alleged wrong, plaintiff may rebut it by general evidence of good character.[2]

8. *Defense.*]—Plaintiff's consent or connivance is not admissible as a bar, unless pleaded.[3] An offer of marriage is not admissible in mitigation.[4]

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[1] Hogan v. Cregan, 6 Robt. 188.
[2] Pratt v. Andrews, 4 N. Y. 493, 495, and cases cited.
[3] Travis v. Barger, 24 Barb. 614; but see Chapter on Crim. Con.
[4] Ingersoll v. Jones, 5 Barb. 661, especially if made after suit brought. White v. Murtland, 71 Ill. 250, s. c. 22 Am. R. 100.

CHAPTER XLVI.

ACTIONS FOR CRIMINAL CONVERSATION.

1. Competency of witnesses.
2. Marriage.
3. Affection and domestic happiness.
4. Criminal intercourse.
5. Loss of consortship: Damages.
6. Defenses.
7. Character.

1. *Competency of witnesses.*]—Plaintiff is a competent witness for either party,[1] subject to the restrictions as to disclosing confidential communications already stated.[2] His wife is not a competent witness for him,[3] but is now competent for defendant, with somewhat similar restrictions.[4]

Defendant is a competent witness for plaintiff, subject to his privilege from criminating himself[5] in those jurisdictions where adultery is a crime. He is competent as a witness on his own behalf; but, if called, it is usually with the effect of waiving his privilege on cross-examination.[6]

2. *Marriage.*]—Marriage must be proved by direct evidence.[7] Permanent separation by a valid agreement, so that the husband

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[1] He was incompetent at common law, on grounds of public policy independent of his incompetency as a party. Rex v. Luffe, 8 East, 193; Dennison v. Page, 29 Penn. St. 420, 423; Ratcliff v. Wales, 1 Hill, 63. And in those States where the statute only removes the incompetency of parties, it is the better view that the husband is still incompetent in his own favor in this class of actions. Manchester v. Manchester, 24 Vt. 649; Dwelly v. Dwelly, 46 Me. 377; Hasbrouck v. Vandervoort, 9 N. Y. 153; p. 165 of this vol. note. On the injustice of admitting the one when the other cannot be admitted, see Baylis v. Baylis, L. R. 1 Pr. & D. 395; Conradi v. Conradi, Id. 514; Harding v. Harding, 4 Sw. & Tr. 145, 149; Blackborne v. Blackborne, L. R. 1 Pr. & D. 563; Mordaunt v. Mordaunt, L. R. 2 Pr. & D. 109, 124.

[2] Page 165 of this vol.

[3] Page 165 of this vol.; Hicks v. Bradner, 2 Abb. Ct. App. Dec. 362; Rea v. Tucker, 51 Ill. 110. Unless after divorce. Ratcliffe v. Wales, 1 Hill, 63; Dickerman v. Graves, 60 Mass. (6 Cush.) 308.

[4] Page 165 of this vol.

The rule as to the competency of declarations of the wife is stated at p. 166 of this vol.

[5] For the general rule as to the privilege, see p. 620 of this vol.

[6] See Boardman v. Boardman, L. R. 1 Pr. & D. 233; Tappan v. Butler, 7 Bosw. 480.

[7] The mode of proof is that stated at pp. 79 and 80 of this vol. Hutchins v. Kimmell, 31 Mich. 126, s. c. 18 Am. R. 164; Birt v. Barlow, 1 Dougl. 171; Hemmings v. Smith, 4 Id. 33; Nixon v. Brown, 4 Blackf. 157. *Contra*, as to husband's competency, Dann v. Kingdom, 1 Supm. Ct. (T. & C.) 492; but see N. Y. Code Civ. Pro. §§ 829–31, removing incompetency. Where ceremonies of marriage in a foreign country, with cohabitation following it, are shown by official certificates duly authenticated, it is presumptively a valid marriage, and it is not necessary to prove the foreign law of marriage. Hutchins v. Kimmell (above).

had no right to the society and assistance of his wife at the time of the alleged intercourse, is a bar.[1] Unless the separation is legal and permanent, it goes in mitigation only.[2]

3. *Affection and domestic happiness.*]—To show the affection and domestic happiness of the husband and wife, it is competent to prove expressions of affection and regard used by either in the presence of the other,[3] and the wife's manner of speaking and writing of her husband even when absent from him;[4] their letters to each other.[5] The opinions of witnesses, who are shown to have had sufficient means of observation, as to the affection of the wife for her husband,[6] the happiness of the marriage,[7] &c., are competent within the same limits that evidence of declarations would be.[8] Evidence of the declarations, letters, &c., or manner of the *husband*, should be confined to the period before his first suspicions of his wife. Evidence of those of the *wife* should be confined to the period before her intimacy with the defendant.[9] The date of a letter is not, for this purpose, sufficient *prima facie* evidence of the time when it was written.[10]

4. *Criminal intercourse.*]—Though the gist of the action is the loss of consortship,[11] criminal intercourse, being alleged, must be proved.[12] Under an allegation general as to time, illicit intercourse at any time within the period is admissible, but in case of surprise an adjournment may be allowed.[13]

Rules as to the mode of proving adulterous intercourse, and the admissibility of the evidence under the issue, and the limits of time, are the same as in actions for divorce, subject to the qualifications stated in this chapter. Neither a judgment of divorce against the wife, nor the confessions of the wife are competent against plaintiff, except in the cases stated at p. 166 of this vol.

5. *Loss of consortship:*[14] *Damages.*]—Evidence of defendant's

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[1] Weedon v. Timbrell, 5 T. R. 357, as explained in Chambers v. Caulfield, 6 East, 244; Graham v. Wigley, 2 Bright's H. & W. 352; and reiterated in Harvey v. Watson, 7 Mann. & G. 644; and see Fry v. Derstler, 2 Yeates (Penn.), 278.

[2] Buller N. P. 27; 1 Selw. N. P. 10.

[3] Edwards v. Crock, 4 Esp. 39; Preston v. Bowers, 13 Ohio St. 1.

[4] Jones v. Thompson, 6 Carr. & P. 415; Willis v. Bernard, 8 Bing. 376, s. c. 5 Carr. & P. 342.

[5] Trelawney v. Coleman, 1 Barnew. & Ald. 90; Edwards v. Crock (above).

[6] Trelawney v. Coleman, 2 Stark. 191.

[7] Bell v. Bell, 1 Sw. & Tr. 565.

[8] Bowie v. Maddox, 29 Geo. 285.

[9] Cases in notes above; Wilton v. Webster, 7 Carr. & P. 198.

[10] Houliston v. Smyth, 2 Carr. & P. 22; Trelawney v. Coleman, 1 Barnew. & Ald. 90; Edwards v. Crock (above); s. p. p. 13 of this vol.

[11] Weedon v. Timbrell, 5 T. R. 357.

[12] Winsmore v. Greenbank, Willes, 577, 581; Wood v. Matthews, 47 Iowa, 409, s. c. 8 Reporter, 143.

[13] Coddington v. Coddington, 4 Sw. & Tr. 63.

[14] As to causes of separation, see p. 179 of this vol.

wealth is not competent.[1] The pecuniary circumstances of plaintiff are not relevant.[2]

The means used by defendant to obtain an intimacy[3] and corrupt the mind[4] of the wife, are competent, and the situation of plaintiff's children who were dependent on the wife's care.[5]

6. *Defenses.*]—Under the general issue may be proved anything which goes to show that plaintiff never had a cause of action, by negativing any matter of fact alleged or necessary to be proved (as distinguished from avoiding conclusions of law), *e. g.*, that he was never married, that the intercourse alleged was by his license or connivance, that his delay to sue or disavowals of a cause of action throw suspicion on his case; as well as all matters merely in mitigation, such as evidence of his or his wife's bad character, of his unhappy domestic life, of the degree of suffering, &c. And, on the other hand, any matter which confesses and avoids the cause of action,—*e. g.*, condonation, release, a former recovery for the same cause, &c.,—must be pleaded in order to be admissible.[6] Plaintiff's consent to the adultery at the time may be proved in bar. In mitigation may be proved, the husband's gross negligence or inattention to the conduct of his wife with respect to the defendant;[7] any circumstances tending to controvert the affection and domestic happiness of the husband and wife before the alleged wrong;[8] or that he had put away his wife and charged her with misconduct before the alleged intercourse.[9]

Condonation with the wife is a mitigation, and throws great doubt on any testimony of the husband to guilt,[10] if not a bar.[11]

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[1] James v. Biddington, 6 Carr. & P. 589, followed in Kniffen v. McConnell, 30 N. Y. 285, 289; Bell v. Bell, 1 Sw. & Tr. 569; Wilson v. Leonard, 5 Ir. Jur. O. S. 101. Except in those jurisdictions were punitory damages are allowed to be enhanced according to the means of the wrong-doer. Peters v. Lake, 66 Ill. 206, s. c. 16 Am. R. 593.

[2] Norton v. Warner, 9 Conn. 172. *Contra*, Thompson v. Glendenning, 1 Head (Tenn.), 297; Massey v. Headford, Phila. P. Byrne, 1804; Rea v. Tucker, 51 Ill. 110.

[3] Massey v. Headford (above).

[4] Campbell v. Hook, Major Hook's Defense, Lond. J. Murray, 1793.

[5] See Bedford v. McKowl, 3 Esp. 119.

[6] This is the common law rule, and in harmony with the general principles of pleading under the Code established in McKyring v. Bull, 16 N. Y. 297. To the same effect, in part, Travis v. Barger, 24 Barb. 614. Compare the rulings in *Slander and Libel* (p. 659 of this vol.) and in *Breach of Promise* (p. 676 of this vol.).

[7] Duberley v. Gunning, 4 T. R. 657, approved and followed in Bunnell v. Greathead, 49 Barb. 106. To the same effect is the unreported case of Trevannion v. Danbuz, mentioned in 1 Steph. N. P. 7; Lowe v. Massey, 62 Ill. (Freem.) 47; Smith v. Masten, 15 Wend. 270.

[8] Smith v. Masten, 15 Wend. 270; Palmer v. Crook, 7 Gray, 418; Coleman v. White, 43 Ind. 429. And, for this purpose, may show specific acts of cruelty. Narracott v. Narracott, 3 Sw. & Tr. 408. The wife's declarations are competent for this purpose within limits already stated. Paragraph 3, and page 179 of this vol.

[9] Winter v. Henn, 4 Carr. & P. 494.

[10] State v. Marvin, 35 N. H. 22.

[11] On this question, see, in the *affirmative*, Aiken v. Macree, 2 Shaw's Dig. 842, Pl. 706; Norris v. Norris, 30 L. J. Mat. Cas. 111; Adams v. Adams, L. R. 1 Pr. & D. 333; *negative*, Foley v. Lord Peterborough, 4 Dougl. 294; Sanborn v. Neilson, 4 N. H. 501.

7. *Character.*]—Defendant's character is not in issue in this action ;[1] hence evidence of his good character is not admissible,[2] in the absence of evidence directly attacking it.[3]

Plaintiff's character and moral principles are in issue[4] for purposes of mitigation; hence his adulteries at any time after marriage and before trial,[5] and equally his gross immoralities,[6] and his avowals of profligate principles,[7] are competent in mitigation.[8]

Evidence impeaching the chastity of the woman previous to the alleged offense, is admissible in mitigation.[9] Evidence of the general good character, that is reputation, of the wife, prior to the alleged familiarities of defendant, is not admissible if no evidence impeaching her character has been given.[10]

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[1] Cox v. Pruitt, 25 Ind. 90; Trial of Swensden, 14 How. St. Tr. (1702), 589, 590.

[2] Ziter v. Merkel, 24 Penn. St. 408; Maguinay v. Sandek, 5 Sneed (Tenn.), 146.

[3] Cox v. Pruitt (above). The expression "putting character in issue," does not mean that a man's reputation is imperiled by the result of the action, but that the character is of particular importance in determining the issue or the measure of damages. Ford v. Jones, 62 Barb. 484; Porter v. Seiler, 23 Penn. St. 424; see, also, p. 673–5 of this vol.

[4] Smith v. Masten, 15 Wend. 270; Foot v. Tracy, 1 Johns. 46, 51.

[5] Id.; Shattuck v. Hammond, 46 Vt. 466, s. c. 14 Am. R. 631; Sanborn v. Neilson, 4 N. H. 501; Rea v. Tucker, 51 Ill. 110.

[6] Bennett v. Smith, 21 Barb. 439. *Contra*, Norton v. Warner, 9 Conn. 171.

[7] See Robinson v. Burton, 5 Harr. (Del.) 335.

[8] Bromley v. Wallace, 4 Esp. 237; Harrison v. Price, 22 Ind. 165.

[9] Gregson v. M'Taggart, 1 Campb. 415; Elsam v. Faucett, 2 Esp. 562; Harter v. Crill, 33 Barb. 283; Smith v. Milburn, 17 Iowa, 30; Rea v. Tucker (above); Mott v. Goddard, 1 Root, 472; Davenport v. Russell, 5 Day, 145; Torre v. Summers, 2 N. & M. 267; Verry v. Watkins, 7 Carr. & P. 308; Hogan v. Cregan, 6 Robt. 138; Thompson v. Glendenning, 1 Head (Tenn.), 296; Camp v. The State, 3 Geo. (Kelly), 417; Conway v. Nicol, 34 Iowa, 533.

[10] Pratt v. Andrews, 4 N. Y. 493.

CHAPTER XLVII

ACTIONS TO RECOVER POSSESSION OF SPECIFIC PERSONAL PROPERTY (REPLEVIN).

1. Existence and identity of the thing.
2. Plaintiff's ownership.
3. Defendant's taking and possession.
4. Fraud.
5. Demand.
6. Damages.
7. Declarations and admissions of former possessor.
8. Defense.

1. *Existence and identity of the thing.*]—As the action is to recover a specific thing, plaintiff's evidence must sustain an inference that it existed, as such[1] at the time of commencing the action;[2] and show its identity sufficiently to enable the court to give judgment for what is to be delivered.[3] Declarations made by or in presence of a party and constituting a part of the *res gestæ* of his possession, are competent on the question of identity.[4]

2. *Plaintiff's ownership.*]—Plaintiff must prove that he[5] had a legal[6] or equitable[7] right to immediate possession[8] at the commencement of the action,[9] and this is enough. Right to the possession and dominion of the goods for the time is all that is essential.[10] Ownership may be proved under a general allegation, designating the things as the "goods of the plaintiff."[11]

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[1] Sager v. Blain, 44 N. Y. 445. A recovery as for money had and received can not be maintained.

[2] Under the new procedure this is usually the time of service. N. Y. Code Civ. Pro. § 416; Wiggin v. Orser, 5 Duer, 118; Tracy v. N. Y. & Harlem R. R. Co. 9 Bosw. 396. In those jurisdictions where the issue of the writ is the commencement, the hour may be proved by extrinsic evidence (Knowlton v. Culver, 1 Chand. [Wis.] 214), and the date of the writ is not conclusive. Welles Replev. 425, § 792.

[3] Graves v. Dudley, 20 N. Y. 76. The identification must be the more complete if it appears that defendant has several of the same kind. Id. For the mode of proof in other respects, see pp. 632 and 633 of this vol. Undertaking and affidavit in claim and delivery, held not evidence of identity. Talcott v. Belding, 36 Super. Ct. (4 J. & S.) 84.

[4] Crowther v. Gibson, 19 Mo. 365; Yarbrough v. Arnold, 20 Ark. 592, 597.

[5] Rogers v. Arnold, 12 Wend. 30.

[6] M'Curdy v. Brown, 1 Duer, 101; Dodworth v. Jones, 4 Duer, 201; Rockwell v. Saunders, 19 Barb. 473.

[7] Frost v. Mott, 34 N. Y. 253.

[8] A right by virtue of a lien is enough. Baker v. Hoag, 7 N. Y. 555 (overruling 3 Barb. 203); Baker v. Hoag, 7 Barb. 113; Fitzhugh v. Wiman, 9 N. Y. 559. For the mode of proof in an action by an officer, see pp. 197 and 605.

[9] See note 2 to paragraph 1.

[10] Johnson v. Carnley, 10 N. Y. 570.

[11] Simmons v. Lyons, 55 N. Y. 671, affi'g 35 N. Y. Super. Ct. (3 J. & S.) 554. Under an allegation of absolute ownership, proof of a lien only is a variance, but usually amendable. Rucker v. Donovan, 13 Kans. 251, s. c. 19 Am. R. 84.

If title is expressly alleged and put in issue, the burden is on plaintiff to prove title, even though defendant has affirmatively alleged an adverse title as his defense.[1] The quiet and peaceable possession by plaintiff of the property, at the time of seizure, is *prima facie* evidence of his title, and throws the burden on defendant of proving the contrary;[2] but possession is not sufficient evidence of title as against direct evidence of title in defendant, or even evidence of prior possession in him under claim of title.[3]

If plaintiff proves ownership and right to immediate possession, he need not prove that he ever had possession.[4]

Subject to the qualification that plaintiff must prove immediate right of possession of a thing in existence at the commencement of the action, his right is proved as in case of conversion.[5]

Evidence can not be received for the purpose of litigating the title of land under the form of an action for replevin;[6] but, for the purpose of determining the ownership of products of the land, plaintiff may prove a title[7] or right of possession[8] in the land, such as to give that ownership, if defendant was a trespasser, or had not paramount title or a ripe adverse possession.[9] It is no objection that title to the land is not alleged in the pleading.[10]

3. *Defendant's taking and possession.*]—Evidence of actual, forcible dispossession of plaintiff is not necessary; any unlawful interference with another's property or exercise of dominion over it, by which the owner is damnified, is sufficient.[11] If defendant is shown to have had possession, and either wrongfully parted with it,[12] or was privy to a demand and refusal,[13] his lack of possession at the commencement of the action is not material.

A conversion need not be proved merely because alleged.[14]

An undertaking or bond on which defendant obtained the return of the property under the statute is competent in disproof of his denial that he had detained it.[15]

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[1] Reynolds v. McCormick, 62 Ill. 412; Morgner v. Biggs, 46 Mo. 65; Chandler v. Lincoln, 52 Ill. 74.

[2] Schulenberg v. Harriman, 21 Wall. 44, 59; Robertson v. Brown, 1 N. Y. Leg. Obs. 297.

[3] Wells Replev. 67–9, §§ 109–16.

[4] Clark v. Skinner, 20 Johns. 465; Dunham v. Wyckoff, 3 Wend. 280; Neff v. Thompson, 8 Barb. 213.

[5] Pages 623 and 624 of this vol.

[6] Wells Replev. 50–4, §§ 79–89.

[7] Hart v. Vinsant, 6 Heisk. (Tenn.) 616.

[8] Halleck v. Mixer, 16 Cal. 574, for the mode.

[9] For the mode of proof, see p. 634 of this vol., and Chap. XLVIII.

[10] Grewell v. Walden, 23 Cal. 165, 169.

[11] Allen v. Crary, 10 Wend. 349; Fonda v. Van Horne, 15 Id. 631; Hymann v. Cook, 1 How. App. Cas. 419; Knapp v. Smith, 27 N. Y. 277; Latimer v. Wheeler (below). Compare Bent v. Bent, 44 Vt. 633. For the mode of proof in an action against an officer, see pp. 198–202, 606–12, 631.

[12] Nichols v. Michael, 23 N. Y. 264; Dunham v. Troy Union R. R. Co. 1 Abb. Ct. App. Dec. 565.

[13] Latimer v. Wheeler, 3 Abb. Ct. App. Dec. 35, affi'g 30 Barb. 485.

[14] Vogel v. Badcock, 1 Abb. Pr. 176. For the mode of proof, see p. 626 of this vol.

[15] Black v. Foster, 7 Abb. Pr. 406, s. c. 28 Barb. 387; but does not admit cause of action. Church v. Frost, 3 Supm. Ct. (T. & C.) 318.

4. *Fraud.*]—A fraud by which defendant obtained the goods from plaintiff may be proved though not alleged.[1]

5. *Demand.*]—Demand may be proved though not alleged.[2] Proof of a wrongful taking by defendant dispenses with the necessity of evidence of demand to sustain the action against him.[3]

6. *Damages.*]—Damages which are the natural result of the circumstances of the taking may be proved in connection with those circumstances, although those circumstances are not alleged;[4] and so may depreciation in value, from naturally expected cause, during detention;[5] but special damages must be specially alleged. Appraisement under the statute is not conclusive evidence of value.[6]

7. *Declarations and admissions of former possessor.*]—The rules as to the acts and declarations of one under whom a party claims have been already stated.[7] Declarations claiming[8] or disavowing ownership[9] are not conclusive against the declarant, unless other facts raising an estoppel are shown.

8. *Defenses.*]—Defendant may recover on plaintiff's failure to prove title and right of possession.[10] A denial of plaintiff's allegation of property and right of possession admits evidence of title and right of possession, either in defendant or any other person;[11] and defendant may show such property in a third person without connecting himself with it.[12] The mode of proving justification under process has been already stated.

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[1] Hunter v. Hudson River Iron & Machine Co. 20 Barb. 493; Bliss v. Cottle, 32 Id. 322. For the mode of proving fraud or deceit, see p. 626 of this vol., and the chapters on actions for deceit or fraud, and on fraud as a defense.

[2] Wells Replev. 370, § 681, and see p. 627 of this vol.

[3] Id. 199, § 348. But not for the purposes of damages. Id.

[4] Wells Replev. 311, § 571.

[5] Id.; Young v. Willet, 8 Bosw. 486.

[6] Wells Replev. 311, § 570. For the mode of proving value and damages, see pp. 306–12, 348, 598 and 627 of this vol. As to value of use, see Yandle v. Kingsbury, 17 Kans. 195, s. c. 22 Am. R. 282; Allen v. Fox, 51 N. Y. 562, overruling 4 Lans. 263.

[7] Pp. 11–14 and 155 of this vol; Whittaker v. Brown, 8 Wend. 490; Bristol v. Dann, 12 Id. 142, Worrall v. Parmelee, 1 N. Y. 519; Taylor v. Marshal, 14 Johns. 204; De Wolf v. Williams, 69 N.Y. 621. Under the New York rule, continued possession of a chattel is not alone such an act as renders the possessor's declarations competent under the rule of *res gestæ*. Tilson v. Terwilliger, 56 N. Y. 273.

[8] Heaton v. Findlay, 12 Penn. St. 304.

[9] Hunt v. Moultrie, 1 Bosw. 531.

[10] McCurdy v. Brown, 1 Duer, 101.

[11] Schulenberg v. Harrimann, 21 Wall. 44, 59; Sparks v. Heritage, 45 Ind. 66; Timp v. Dockham, 32 Wis. 146; Caldwell v. Bruggerman, 4 Minn. 270, 276. And see Morey v. Safe Deposit Co. 7 Abb. Pr. N. S. 199, s. c. 39 How. Pr. 124. Compare Ontario Bank v. N. J. Steamboat Co. 59 N. Y. 510, affi'g 5 Daly, 117.

[12] Rockwell v. Saunders, 19 Barb. 473, and cases cited.

CHAPTER XLVIII.

ACTIONS TO AFFECT THE TITLE OR POSSESSION OF REAL PROPERTY.

I. Actions to recover the possession of real property. (Ejectment.)
1. Plaintiff's title.
2. Title of State.
3. Possession as evidence of title.
4. Title by deed.
5. — delivery, and date.
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7. — alterations.
8. — connected instruments.
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12. — deed under legal or judicial authority.
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17 State grant.
18. Landlord and tenant.
19. Mortgagor and mortgagee.
20. Vendor and purchaser.
21. Entry.
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23. Dower.
24. Curtesy.
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27. Presumed grant.
28. Deed void for adverse possession.

I. Actions to recover, &c.—*continued.*
29. Impeaching deed on equitable grounds.
30. Admissions and declarations.
31. Recitals.
32. Estoppels.
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34. Defendant's possession: Ouster.
35. Mesne profits.
36. *Defenses.*
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II. Actions to determine conflicting claims.
39. Mode of proof.

III. Actions to remove cloud on title.
40. Mode of proof.

IV. Actions of foreclosure.
41. Foreclosure of vendor's lien.
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V. Actions to redeem.
45. Mode of proof.

VI. Actions of partition.
46. Mode of proof.

I. Actions to recover the possession of real property. (Ejectment.)

1. *Plaintiff's title.*] — Plaintiff can only recover on the strength of his own title. Proof of a cloud on title is not enough.[1] The failure of defendant to show title can not avail.[2]

Under the new procedure plaintiff may recover on an equitable title.[3] He may prove two titles, although either, if established,

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[1] Pixley v. Rockwell, 1 Sheld. Buff. Super. Ct. 267.

[2] Brady v. Hennion, 8 Bosw. 528; Tyl. Ej. 72; Watts v. Lindsey, 7 Wheat. 158.

[3] Phillips v. Gorham, 17 N. Y. 270; Lattin v. McCarty, 41 N. Y. 107, rev'g 8 Abb. Pr. 225, s. c. 17 How. Pr. 239; Sheehan v. Hamilton, 4 Abb. Ct. App. Dec. 211. Otherwise at common law. Fenn v. Holme, 21 How. U. S. 481.

would be enough.[1] A variance in alleging the nature of the title,[2] or the proportion of plaintiff's interest, is not fatal.[3]

2. *Title of State.*—In ejectment by the State, evidence that the premises were vacant and wholly unoccupied at a time within forty years before action brought, and that defendant was in possession when the action was brought, is *prima facie* sufficient,[4] if it does not appear that the title of the State was ever divested.[5]

3. *Possession as evidence of title.*]—Mere general possession of land, unexplained, is *prima facie* evidence of ownership,[6] in the absence of any other evidence as to title; especially if coupled with actual improvement.[7] But to raise a presumption of any particular kind of title or degree of interest, the evidence of possession must be coupled with evidence of a claim of title.[8] A witness may be allowed in the first instance to testify directly to the fact of possession,[9] if he can do so positively—not as a matter of opinion,—subject, of course to cross-examination on the details. Evidence that a place was generally known by the name of a man is competent in aid of other evidence of his possession.[10] When no legal title is shown, the party showing the prior possession is held to have the better right.[11] Mere possession may be rebutted by parol evidence of abandonment,[12] but the evidence should be clear.[13]

When legal title to unoccupied land is shown, possession is presumed to be in him who is shown to have the title.[14] This is constructive possession, and does not avail where actual possession must be shown.[15]

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[1] Enders v. Sternbergh, 2 Abb. Ct. App. Dec. 31, rev'g 52 Barb. 222.

[2] Chapman v. Delaware, &c. R. R. Co. 3 Lans. 261. *Contra*, Patterson v. Keystone, &c. Co. 30 Cal. 360, 364. Compare Cruger v. McLaury, 41 N. Y. 219, affi'g 51 Barb. 642.

[3] Lewis v. McFarland, 9 Cranch, 151; Hinman v. Booth, 21 Wend. 266, 267; Ryerss v. Wheeler, 22 Id. 148. *Contra*, Gillet v. Stanley, 1 Hill, 121; Cole v. Irvine, 6 Id. 634.

[4] Wendell v. Jackson, 8 Wend. 183, affi'd 5 Id. 142.

[5] See People v. Snyder, 51 Barb. 589, affi'd in 41 N. Y. 397.

[6] COWEN, J. Northrop v. Wright, 24 Wend. 221, rev'd on other grounds in 7 Hill, 476; Hill v. Draper, 10 Barb. 454. *Contra*, Delancey v. McKeen, 1 Wash. C. Ct. 354. But as against a naked trespasser, it is agreed that possession is enough. Burt v. Panjaud, U. S. Supreme Ct. 99 U. S. (9 Otto), 180.

[7] Sherry v. Frecking, 4 Duer, 452; Payment of taxes and survey, &c. not evidence of possession. Thompson v. Burhans, 61 N. Y. 52, rev'g 61 Barb. 260. *Contra*, Hodgdon v. Shannon, 44 N. H. 572.

Unsuccessful attempt to interrupt possession strengthens the presumption. Sargent v. Seagrave, 2 Curt. C. Ct. 553.

[8] Ricard v. Williams, 7 Wheat. 59, 105.

[9] Where a witness testifies on the direct-examination that a party had possession of real estate at a specified time, the evidence is admissible; the facts constituting possession may be obtained from him on cross-examination. Parsons v. Brown, 15 Barb. N. Y. 590. *Contra*, Thistle v. Frostburg Coal Co. 10 Md. 129.

[10] Russell v. Jackson, 22 Wend. 276, affi'g 4 Id. 543.

[11] Tyl. Ej. 72, 204.

[12] Onderdonk v. Lord, Hill & D. Supp. 129.

[13] Corning v. Troy Iron & Nail Factory, 39 Barb. 311, affi'd in 40 N. Y. 191.

[14] Florence v. Hopkins, 46 N. Y. 182.

[15] Paragraph 38. Constructive possession not applicable to large tracts not

4. *Title by deed.*]—To prove title by deed, plaintiff must show a deed which satisfies the requirements of the law of the State where the land lies.[1] The deed may be proved by producing either the original,[2] or the record, or a certified copy from the record.[3] A certificate which appears, on its face, to be in conformity with the statute, is presumptive proof of its own genuineness; and where it describes the proper officer acting in the proper place, it is taken as proof both of his character and local jurisdiction.[4] A record or certified copy, which by reason of defect is not competent as such, may, nevertheless, be available as secondary evidence on proof of the loss of the original.[5] A substantial compliance of the certificate with the statute is sufficient.[6]

In aid of a certificate of acknowledgment, reference may be had to any part of the instrument itself.[7] An error in venue may

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manageable according to the custom and business of the country. Thompson v. Burhans, 61 N. Y. 52, rev'g 61 Barb. 260.

[1] Compliance with the stamp act need not be proved in a State court. See p. 453 of this vol.

[2] For mode of proof of handwriting, see pp. 392 to 398 of this vol., and of execution in other respects, pp. 505 to 507.

[3] Chamberlain v. Bradley, 101 Mass. 188, s. c. 3 Am. R. 331.

The mode of proof by the record or certified copy varies according to the local statutes, which should be consulted. Under the New York statutes and many others the following rules apply. The deed must be either acknowledged or witnessed. Roggen v. Avery, 63 Barb. 65. Compare Fryer v. Rockfeller, 63 N. Y. 268.

If the *original* is offered in evidence, a certificate of acknowledgment, or of proof by living subscribing witness (even though made after action brought, p. 6 of this vol.) is primary evidence (see Clark v. Nixon, 5 Hill, 36), but not conclusive (1 N. Y. R. S. 759 [2 Id. 6 ed. 1146], § 17; s. p. 3 Abb. N. Y. Dig. new ed. 155, pl. 2295. *Contra*, in some States, see p. 175 of this vol.); but a county clerk's certificate is necessary to read the original in evidence in any other county than that in which the officer taking the acknowle lgment, &c., resided (1 N. Y. R. S. 759 [2 Id. 6 ed. 1146], § 18; Wood v. Weiant, 1 N. Y. 77). If a certificate of proof by a subscribing witness is relied on, it will be nullified by evidence that the witness was interested or incompetent (1 N. Y. R. S. 759 [2 Id. 6 ed. 1146], § 17).

A transcript or *certified copy* of the record if produced, duly certified by the recording officer under seal (1 R. S. 760 [2 Id. 6 ed. 1147], § 26), is equally competent as the original instrument, provided the acknowledgment or proof was sufficient to entitle to record; otherwise, not (Carpenter v. Dexter, 8 Wall. 513). If the proof was by evidence of handwriting after death of the subscribing witnesses, the original is the only primary evidence, and must be produced and duly proved at the trial, or accounted for, and secondary evidence given (1 N. Y. R. S. 761 [2 Id. 6 ed. 1150], §§ 30–33.

The manner in which the *record* may be produced is defined by N. Y. Code Civ. Pro. § 866. The omission, from the record, of the memorandum of alterations before execution is relevant to the question of alteration after execution (Hager v. Hager, 38 Barb. 92, 98).

Where the acknowledgment and date of registry of a deed are in dispute, proving it by a certified copy without producing or accounting for the original, is a circumstance of suspicion which is a proper subject of comment (5 Wall. 85).

[4] Thurman v. Cameron, 24 Wend. 87, and cas. cit.

[5] Jackson v. Rice, 3 Wend. 180, 182.

[6] Raverty v. Fridge, 3 McLean, 245, and cas. cit.; Carpenter v. Dexter, 8 Wall. 513.

[7] Carpenter v. Dexter, 8 Wall. 513; s. p. 12 Serg. & R. 48. For instance, a defect in the venue of the certificate may be supplied by a presumption drawn

be cured by oral evidence.[1] Evidence of the official character of the certifying officer need not be added to his certificate, unless required by the statute.[2]

5. —*delivery and date.*]—Under a denial, the burden is on plaintiff to prove delivery;[3] but an admission of execution without more usually admits delivery.[4] In addition to what has already been said,[5] possession by the grantee,[6] and the fact of record,[7] are each competent and sufficient *prima facie* evidence of delivery, as against the grantor.[8] Subsequent conduct of the parties to the action recognizing the title as transferred, are competent to show ratification of a delivery shown only by record.[9] The statutory acknowledgment or proof and the recording of a deed are not conclusive evidence of delivery or acceptance. Nor are they sufficient alone against the absolute testimony of the supposed grantee denying delivery and acceptance.[10]

The rule excluding oral evidence to contradict a writing does not exclude oral evidence of delivery or non-delivery of the writing;[11] but it does exclude oral evidence that delivery to the party himself[12] was on an oral condition nullifying the delivery.[13]

The time of delivery is the time at which the deed takes effect (unless the court, on equitable grounds, give it relation back to

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from a statement of the place of execution in the title or testificandum clause of the deed. Carpenter v. Dexter (above); Brooks v. Chaplin, 3 Vt. 281. And the omission to certify that the person making the acknowledgment was known to the officer to be the one who executed the deed, by reference to the fact that the officer's name (without addition) appears as subscribing witness under a clause stating that the deed was "signed," &c., in his presence. Carpenter v. Dexter (above); and see Luffborough v. Parker, 12 Serg. & R. 48.

[1] Angier v. Schieffelin, 72 Penn St. 106, s. c. 13 Am. R. 659.

[2] Secrist v. Green, 3 Wall. 744, 750; Carpenter v. Dexter (above).

[3] Burkholder v. Casad, 47 Ind. 418.

[4] See Robert v. Good, 36 N. Y. 408, affi'g 2 Daly, 64.

[5] Pages 507 and 508 of this vol.

[6] Flagg v. Mann, 2 Sumn. 486, 509; Buckley v. Carlton, 6 McLean, 125.

[7] Chamberlain v. Bradley, 101 Mass. 188, s. c. 3 Am. R. 331; Kille v. Ege, 79 Penn. St. 15; Younge v. Guilbeau, 3 Wall. 636. Even though at the grantor's request. Bulkley v. Buffington, 5 McLean, 457.

[8] See Parmelee v. Simpson, 5 Wall. 81, 85.

[9] Gould v. Day, 94 U. S. (4 Otto), 405. As to the declarations of a former owner, see paragraph 80, and p. 405 of this vol.

[10] Jackson v. Perkins, 2 Wend. 308; Younge v. Guilbeau, 3 Wall. 636, 641. For other cases on presumption of delivery, see Rogers v. Carey, 47 Mo. 232, s. c. 4 Am. R. 322.

[11] Roberts ads. Jackson, 1 Wend. 478, 480; Stephens v. Buffalo & N. Y. City R. R. Co. 20 Barb. 332. To disprove acceptance of a deed of trust, an unsealed declaration by the intended trustee (a stranger to the action) that immediately on receiving notice of it he did refuse to accept and had never acted (the paper being proved and recorded), is competent as a verbal act tending to show non-acceptance. Armstrong v. Morrill, 14 Wall. 120, 139. This was held, although the declaration bore date 11 years after the date of the deed of trust, and was proved nearly 50 and recorded more than 60 years after the date of the deed of trust.

[12] See as to delivery to attorney or agent, Ford v. James, 2 Abb. Ct. App. Dec. 159; Watkins v. Nash, L. R. 20 Eq. Cas. 262, s. c. 13 Moak Eng. R. 781.

[13] Worrall v. Munn, 5 N. Y. 229, and cas. cit.

an earlier date[1]); and, in the absence of other evidence, the date written in[2] an attested or acknowledged instrument[3] is presumptively the date of delivery,[4] notwithstanding its acknowledgment,[5] or its record[6] is of later date.

If the deed is shown to have been antedated (and the fact that it remained in the grantor's hands after the day of its date is sufficient evidence of this[7]), the presumption is removed, and the burden is on the party claiming under it to show the date of delivery, if the validity or effect of the deed depends on that.[8] Slight evidence drawn from the transaction itself may be sufficient for this purpose.[9]

6. — *parties.*[10]]—In addition to what has been said as to the proof of identity,[11] it should be added here, that if there are two persons, father and son, of the same name, the use of the name without addition means presumptively, in absence of other evidence, the father;[12] but this presumption may be rebutted by showing that the parties intended the son by the name in the deed.[13] A difference in surname, too great to be disregarded as involving no substantial difference in sound, cannot be cured by parol evidence,[14] unless the evidence is sufficient for relief in equity.[15] Omission of middle name is not material.[16]

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[1] County of Calhoun v. American Emigrant Co. 93 U. S. (3 Otto), 124, 127.

[2] Or a later date inscribed by the grantor upon the stamp for cancellation. Van Rensselaer v. Vickery, 3 Lans. 57.

[3] Otherwise of a deed in fee, unattested and unacknowledged. Genter v. Morrison, 31 Barb. 155.

[4] Robinson v. Wheeler, 25 N. Y. 252, and cases cited; People v. Snyder, 41 N. Y. 397, affi'g 51 Barb. 589.

[5] People v. Snyder (above).

[6] Robinson v. Wheeler (above).

[7] Harris v. Norton, 16 Barb. 264.

[8] Costigan v. Gould, 5 Den. 290.

[9] McGowan v. Smith, 44 Barb. 232; Jackson v. Schoonmaker, 2 Johns. 230.

Whether the date in a deed by an entire stranger to the parties is sufficient when the competency of the instrument in evidence depends on the time of the delivery, compare with these cases, pp. 13 and 14 of this vol.

[10] Whether showing that the grantee's name was not inserted in the blank until after attestation and acknowledgment and parting with possession by the grantor, affects the validity of the deed, see, for the *affirmative*, Upton v. Archer, 41 Cal. 85, s. c. 10 Am. R. 266; Moore v. Bickham, 4 Binn. (Pa.) 1; U. S. v. Nelson, 2 Brock. 64; Coit v. Starkweather, 8 Conn. 289; Davenport v. Sleight, 2 Dev. & B. (N. C.) L. 381; Chase v. Palmer, 29 Ill. 306; Burns v. Lynde, 6 Allen (Mass.), 305; Basford v. Pearson, 9 Id. 387; Drury v. Foster, 2 Wall. 24; 2 Parsons on Cont. citing Hibblewhite v. McMorone, 6 M. & W. 200; Douthitt v. Stinson, 63 Mo. 268; and for the *negative*, Van Etta v. Evenson, 28 Wis. 33, s. c. 9 Am. R. 486; Owen v. Perry, 25 Iowa, 412; Pence v. Arbuckle, 22 Minn. 417; McNab v. Young, 81 Ill. 11; Hemmenway v. Mulock, 56 How. Pr. 38; Vanderbilt v. Vanderbilt, 54 Id. 250; and see Field v. Stagg, 52 Mo. 534, s. c. 14 Am. R. 435; Preston v. Hull, 23 Gratt. (Va.) 600.

[11] Page 101 of this vol.

[12] Padgett v. Lawrence, 10 Paige, 170; Stevens v. West, 6 Jones (N. C.) L. 49.

[13] Padgett v. Lawrence (above).

[14] Jackson v. Hart, 12 Johns. 77; and see Jackson v. Boneham, 15 Id. 226; Babcock v. Pettibone, 12 Blatchf. 354.

[15] See p. 512, and Chapter on REFORMATION for MISTAKES, &c.

[16] Games v. Dunn, 14 Pet. 322.

Oral evidence is competent to show which was intended, where two persons answer the same name;[1] or where two names, having sufficient resemblance, appear, and it does not appear that there were two persons corresponding; but if it appear that there were two such persons, oral evidence is not competent to show that one was intended by the name of the other.[2]

To admit a deed purporting to be executed by the attorney of the party to be bound, there must be some evidence of his authority,[3] but it may be presumed from a recital, in the deed, of a power of attorney and from long possession under the deed.[4] Where a deed is executed under a power, and so far as appears from the two instruments was executed agreeably to it, the burden is upon him assailing the deed to show that conditions specified in the power were not performed.[5]

7. — *alterations.*]—An unexplained alteration appearing on the face of an instrument does not render the deed incompetent as evidence of a transfer of title. It is not error to let the instrument go to the jury.[6] In so far as a deed operates as a present transfer of title, an alteration, though fraudulently made by the grantee subsequent to delivery, cannot operate as a re-conveyance to divest the title once vested; but, if at all, by way of estoppel, or as having destroyed the evidence necessary to manifest the transfer. On the other hand, so far as the deed is executory,—as for instance in case of a covenant of warranty relied on to pass, by way of estoppel, an after acquired title,—a material alteration fraudulently made by the grantee, annuls the covenant itself thereafter.[7]

Oral evidence is competent alike to prove or to explain an alteration in a deed; and, notwithstanding the statute of frauds to prove oral assent to an alteration;[8] and, for these purposes, another than the subscribing witness is competent.[9]

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[1] Jackson v. Goes, 13 Johns. 518.

[2] Jackson v. Hart, 12 Johns. 77.

[3] Denn v Reid, 10 Pet. 524.

[4] Doe v. Phelps, 9 Johns. 169; Doe v. Campbell, 10 Id. 475; and see Forman v. Crutcher, 2 A. K. Marsh (Ky.) 69. Possession is essential. McKinnon v. Bliss, 21 N. Y. 206.

[5] Clements v. Machebœuf, 2 U. S. 92 (Otto), 418. and cas. cit. Compare Morrill v. Cone, 22 How. U. S. 75.

[6] Little v. Herndon, 10 Wall. 26, 31 (in this case cancellation of one number and interlineation of another in the description of premises in a deed), NELSON, J.; and see page 406 of this vol. After great conflict of opinion, the weight of recent authority is in harmony with sound general principles; and, without denying that an alteration may be so suspicious as to require the exclusion of the instrument if offered without explanation, ordinarily submits the instrument to the jury with whatever explanation may be afforded by the contents and appearance of the instrument itself, and by the extrinsic evidence, if any, adduced, leaving it for the jury to say whether the explanation is satisfactory. See Maybee v. Sniffen, 2 E. D. Smith, 1, s. c. 10 N. Y. Leg. Obs. 18; Herrick v. Malin, 22 Wend. 387, 393; Waring v. Smyth, 2 Barb. Ch. 119, 133; Smith v. McGowan, 3 Barb. 404, 407; Jackson v. Osborn, 2 Wend. 555, 559, 1 Whart. Ev § 629.

[7] See opinion of CLIFFORD, J., in Smith v. U. S. 2 Wall. 219, 231, and cas. cit., and 9 Cent. L. J. 173, note.

[8] Speake v. United States, 9 Cranch, 28,

[9] Penny v. Corwithe, 18 Johns. 499.

8. —*connected instruments.*]—Documents referred to in the deed, and material to the title[1] should be produced, or their absence accounted for and secondary evidence given.[2] In case of loss, long possession, or even the terms,[3] or character, may enable the court to presume the contents and effect of the lost instrument.[4] A document made, by reference, part of a deed under which both parties claim, is admissible on proof of identity, without further proof of its execution.[5] A map referred to as recorded may be resorted to, to identify the premises, although the record was illegal.[6] If more than one map answering the reference exists, oral evidence to show what was intended, is competent.[7] A reference to premises as those previously conveyed to the grantor by another person, does not exclude oral evidence to identify the land, but does not allow of oral evidence of the parties' intention.[8]

9. —*consideration.*]—The consideration clause is not within the rule by which written evidence excludes oral;[9] but the nonpayment of the consideration stated, or its nominal character, is not relevant against the party claiming under the deed,[10] unless in connection with evidence showing equitable grounds for avoiding the transfer, for without such proof the grantor or those claiming under him cannot contradict the recital of consideration.[11] Hence the party claiming under a deed acknowledging a consideration need not, in the first instance, give any evidence of consideration[12] unless he claims to be protected as *bona fide* purchaser for value;[13] and even then the acknowledgment in the deed of the receipt of the purchase money is sufficient *prima facie* evidence of its payment to bring him within the protection of the recording act,[14] though not to enable him to hold under a fraud com-

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[1] Otherwise of an instrument merely directing the future disposition of the property. Duke of Cumberland v. Graves, 9 Barb. 595.

[2] Jackson v. Parkhurst, 4 Wend. 369; s. p. in the case of the bond recited in the mortgage. See paragraph 41, on Foreclosure.

[3] Jackson v. Lamb, 7 Cow. 431.

[4] McBurney v. Cutler, 18 Barb. 203.

[5] See Crawford v. Loper, 25 Barb. 449; Smith v. N. Y. Cent. R. R. Co. 4 Abb. Ct. App. Dec. 262.

[6] Noonan v. Lee, 2 Black, 499, 504. Compare Caldwell v. Center, 30 Cal. 539. As to whether the recorded plat referred to is conclusive against proving the original plat and a mistake in the record, see Jones v. Johnston, 18 How. U. S. 150.

[7] Slosson v. Hall, 17 Minn. 95.

[8] Jackson v. Parkhurst (above); and see Reed v. McCourt, 41 N. Y. 435.

[9] Adams v. Hull, 2 Den. 306.

[10] Meakings v. Cromwell, 2 Sandf. 512; Meriam v. Harsen, 2 Barb. Ch. 232, affi'g 4 Edw. Ch. 70; Childs v. Barnum, 11 Barb. 14, affi'g 1 Sandf. 58; s. p. Wood v. Chapin, 13 N. Y. 509.

[11] Grout v. Townsend, 2 Den. 336, affi'g 2 Hill, 554.

[12] Clarke v. Davenport, 1 Bosw. 95.

[13] See paragraph 37.

[14] Wood v. Chapin, 13 N. Y. 509; Bolton v. Jacks, 6 Robt. 166, 234. Compare Ring v. Steele, 4 Abb. Ct. App. Dec. 68; Wood v. McClughan, 4 Supm. Ct. (T. & C.) 420, s. c. 2 Hun, 150.

mitted by his grantor.[1] Extrinsic evidence of consideration[2] is competent in support of a deed;[3] and for this purpose the actual consideration, whether pecuniary,[4] or of blood,[5] or marriage,[6] may be proved by extrinsic evidence, although the deed express a different consideration,[7] or a nominal consideration,[8] or none.[9]

10. —*oral evidence to vary or explain writings.*]—In application of general principles already stated, it is to be observed that a conveyance of real property is not merely the voluntarily chosen expression of the intention of the parties, and therefore, as between them and those claiming under them, presumably the final definition of their intention,[10] but that it is also by statute the only sufficient means of a voluntary transfer;[11] and therefore an intent to transfer real property cannot be imported into the deed by oral evidence; but oral evidence can only be used as a light to enable the court to read what is in the deed.[12] Hence, to enable the court to understand what was intended, but not to contradict what is unambiguously expressed,[13] oral evidence is competent to identify,[14] locate[15] and apply the description.[16] The long continued and uniform acts of the parties, in case of ambiguity (but not otherwise[17]) may show that a deed was intended

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[1] Bolton v. Jacks (above); Lloyd v. Lynch, 28 Penn. St. 419.

[2] See other cases in Chapter LI.

[3] See paragraph 37.

[4] Hinde v. Longworth, 11 Wheat. 199; Jenkins v. Pye, 12 Pet. 241.

[5] Goodell v. Pierce, 2 Hill, 659; and see Loeschigk v. Hatfield, 51 N. Y. 660, affi'g 5 Robt. 26, s. c. 4 Abb. Pr. N. S. 210.

[6] See Roberts v. Roberts, 22 Wend. 140.

[7] Bank of the United States v. Housman, 6 Paige, 526; Hinde v. Longworth (above).

[8] Jenkins v. Pye (above).

[9] Goodell v. Pierce, 2 Hill, 659.

[10] For the limits and application of this principle see pp. 508, 294, &c. and 483, &c. of this vol.

[11] 1 N. Y. R. S. 738, § 137; 2 Id. 134 §§ 6–9.

[12] Drew v. Swift, 46 N. Y. 204; Tymason v. Bates, 14 Wend. 671, rev'g 13 Id. 300; Bartlett v. Judd, 21 N. Y. 200, affi'g 23 Barb. 262; Stanley v. Green, 12 Cal. 148, 162; Purkiss v. Benson, 28 Mich. 538; Mott v. Richtmyer, 57 N. Y. 49. For fuller discussion of this principle see p. 129, &c. of this vol.

[13] Drew v. Swift, 46 N. Y. 204, and cas. cit. Thus oral evidence, that the word "degree" should be read "perches," is not admissible. Clarke v. Lancaster, 36 Md. 196, s. c. 11 Am. R. 486.

[14] See paragraph 8; Parks v. Moore, 13 Vt. 183; and compare Doe *d.* Freeland v. Burt, 1 T. R. 701, with Doe *d.* Norton v. Webster, 12 A. & E. 442, 450.

[15] McNitt v. Turner, 16 Wall. 352, 364. The deed is not admissible if the description of premises is incapable of affording the clue to their identification, but if there be a reference to extrinsic documents or acts for the identification, the deed is admissible, subject to the subsequent production of the necessary evidence (Deery v. Cray, 10 Wall. 263); and the production of the documents or evidence of the acts referred to in the deed is not always essential, but an actual boundary long acquiesced in, the deed being ancient may be enough. Ib.

[16] Blake v. Doherty, 5 Wheat. 359.

[17] Unless for a length of time sufficient to give title by adverse possession, or unless there is an estoppel. Emerick v. Kohler, 29 Barb. 165. Title cannot be divested by estoppel *in pais*. Babcock v. Utter, 1 Abb. Ct. App. Dec. 27. Whether an estoppel arises from matter of description, doubted: it does not from uncertain matter. Edmonston v. Edmonston, 13 Hun, 133, 136.

as a conveyance,[1] and the boundaries intended.[2] Within these limits, the rule excluding oral evidence, applies alike to prior contemporaneous and subsequent declarations.

Historical works, books of science or art, and published maps or charts, when made by persons indifferent between the parties, are primary evidence of facts of general notoriety and interest; but they weigh only as hearsay, against testimony of witnesses to facts within their memory.[3] Maps and diagrams necessary or useful for the understanding of testimony may be put in evidence on proof of their correctness, although prepared for the purpose of the trial.[4]

11. — *boundaries.*]—A variance in the boundaries proved from those alleged, if it has not misled, should be cured by amendment.[5] The rule that fixed and known monuments and boundaries control other designations, is only a natural presumption ordinarily arising from the terms of the whole description.[6] Official surveys, properly authenticated,[7] are *prima facie* evidence of their own correctness.[8] Evidence of the surveyor's declarations, contradicting his official return, are not evidence while he is living.[9] The notes of the official surveyor are competent evidence as to those objects which, in the discharge of his duty, he ought to have ascertained—such as the lines and monuments—and received as a part of the *res gestæ;* but not of anything else—for instance, possession.[10] Declarations of a surveyor employed to run a boundary, if made in connection with his work, and in reference to it, are admissible in evidence after his death, against the party who employed him.[11] A surveyor, as an expert may testify to his opinion as to matters of fact requiring special knowledge,[12] but not as to the construction or effect of the deed.[13] Practical acquiescence

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[1] Steinback v. Stewart, 11 Wall. 566, 576.

[2] Cavazos v. Trevino, 6 Wall. 773.

[3] Missouri v. Kentucky, 11 Wall. 395, 410.

[4] Curtiss v. Ayrault, 3 Hun, 487, 490, and cas. cit.

[5] Russell v. Conn. 20 N. Y. 81.

[6] Baldwin v. Brown, 16 N. Y. 359, 361. See, also, pages 569, 571, and 726, of this vol.

[7] People v. Denison, 17 Wend. 312.

[8] Cofield v. McClelland, 16 Wall. 331; and, after the lapse of twenty-one years, there arises a conclusive presumption of law that such survey was regularly made and marked upon the land as returned. Ormsby v. Ihmsen, 34 Penn. St. 462.

[9] Barclay v. Howell's Lessee, 6 Pet. 498; compare Birmingham v. Anderson, 70 Penn. St. 506.

[10] Ellicott v. Pearl, 1 McLean, 206, affi'd in 10 Pet. 412. Compare Ormsby v. Ihmsen (above). The rules as to memoranda, refreshing memory, have been already stated. Chapter XVI.

[11] McCormick v. Barnum, 10 Wend. 104; Barclay v. Howell's Lessee (above).

[12] For instance as to whether certain marks on trees and piles of stones, were intended as monuments of boundaries. Davis v. Mason, 4 Pick. 156. Compare Barron v. Cobleigh, 11 N. H. 557.

[13] For instance, whether certain land is included in a written description. Woodburn v. Farmers, &c. Bank, 5 Watts. and S. 447; Schultz v. Lindell, 30 Mo. 310, 321. One who has examined surveys and maps including the premises, and plotted the

(by the owners[1] who are separated by the boundary in question) in the location of a boundary for more than twenty years,[2] is conclusive; but acquiescence for a few years is not enough,[3] unless on the ground of estoppel.[4] The declarations of ancient persons, made while in possession of land owned by them, pointing out their boundaries on the land itself, and who are deceased at the time of the trial, are admissible; where nothing appears to show that they were interested to misrepresent in thus pointing out their boundaries, and it need not appear affirmatively that the declarations were made in restriction of, or against, their own rights.[5] To identify a monument represented on a plat or survey as marking a corner, it is not competent to prove reputation of the neighborhood as to it, at the present day, unless such reputation was traditionary in its character; having passed down from those who were acquainted with the reputation of the mark from an early day to the present time, or unless the information as to such reputation was derived from ancient sources or from persons who had peculiar means of knowing what the reputation of the mark was at an early day. But it is competent to prove that the occupants of the tracts adjoining the corner each claimed the mark as the true corner of their tracts.[6]

12. — *title under judicial or statutory authority.*]—A deed made pursuant to the requirement of a judicial decree[7] or order,[8] if it be made by the person in whom title was vested,[9] may be

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same out according to the surveys, and followed, with his eye, the different lines as given in the deed under which a party claims, may be allowed to testify as to the location of the party's occupancy. Van Rensselaer v. Vickery, 3 Lans. 57. It is competent to prove by a surveyor, that the courses and distances in a deed are incongruous, and that all the lines differ in length from the deed. Ratcliffe v. Cary, 4 Abb. Ct. App. Dec. 4.

[1] Terry v. Chandler, 16 N. Y. 354, 357.

[2] Baldwin v. Brown, 16 N. Y. 359; McCormick v. Barnum, 10 Wend. 104, 109; Jones v. Smith, 64 N. Y. 180. A universal rule. Tyl. Ej. 575.

[3] Id. Reed v. McCourt, 41 N. Y. 435.

[4] Smith v. McNamara, 4 Lans. 169; and see Vosburgh v. Teator, 32 N. Y. 561, 568. An oral agreement and short possession are not alone enough to change boundary, nor can an acquiescence for twenty years be disregarded on evidence that it was suffered under mistake (Baldwin v. Brown, above); or intended as temporary. Pierson v. Mosher, 30 Barb. 81. On the question of practical location it is competent to ask a witness whose residence and relation to the parties has been such that had there been difference between the adjoining proprietors in respect to the line, he would have been likely to know it, whether he ever heard of more than one line; and his answer, that he had not, is some evidence of acquiescence in that line. Ratcliffe v. Cary, 4 Abb. Ct. App. Dec. 4.

[5] Daggett v. Shaw, 5 Metc. (Mass.) 223, 226. Compare Wendell v. Abbott, 45 N. H. 349; Bartlett v. Emerson, 7 Gray (Mass.), 174.

[6] Shutte v. Thompson, 15 Wall. 151.

[7] Games v. Dunn, 14 Pet. 332, aff'g 1 McLean, 321.

[8] Hamrick v. Neely, 10 Wall. 364, 366. *Contra*, Platt v. Picton, 3 Robt. 64.

[9] As for instance by the debtor himself (Rockwell v. Brown, 54 N. Y. 210, rev'g 33 N. Y. Super. Ct. 1 J. & S., s. c. 11 Abb. Pr. N. S. 400; 42 How. Pr. 226), or by an assignee or receiver to whom the debtor is shown to have conveyed (compare Dawley v. Brown, 65 Barb. 107; The Chatauqua Co. Bank v. White, 6 N. Y. 236; Same v. Risley, 19 N. Y. 369; Van Wyck v. Baker, 10 Hun, 39; Cole v. Tyler, 65 N. Y. 73). If the debtor's title was vested in the receiver by law without assignment, the

given in evidence (against a stranger,[1] equally as against a party) without producing the decree or order,[2] though it be recited in the deed.[3] But the decree or order may be put in evidence, either to support the deed,[4] or to show that it was unauthorized,[5] or to qualify its apparent effect,[6] or to show that the proceeding was without jurisdiction.[7] The purchaser is presumed to have known the legal effect of the decree.[8] If jurisdiction appears, errors or mistakes cannot be shown, to impeach the title, in a collateral proceeding.[9] If the want of jurisdiction appears, or if the statute expressly makes the sale void for an irregularity, the title will not avail in ejectment,[10] except as against the party who obtained it and effected the sale under it, and those claiming under his title,[11] or as color of title under which adverse possession is shown; but a decree is admissible even against one not served, if it may be a link in plaintiff's title, in connection with other evidence.[12]

To show title by foreclosure, by advertisement under the statute,[13] regular foreclosure must be shown.[14] The evidence which the statute declares to be equivalent to a deed, cannot be added to, varied, or contradicted by parol by a person claiming under it;[15] but any other person may thus controvert it.[16] The affidavits of publication, posting, and affixing in county clerk's books, being only *prima facie* evidence of the acts declared to stand as the conveyance, defects therein may be supplied by parol.[17]

In the case of *special statutory proceedings*, the record is the

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decree effecting this should be produced. See Koontz v. Northern Bank, 16 Wall. 196.

[1] Barr v. Gratz, 4 Wheat. 213; Gregg v. Forsyth, 24 How. U. S. 179.

[2] Except when the statute forbids sale unless such order is made. Gallatian v. Cunningham, 8 Cow. 361.

[3] Games v. Dunn, 14 Pet. 322.

[4] Fuller v. Van Geesen, 4 Hill, 171, affi'd in How. App. Cas. 240; Dirst v. Morris, 14 Wall. 484, 490. And in case of decree in foreclosure the mortgage need not be produced (Sinclair v. Jackson, 8 Cow. 543), and cannot be impeached (Jackson v. Jackson, 5 Cow. 173), except on grounds adequate to impeach the judgment itself (Mandeville v. Reynolds, 68 N. Y. 528, 542, affi'g 5 Hun, 338).

[5] See Gray v. Brignardello, 1 Wall. 627.

[6] Bigelow v. Forrest, 9 Wall. 339, 351.

[7] Rockwell v. McGovern, 69 N. Y. 294, affi'g 40 Super. Ct. (J. & S.) 118.

[8] Bigelow v. Forrest (above).

[9] Rorer on Jud. S. 202, § 480; 203, § 482.

[10] Id. 204, § 485; and see Gregg v. Forsyth, 24 How. U. S. 180; Secrist v. Green, 3 Wall. 744, 751.

[11] Brobst v. Brock, 10 Wall. 519, 533, and cas. cit.

[12] Dirst v. Morris, 14 Wall. 484, 490. For the mode of proving the decree see Chapter XXIX.

[13] 2 N. Y. R. S. 547; L. 1838, p. 261, c. 266.

[14] Layman v. Whiting, 20 Barb. 559.

[15] Mowry v. Sanborn, 68 N. Y. 153, rev'g 7 Hun, 380. Otherwise before the statute had this effect. Hawley v. Bennett, 5 Paige, 104.

[16] Sherman v. Willett, 42 N. Y. 146, 149.

[17] Mowry v. Sanborn, 72 N.Y. 534; and see Mann v. Best, 62 Mo. 491. As to delay in making and recording the affidavit, compare Tuthill v. Tracy, 31 N. Y. 157; Frink v. Thompson, 4 Lans. 489; Chapman v. Delaware, &c. R. R. Co. 3 Lans. 261.

primary evidence,[1] and is *prima facie*, but not conclusive, evidence of the jurisdictional facts recited in it.[2]

13. *—on execution sale.*[3]]—Title is to be proved by the sheriff's certificate and deed,[4] the judgment or decree,[5] or a duly authenticated copy,[6] or, in case of a justice's judgment docketed, the transcript with proof of its entry,[7] and the execution.[8] Contents of a lost execution may be proved by secondary evidence,—and for this purpose the deceased attorney's register is competent, after issue to the sheriff has been shown.[9] These documents are *prima facie* sufficient as against the debtor, if he is also shown to have been in possession.[10] But as against others in possession, plaintiff must show that some title or interest was in the judgment debtor.[11] Authority of a general deputy to execute a deed in the sheriff's name is presumed.[12] A sheriff's deed is supported by a presumption that the officer performed his duty,[13] and that the acts recited, though stated very generally, were done in a manner conformable to the statute;[14] and the granting part is not to be varied,[15] except by evidence legitimate by way of explanation, or making a case for equitable reformation.[16] The sheriff's certificate of sale, or a

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[1] See Jackson v. Daley, 5 Wend. 526. The book of a school commissioner (since deceased) preserved in the county archives, and containing a record of his proceedings in selling lands reserved for school purposes, and a list of such lands made by one (since deceased) acting under his direction, is competent, both as a public record and as entries of a deceased person in course of official duty, to prove what lands were reserved for school purposes, and therefore could be conveyed by the State. Hedrick v. Hughes, 15 Wall. 123, 127. The secondary evidence of the contents of a record need not be a strict copy. A memorandum or selection of extracts, if embodying correctly what is material, is competent, especially where it was contemporaneous with the record. Id.

[2] Adams v. Saratoga & Washington R. R. Co. 10 N. Y. 328, rev'g 11 Barb. 414. As to the presumptions indulged in support of the record in other respects, see Denning v. Smith, 3 Johns. Ch. 332; Wood v. Chapin, 13 N. Y. 509; Cleveland v. Boerum, 27 Barb. 252, affi'g 23 Id. 201, 3 Abb. Pr. 294, and pp. 544–8 of this vol.

[3] These rules are much varied by the statutes in some of the States.

[4] Clute v. Emmerick, 12 Hun, 504. Recitals in the deed to an assignee of the certificate are sufficient evidence of the assignment. Rorer Jud. S. 402, § 1077.

[5] Wilson v. Conine, 2 Johns. 280; Ins. Co. v. Halleck, 6 Wall. 556.

[6] Jackson v. Hasbrouck, 12 Johns. 213; Townshend v. Wesson, 4 Duer. 342. See p. 535 of this vol.

[7] WALWORTH, Ch., Tuttle v. Jackson, 6 Wend. 213, 222; Arnold v. Gorr, 1 Rawle, 223; Dickinson v. Smith, 25 Barb. 102.

[8] Labattie v. Baggs, 55 Ga. 572. Lack of seal (Ins. Co. v. Halleck, 6 Wall. 556, 558) may be cured by amendment. McGoon v. Scales, 9 Wall. 23, 31.

[9] Leland v. Cameron, 31 N. Y. 115.

[10] Kellogg v. Kellogg, 6 Barb. 116; Tuttle v. Jackson, 6 Wend. 213, 223. And in some cases conclusive, Dickinson v. Smith, 25 Barb. 102, and cases cited.

[11] Tyl. Ej. 177, 530.

[12] Jackson v. Davis, 18 Johns. 7.

[13] Wood v. Morehouse, 45 N. Y. 368, affi'g 1 Lans. 405; Jackson v. Shaffer, 11 Johns. 513.

[14] Leland v. Cameron, 31 N. Y. 115; McGoon v. Scales, 9 Wall. 23, 30. Compare, to the contrary, Walker v. Moore, 2 Dill. C. Ct. 256.

[15] Jackson v. Roberts, 11 Wend. 422. As to the recitals, compare Phillips v. Shiffer, 14 Abb. Pr. N. S. 101.

[16] Bartlett v. Judd, 21 N. Y. 200, affi'g 23 Barb. 262.

certified copy, is by the statute[1] presumptive evidence of the facts required to be stated therein,[2] and plaintiff should be prepared to prove such a certificate.[3] Return of the execution sale is not necessary unless made so by statute.[4]

The deed may be defeated by oral evidence that the judgment had been paid;[5] but the declarations of the sheriff, though he be deceased, are not competent for this purpose,[6] unless part of the *res gestæ*. A certificate of redemption duly made is *prima facie* evidence.[7]

14. — *on surrogate's sale.*]—By the recent statute in New York,[8] as well as by the weight of opinion in modern decisions, independent of such special statutes, if jurisdiction appear (and this is, *prima facie*, shown by recitals in the record according to principles already stated),[9] the burden now lies on the party claiming in opposition to a sale under a surrogate's order, to show a defect in the proceedings, such as would impeach the judgment of a court of general jurisdiction. The lapse of sufficient time (twenty or thirty years) raises a conclusive presumption that the proceedings to sustain the order for sale and the deed, were regular.[10]

15. — *on tax sale.*]—Unless otherwise provided by statute, the claimant must prove strictly every substantial requisite to a valid tax and sale under it.[11] He must show affirmatively step by step that every thing has been done which the statute made essential;[12] unless he had actual possession, and is suing a mere trespasser,[13] or is relying on the title only as a claim characterizing his adverse possession.[14] The recitals in a tax deed are not, against the owner, even *prima facie* evidence.[15] Lapse of time, however, excuses inability

[1] 2 N. Y. R. S. p. 370, § § 43, 44; 1 L. 1857, p. 93, c. 60, § 2.

[2] Anderson v. James, 4 Robt. 35.

[3] Clute v. Emmerick, 12 Hun, 504. *Contra*, Tyl. Ej. 529.

[4] Wheaton v. Sexton, 4 Wheat. 503. Compare Willcox v. Emerson, 10 R. I. 270, s. c. 14 Am. R. 683.

[5] Jackson v. Cadwell, 1 Cow. 622; Stafford v. Williams, 12 Barb. 240.

[6] Woodgate v. Fleet, 11 Abb. Pr. N. S. 41, s. c. 44 N. Y. 1.

[7] People *ex rel.* Chase v. Rathbun, 15 N. Y. 528, affi'g Griffin v. Chase, 23 Barb. 278; and see Livingston v. Arnoux, 56 N. Y. 507, affi'g 15 Abb. Pr. N. S. 158; Rice v. Davis, 7 Lans. 393.

[8] N. Y. L. 1850, p. 117, c. 82; L. 1869, p. 475, c. 260; L. 1872, p. 229, c. 92; L. 1878, p. 139, c. 129; Forbes v. Halsey, 26 N. Y. 53.

[9] P. 544, &c. of this vol. Comstock v. Crawford, 3 Wall. 396. A petition conforming to the statute is sufficient (Florentine v. Barton, 2 Wall. 210, 216), with proof of publication, where publication is required (McNitt v. Turner, 16 Wall. 352, 365). Where the statute does not require notice, the record need not show that notice was given (Florentine v. Barton [above]). Neither the evidence nor the finding of necessary facts need appear, if the statute does not require it (Cornett v. Williams, 20 Id. 226, 250).

[10] 1 Greenl. Ev. 13th ed. 26, § 20; Florentine v. Barton (above).

[11] Williams v. Peyton, 4 Wheat. 77; Little v. Herndon, 10 Wall. 26, 31.

[12] Blackw. 75.

[13] Thompson v. Burhans, 61 N. Y. 59, rev'g 61 Barb. 260.

[14] Id.; Pillow v. Roberts, 13 How. U. S. 472.

[15] Blackw. 73; Tyl. Ej. 536.

to produce full evidence of minute details;[1] but a presumption of regularity cannot serve in lieu of producing the record if it can be produced, nor serve to show that there was a proper record where it appears that none can be found.[2] The official assessment made and kept pursuant to law is admissible, on production, with evidence that it comes from the proper official custody, and the oath of the maker or custodian is not necessary.[3] The final assessment roll is equally competent.[4] If the designation of land is sufficient under the statute, the testimony of the assessor is competent to identify the property.[5] If the statute[6] makes the deed *prima facie* evidence, it merely shifts the burden of proof;[7] and whether it declare the deed to be *prima facie* or conclusive[8] evidence, the courts do not give it this effect any further than expressly required, and will not extend the presumption to previous[9] or subsequent[10] proceedings. If the statute does not declare that the deed shall be *prima facie* evidence, the burden is on one claiming under the deed to prove compliance with the law; and the general presumption of official regularity cannot avail to supply the want of such evidence, as to matters which should be of record, even after the lapse of more than thirty years.[11] Steps which the law makes prerequisites of sale, if not recited in the deed, should be proved *aliunde* in order to sustain the deed, although the law does not require them to be recited.[12] Where the statute is prohibitory in respect to conditions of power to act, recitals showing a departure from the statute cannot be helped by the presumption of regularity.[13] The presumption is indulged to supply the place of that which is not apparent, not to give a new character to that which is seen to be defective.

Payment of the tax may be proved by oral evidence as well

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[1] Stead v. Course, 4 Cranch, 403; Hilton v. Bender, 69 N. Y. 75, 82.

[2] Blackw. 533; Hilton v. Bender (above).

[3] 1 Whart. Ev. § 639. Or a certified copy. Wing v. Hall, 47 Vt. 182. The production of what purport to be assessment rolls, without proof of their authenticity or the genuineness of the assessors' signatures, is not sufficient evidence that the taxes therein mentioned were duly imposed. Stevens v. Palmer, 10 Bosw. 60.

[4] Ronkendorf v. Taylor's Lessee, 4 Pet. 349.

[5] Russel v. Werntz, 24 Penn. St. 337, 346.

[6] The statutory presumption may depend on the statute in force at the time of the trial. Hickox v. Tallman, 38 Barb. 608.

[7] Williams v. Kirtland, 13 Wall. 306; Johnson v. Elwood, 53 N. Y. 431; modified on another point, in 56 Id. 614.

[8] Whether a statute declaring it conclusive is constitutional, see McCready v. Sexton, 29 Iowa, 353, s. c. 4 Am. R. 214; Blackw. 80, and cas. cit.

[9] Beekman v. Bigham, 5 N. Y. 366; Whitney v. Thomas, 23 N. Y. 281; Rathbone v. Hooney, 58 N. Y. 463.

[10] Westbrook v. Willey, 47 N. Y. 457; McCready v. Sexton, 29 Iowa, 356, s. c. 4 Am. R. 214.

[11] Hilton v. Bender, 69 N. Y. 75, 77, rev'g 2 Hun, 1, s. c. 4 Supm. Ct. (T. & C.) 270.

[12] Brown v. Goodwin, 1 Abb. New Cas. 452.

[13] French v. Edwards, 13 Wall. 506, 514; and compare Walker v. Moore, 2 Dill. C. Ct. 256; Leland v. Cameron, 31 N. Y. 115.

as by the receipt or books of the collector.[1] The word "*paid*" on a collector's book, opposite a tax upon land, is not evidence that the taxes were paid by the person in whose name the land is assessed.[2]

16. *Grantor's title.*]—Plaintiff, relying on a conveyance to him from a grantor other than the State, must show that his grantor had either title, or possession claiming title.[3] If the conveyance was from one in peaceable possession claiming title at the time it was executed, this is sufficient. If from one out of possession,—as in case of wild lands,—plaintiff must show a grant from the original source of title, and a regular deduction therefrom.[4] Length of possession is not essential, unless it is relied on as adverse possession, and in that case, if sufficiently long continued, the validity of the deed is not essential.[5] The capacity of the grantor to acquire[6] and convey,[7] may be presumed in the absence of evidence tending to the contrary. In the absence of evidence to the contrary, there is a presumption that the grantee took according to the true title of the grantor, and with knowledge of it.[8] Title shown once to have existed, is presumed to continue,[9] and he who relies upon a disseizin must prove it.[10] Every presumption is in favor of possession in subordination to the title of the true owner.[11] In proving an exchange, possession of the parcel given in exchange is relevant.[12]

17. *State grant.*]—A patent can be proved by a *constat*, or an exemplification of record,[13] without producing the patent itself.[14] A patent is presumptive evidence of its own regularity and validity,[15] and at common law conclusive, except as against evidence showing it to be absolutely void. Evidence, oral or written, which shows a want of power in officers who issue a patent, is admissible, even in an action at law, to defeat a title set up under it.[16]

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[1] Adams v. Beale, 19 Iowa, 61.

[2] Irwin v. Miller, 23 Ill. 401.

[3] Dominy v. Miller, 33 Barb. 386; s. p. Stevens v. Hauser, 39 N. Y. 302; and see Smith v. Lawrence, 12 Mich. 431. *Contra*, Chamberlain v. Bradley, 101 Mass. 188, s. c. 3 Am. R. 331; Bolster v. Cushman, 34 Me. 428; and see McNitt v. Turner, 16 Wall. 352.

[4] Tyl. Ej. 541.

[5] Stark v. Starr, 1 Sawy. 15.

[6] Yates v. Van De Bogert, 56 N. Y. 526.

[7] Battin v. Bigelow, Pet. C. Ct. 452.

[8] Smith v. Townsend, 25 N. Y. 479.

[9] Thomas v. Hatch, 3 Sumn. 170.

[10] Stevens v. Hauser, 39 N. Y. 302, rev'g 1 Robt. 50.

[11] Jackson v. Sharp, 9 Johns. 163; Jackson v. Waters, 12 Id. 365; Jackson v. Thomas, 16 Id. 293.

[12] Moss v. Culver, 64 Penn. St. 414, s. c. 3 Am. R. 601.

[13] McKineron v. Bliss, 31 Barb. 180, aff'd, on other grounds, as McKinnon v. Bliss, 21 N. Y. 206; and see McGarrahan v. Mining Company, 96 U. S. (6 Otto), 316.

[14] Patterson v. Winn, 5 Pet. 233.

[15] Jackson v. Marsh, 6 Cow. 281; People v. Mauran, 5 Den. 389; United States v. Stone, 2 Wall. 525, 535.

[16] Sherman v. Buick, 93 U. S. (3 Otto), 209.

The due performance of official acts may be presumed in support of its validity.[1] The rules usual for presuming a lost grant do not avail to the same extent, to prove a grant by the government.[2]

18. *Landlord and tenant.*]—In ejectment between landlord and tenant, the lease should be proved,[3] and it is sufficient evidence of plaintiff's title.[4] The landlord's execution of the lease, even where he sues to rescind it as void, is competent in evidence as an act of ownership, and is *prima facie* evidence of title, even though defendants are only connected with it by evidence that they are in possession of the demised premises.[5] It is for them to show that their possession is referable to some other title.[6] Notice to quit is not necessary under a demise for a term to expire at a time certain.[7]

Where a tenancy expired by notice to quit, the service of the notice may be proved by the testimony of the person making it, or of any eye witness,[8] or by memorandum or entry made contemporaneously in the ordinary course of duty by the person who made the service, he being since deceased.[9] The authority of an agent giving the notice may be proved as in other cases of agency, except that a subsequent ratification will not enure to bind the tenant by a notice not authorized when given.[10] The contents of the notice may be proved by producing a duplicate original,[11] or if that cannot be done, by oral evidence, without having given defendant notice to produce the original.[12] The fact that the period contemplated by the notice had expired when the action was brought, may be shown presumptively by the admission of the tenant; and this is conclusive if express and acted on.[13] The refusal of the tenant to admit the tenancy may be proved in lieu of a notice to quit.[14]

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[1] Jackson v. Cole. 4 Cow. 587; Cofield v. McClelland, 16 Wall. 331, 335; Carpenter v. Rannels, 19 Id. 138, 146; but compare U. S. v. Jonas, 19 Wall. 598, 604.

[2] Oaksmith's Lessee v. Johnston, 92 U. S. (2 Otto), 343, 345.

[3] Presumptions arising from the lapse of time will aid defects in the proof of the lease. Bogardus v. Trinity Church, 4 Sandf. Ch. 633; Carver v. Jackson, 4 Pet. 1. If the demise was oral, it may be proved by any person present at the making of it, or by circumstances, such as the payment of rent. Tyl. Ej. 550. An agreement for a lease is not enough without proof of rent paid, if the tenant claims to hold adversely. Jackson v. Cooly, 2 Johns. Cas. 223.

[4] Stott v. Rutherford, 92 U. S. (2 Otto), 107. See p. 523, &c. of this vol.

[5] Magdalen Hospital v. Knotts, 36 Weekly R. 640.

[6] Id. *Contra*, Caldwell v. Center, 30 Cal. 539.

[7] Tyl. Ej. 207; Gregg v. Von Phul, 1 Wall. 274. See, also, Larned v. Hudson, 60 N. Y. 102; Smith v. Littlefield, 51 N. Y. 539; People *ex rel.* Aldhouse v. Goelet, 14 Abb. Pr. N. S. 130, s. c. 64 Barb. 476.

[8] Tyl. Ej. 551.

[9] Doe *d.* Patteshall v. Turford, 11 Mees. & W. 773; and see Leland v. Cameron, 31 N. Y. 115.

[10] See Tyl. Ej. 552.

[11] Tory v. Orchard, 2 Bos. & P. 41.

[12] Falkner v. Beers, 2 Doug. (Mich.) 117.

[13] Tyl. Ej. 552, and cases cited; p. 527 of this vol. For mode of proving commencement of action, see p. 688 of this vol.

[14] Tyl. Ej. 553.

19. *Mortgagor and mortgagee.*[1]]—The mortgage is sufficient evidence of title as against the mortgagee. If overdue, default and forfeiture may be presumed. As against third persons, plaintiff must also show their tenancy, and either that it has been determined or that it is subject to the mortgage.[2]

20. *Vendor and purchaser.*]—A vendor suing for possession, after default on the part of the purchaser, should prove the contract,[3] and default, and that defendant was in possession at the commencement of the action. This is sufficient.[4] The contract is conclusive evidence of plaintiff's title.[5] Notice to quit is not necessary if defendant is put in the wrong by evidence of breach, making his possession tortious.[6]

21. *Entry.*]—The New York statute[7] dispenses with proof of actual entry in all cases.[8]

22. *Title by descent or devise.*]—The modes of proof have already been stated.[9] More strict proof of death is required, to establish title in ejectment, than where the question arises incidentally and collaterally.[10]

23. *Dower.*]—In those States where dower may be recovered by ejectment, the ordinary rules of the action apply.[11] The marriage may be proved by indirect evidence. Evidence of the husband's seizin, which would be sufficient to authorize a recovery by the heir, is enough.[12] Proof of actual possession in the husband or his tenant is presumptive evidence of seizin.[13] A purchaser from the husband is not estopped from denying that he had an

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[1] By statute, in New York, the mortgagee cannot bring ejectment (2 N. Y. R. S. 312, § 57), and his remedy against the mortgagor is by action to redeem. Hubbell v. Moulson, 53 N. Y. 225.

[2] Tyl. Ej. 543–9.

[3] See p. 504, &c. of this vol.

[4] Tyl. Ej. 558; Frisbie v. Price, 27 Cal. 253.

[5] Jackson v. Ayres, 14 Johns. 224; Jackson v. Britton, 4 Wend. 507. Upon principles already stated respecting tenant's estoppel. See p. 528 of this vol.

[6] Gregg v. Von Phul, 1 Wall. 274; Tyl. Ej. 558.

[7] 2 N. Y. R. S. 306, § 25.

[8] Lawrence v. Williams, 1 Duer, 585. So, also, in England. Dumpor's Case, 1 Smith's L. Cas. 93, 108. To prove a legal entry in avoidance of an estate, there must be an intent to enter for the purpose of taking actual or constructive possession, not merely to make a demand or for other purpose. If the lessor making the entry declares that he comes for a different purpose, he cannot subsequently sustain it by proving a purpose to take possession for the forfeiture. Dumpor's Case, 1 Smith's L. Cas. 93, 107. Where a party has a legal right to enter in one character, or under one title, the law presumes that his entry was in that character, and under that title, and not as a trespasser. Benson v. Bolles, 8 Wend. 175.

[9] Chapter V of this vol.

[10] Carroll v. Carroll, 60 N. Y. 121, 125, rev'g 2 Hun, 609; 6 Supm. Ct. (T. & C.) 294; 16 Abb. Pr. N. S. 239.

[11] Tyl. Ej. 172.

[12] Jackson v. Waltermire, 5 Cow. 299; Carpenter v. Weeks, 2 Hill, 341. A deed and mortgage, differently dated, may be shown by parol to have been simultaneously delivered, so as to disprove continuing seizin. Mayberry v. Brien, 15 Pet. 21.

[13] Carpenter v. Weeks, 2 Hill, 341.

absolute estate.[1] Evidence of the husband's declarations and admissions are competent against the widow, equally as against the heir.[2]

A variance in respect to the extent of the premises,[3] or the character of the tenure,[4] may be cured by amendment. Admeasurement shown by a regular record is presumed, in the absence of evidence, to have been made on the widow's application and with her assent.[5] It is conclusive as to the location and extent,[6] but is not evidence of title.[7]

24. *Curtesy.*]—In general, evidence of actual seizin is necessary.[8] Under the married women's act, curtesy may be defeated by evidence that the wife devised or conveyed.[9] A tenant by the curtesy, holding possession, is presumed to hold as such tenant, and not adversely, though he have a void deed of the fee.[10]

25. *Title under ancient instrument.*]—An ancient deed or will, or other instrument of title,[11] may be admitted in evidence without direct proof of execution,[12] when shown to have come from proper custody, and appearing to be of the age of at least thirty years,[13] if either a corresponding possession under it[14] for at least thirty years[15] is shown, or if such account of it be given as may reasonably be expected under all the circumstances of the case, and as affords a presumption that it is genuine.

There must always be possession or other corroborating proofs.[16]

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[1] Cooper v. Whitney, 3 Hill, 95; Foster v. Dwinel, 1 Am. L. Reg. N. S. 604, and note of REDFIELD, J. Unless, perhaps, when he derives all his title by that deed. McLeery v. McLeery, 5 Me. 172, s. c. 20 Am. R. 683, 686, and cases cited.

[2] Van Duyne v. Thayre, 14 Wend. 233; Keator v. Dimmick, 46 Barb. 158. *Contra*, Derush v. Brown, 8 Ohio, 413.

[3] Bear v. Snyder, 11 Wend. 592.

[4] Borst v. Griffin, 9 Wend. 307.

[5] Tilson v. Thompson, 10 Pick. 359.

[6] Jackson v. Hixon, 17 Johns. 123; Jackson v. Churchill, 7 Cow. 287.

[7] Jackson v. Randall, 5 Cow. 168; Jackson v. De Witt, 6 Id. 316. At least not conclusive. Parks v. Hardey, 4 Bradf. 15; Wood v. Seely, 32 N. Y. 105. As to computing a gross sum in lieu, compare the statute, 2 N. Y. L. 1870, p. 1722, c. 717, § 5 (2 R. S. 6 ed. 1124), with note to paragraph 45.

[8] Ferguson v. Tweedy, 43 N. Y. 543, affi'g 56 Barb. 168; or at least evidence excluding the idea of actual seizin in a stranger. 2 Abb. N. Y. Dig. new ed. 493. Compare Young v. Langbein, 7 Hun, 151.

[9] Lansing v. Gulick, 26 How. Pr. 250, and cases cited; Matter of Winne, 2 Lans. 21, rev'g 1 Lans. 508.

[10] Corwin v. Corwin, 6 N. Y. 342, rev'g 9 Barb. 219.

[11] Otherwise of an ancient account adduced in support of title, though found with the title deeds. Jackson v. Murray, Anth. N. P. 143. Compare Roe v. Rawlings, 7 East, 279.

[12] For the general rule, see Enders v. Sternbergh, 2 Abb. Ct. App. Dec. 31.

[13] The handwriting of signatures to unauthorized indorsements or certificates may be proved, for the purpose of showing the antiquity. Jackson v. Laroway, 3 Johns. Cas. 283.

[14] Crowder v. Hopkins, 10 Paige, 183.

[15] Staring v. Bowen, 6 Barb. 109. Less is not enough (Jackson v. Blanshan, 3 Johns. 292), unless there be the aid of some evidence of execution. Jackson v. Luquere, 5 Cow. 221.

[16] Wilson v. Betts, 4 Den. 201; s. p. Clark v. Owens, 18 N. Y. 434; Ridgeley v. Johnson, 11 Barb. 527.

Where these are shown, the fact that an attesting witness is living, within the jurisdiction, does not make it essential to produce him.[1] The presumption may be rebutted.[2]

Evidence of handwriting is admissible in aid of the presumption; and, in qualification of the general rule already stated,[3] it is to be observed that where, from the antiquity of the writing, it is impossible for any living witness to swear that he ever saw the party write, comparison is allowed, from necessity, with documents known to be in his handwriting, though not otherwise in evidence.[4]

26. *Lost instrument, and secondary evidence.*]—Notice to a party to the action to produce an instrument, is regular though the instrument be in possession of his grantor; and plaintiff need not call such grantor as a witness.[5] A deed produced, by a party to it and to the action, pursuant to notice to produce, may be read in evidence without proof of its execution, unless there is evidence impeaching it.[6] Secondary evidence may be given of a document, lost or destroyed without the fault of the party offering it, although such document be one which, by reason of age, proved itself without ordinary proof of execution. In such a case the same principle of necessity which admits secondary evidence of its contents, allows proof, by testimony, of its general appearance and of its marks of antiquity.[7] Parol evidence of the contents of a lost deed should show substantially all the contents. A small portion is not enough;[8] but evidence is sufficient which enables the court to approximate to the date, and to determine the character, the parties, and the premises conveyed.[9]

27. *Presumed grant.*]—The cases in which a grant is presumed are chiefly of three classes.

1. Where one has been in possession under claim of right for a great lapse of time (the period fixed by the statute of limitations is usually followed[10]), sufficient to justify an inference of rightful enjoyment, a grant may be presumed for the sake of quieting his title and possession, unless the circumstances are equally consistent with the idea that he had none.[11] This pre-

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[1] Jackson v. Christman, 4 Wend. 277.

[2] Wilson v. Betts (above); Meegan v. Boyle, 19 How. U. S. 130.

[3] Pp. 393–8 of this vol.

[4] Strother v. Lucas, 6 Pet. 763; Jackson v. Brooks, 8 Wend. 426; West v. State, 22 N. J. L. (2 Zab.) 212, 241; Sweigart v. Richards, 8 Penn. St. 486.

[5] Jackson v. Livingston, 7 Wend. 136; Corbin v. Jackson, 14 Id. 619.

[6] Betts v. Badger, 12 Johns. 223; McGregor v. Wait, 10 Gray (Mass.), 72.

[7] Enders v. Sternbergh, 2 Abb. Ct. App. Dec. 31, rev'g 52 Barb. 222.

[8] So held in trespass. Edwards v. Noyes, 65 N. Y. 125; and see Metcalf v. Van Benthuysen, 3 N. Y. 424.

[9] Kent v. Harcourt, 33 Barb. 491.

[10] Ricard v. Williams, 7 Wheat. 59; Flora v. Carbean, 38 N. Y. 111. Compare Barclay v. Howell, 6 Pet. 498; Mitchel v. United States, 9 Pet. 711, 760.

[11] Ricard v. Williams, 7 Wheat. 59, 109; Schauber v. Jackson, 2 Wend. 14; Flora v. Carbean, 38 N. Y. 111.

sumption is aided by evidence that he had a right to a grant. To raise this presumption, some evidence must be given tending to show title good in substance (though wanting some essential matter to make it formally complete), and a possession consistent with the grant to be presumed.[1] But very slight circumstances will authorize the inference after a great lapse of time.[2]

2. Where those claiming title show themselves to have been entitled to a conveyance from trustees in conformity to the trust, or from others in pursuance of a contract, a grant may be conclusively presumed against a person in possession without right.[3]

3. Where defendant not claiming title but only possession, gives evidence tending to raise an inference that plaintiff, or those under whom he claims had divested themselves of title by a conveyance to some third person, the jury may infer a grant;[4] but the law does not presume it.[5]

28. *Deed void for adverse possession.*]—Showing possession in a third person is not enough; it must be shown to be adverse,[6] and under the claim of some specific title[7] asserted in good faith.[8] The adverse possession must be clearly and positively proved.[9] If the deed is shown to have been made by the true owner, every presumption is in favor of a possession in subordination to his title.[10]

29. *Impeaching on equitable grounds.*]—Under the new procedure a deed, or other muniment of title, may be impeached on equitable grounds.[11] A party who has read the instrument in evidence, for the purpose of showing the nature of his adversary's claim, is not thereby precluded from impeaching the instrument.[12]

30. *Admissions and declarations.*]—A party cannot prove or disprove title to land by his adversary's parol admission of title or of the want of it.[13] But in support of other legal evidence of title, evidence of a general admission, or even an indirect recognition, is competent,[14] and is sufficient against a mere intruder.[15]

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[1] Enders v. Sternbergh, 2 Abb. Ct. App. Dec. 31, rev'g 52 Barb. 222.

[2] Russell v. Jackson, 22 Wend. 276, 282, affi'g 4 Id. 543.

[3] Schauber v. Jackson, 2 Wend. 14, 32, *per* WALWORTH, Ch., dissenting; French v. Edwards, 21 Wall. 147, and a further decision in 5 Sawy. 266.

[4] Schauber v. Jackson, 2 Wend. 14, 63. *Contra*, Doe v. Butler, 3 Wend. 149.

[5] Schauber v. Jackson (above).

[6] Stevens v. Hauser, 39 N. Y. 302, rev'g 1 Robt. 50.

[7] Crary v. Goodman, 22 N. Y. 170.

[8] Livingston v. Peru Iron Co. 9 Wend. 511, rev'g 2 Paige, 390.

[9] Wickham v. Conklin, 8 Johns. 220; Jackson v. Sharp, 9 Id. 163; Jackson v. Waters, 12 Id. 365; Howard v. Howard, 17 Barb. 663; but compare La Frombois v. Jackson, 8 Cow. 589.

[10] Jackson v. Sharp, 9 Johns. 163; Jackson v. Waters, 12 Id. 365.

[11] Despard v. Walbridge, 15 N. Y. 374. See paragraphs 1 and 36.

[12] Remington v. Linthicum, 14 Pet. 84.

[13] Walker v. Dunspaugh, 20 N. Y. 170; Jackson v. Miller, 6 Cow. 751, 755; Jackson v. Cary, 16 Johns. 302, 306; McPhaul v. Gilchrist, 7 Ired. (N. C.) L. 169, 173.

[14] Jackson v. Dobbin, 3 Johns. 223; Jackson v. Croy, 12 Johns. 427.

[15] Sykes v. Hayes, 5 Biss. 529.

Wherever the declaration of one having or claiming title to real estate would be competent against him, it is competent against persons subsequently deriving title through or from him, provided that it was made while he held all the title which they obtained or can claim;[1] but it is not competent for the purpose of impeaching or destroying a record title.[2] Declarations made after he contracted to convey, but before conveying, are competent,[3] but those made after he conveyed (even though while he continued in the occupation by sufferance[4]), are not competent against those claiming under him.[5]

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[1] Chadwick v. Fonner, 69 N. Y. 407, and cas. cit., rev'g, on other grounds, 6 Hun, 543. The declarations need not have been made on the land. Abeel v. Van Gelder, 36 N. Y. 513, 516; Smith v. McNamara, 4 Lans. 169. Actual or constructive possession is enough. Id. Id.

[2] Gibney v. Marchay, 34 N. Y. 304.

[3] Chadwick v. Fonner (above); Corbin v. Jackson, 14 Wend. 619.

[4] Vrooman v. King, 36 N. Y. 477, 483; 2 Whart. Ev. § 1165 and cas. cit. *Contra*, Adams v. Davidson, 10 N. Y. 309.

[5] The cases on this subject are innumerable, and to a considerable extent irreconcilable. The following rules I deem safe guides in the application of the principle stated in the text, agreeably to the present general canons of evidence:

1. If it is a question whether a person was in possession at a given time, his acts of ownership at that time, and his declarations and admissions made in connection with such acts, and characterizing them, are competent. Perkins v. Blood, 36 Vt. 273, 282; Young v. Adams, 14 B. Monr. (Ky.) 127, 132; Andrews v. Fleming, 2 Dall. 93; St. Clair v. Shale, 9 Penn. St. 252; West v. Price, 2 J. J. Marsh (Ky.), 380; Comins v. Comins, 21 Conn. 413.

2. If a party, or one under whom a party claims, is shown to have been in possession (Ellis v. Janes, 10 Cal. 456; Reed v. Dickey, 1 Watts [Penn.], 152), and it is a question whether he held under claim of title, and if so what claim, his declarations and admissions (including entries and memoranda; Hodgdon v. Shannon, 44 N. H. 572; Rand v. Dodge, 17 N. H. 343, 356) made while in possession, and characterizing his claim of title, are competent. Enders v. Sternbergh, 2 Abb. Ct. App. Dec. 31, rev'g 52 Barb. 222; Sample v. Robb, 16 Penn. St. 305, 319; Jackson v. Bard, 4 Johns. 230; Fellows v. Fellows, 37 N. H. 75, 84.

3. If it is a question what were the boundaries of his possession, his acts done upon the land (and equally his declarations, made while in possession), and defining his then actual boundary, are competent evidence of the location of the line; but not of the title (Bower v. Earl, 18 Mich. 367, 376; Van Blarcom v. Kip, 26 N. J. L. [2 Dutch.] 351, 360; Gratz v. Beates, 45 Penn. St. 495; Dawson v. Mills, 32 Penn. St. 302), except in the cases where actual location affects title (paragraph 11).

4. In all these cases the declarations are received as in the nature of a part of the *res gestæ* of the continuous and pervading fact of possession or claim, and hence are admissible not only against, but equally in favor of, the declarant and those claiming under him. Sheaffer v. Eakeman, 56 Penn. St. 144; page 158 of this vol.

5. If possession with or without apparent paper title has been shown to have been in a person under whom either party claims, evidence of his declarations and admissions, against his interest, of facts such as oral evidence is competent to show, and which directly disparage his title or the extent or the effect of his possession, is admissible against those claiming under him, if clearly shown to have been made while he held the possession and the title, if any. P. 158 of this vol; Outcalt v. Ludlow, 32 N. J. L. 239; Carpenter v. Carpenter, 8 Bush (Ky.), 283; Eckford v. DeKay, 8 Paige 89; Keator v. Dimmick, 46 Barb. 158; Graham v. Busby, 34 Miss. 272, 274; Jackson v. Livingston, 7 Wend. 136; Corbin v. Jackson, 14 Id. 619. Statements of merely incidental facts (such as the amount due on a mortgage, &c.; Cook v. Swan, 5 Conn. 140; Foote v. Beecher, 7 Abb. New Cas.), as well as any declarations made before acquiring (Wallace v. Miner, 6 Ohio, 366) or after parting with (Vrooman v. King, 36 N. Y. 483) the possession or title, are inadmissible, unless as part of the *res gestæ* of a specific fact already properly in evidence (Moore v. Hamil-

Admissions as to title are dangerous evidence.[1]

31. *Recitals.*]—A *recital* in a deed[2] is evidence of the fact or instrument recited, as against the parties to the deed, and those who claim under them by matters subsequent, whether by privity in blood, estate or law;[3] but not against others,[4] unless accompanied with other evidence of the ancient existence of the deed and of possession in accordance with it,[5] in which case it is admissible even against strangers.[6] A deed, containing a recital, is competent, although it does not directly affect the title.[7] A general recital, as distinguished from a direct affirmation of fact, is not a conclusive estoppel;[8] and one which would otherwise be conclusive may be explained by mistake,[9] &c., unless acted on, so as to create an equitable estoppel.

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ton, 44 N. Y. 666; Kent v. Harcourt, 33 Barb. 491; Rigg v. Cook, 9 Ill. [4 Gilm.] 336, 350; Bell v. Woodward, 46 N. H. 315, 335; Brush v. Blanchard, 19 Ill. 31; McDowell v. Goldsmith, 6 Md. 319, 338; Dinkle v. Marshall, 3 Binn. [Penn.] 587; Carroll v. Granite Manuf. Co. 11 Md. 399, 407; Johnson v. Elliot, 26 N. H. [6 Fost.] 67, 76; Cheswell v. Eastham, 16 N. H. 296), or brought home to the party against whom they are adduced.

6. If one under whom neither party claims is shown to have been in possession, with or without apparent title, and it is a question whether he held under a claim of title and if so what claim, his declarations and admissions made while in possession, and characterizing his claim of title, are competent after his decease, but not before. 2 Whart. Ev. § 1156.

7. In none of these cases are admissions and declarations competent as a substitute for (Maslin v. Thomas, 8 Gill. [Md.] 18, 29), or in contradiction of, a paper title. Gibney v. Marchay, 34 N. Y. 301, 304; Jackson v. Cole, 4 Cow. 587; Oakes v. Marcy, 10 Pick. (Mass.) 195.

8. Declarations, not admissible under these rules, are not rendered admissible by the fact that they are offered to rebut other contrary declarations already in evidence. Waring v. Warren, 1 Johns. 340; s. p. Henton v. Findlay, 12 Penn. St. 304. Nor even though made as dying declarations. Jackson v. Vredenburgh, 1 Johns. 159.

For the application of these rules, on a question of fraud as against creditors, see Chapter LI.

For declarations as to advancements, see p. 155 of this vol.

[1] Jackson v. Shearman, 6 Johns. 19; Jackson v. Cary, 16 Id. 302; Jackson v. Miller, 6 Cow. 751, affi'd in 6 Wend, 228.

Evidence that possession was characterized by declarations claiming it under a writing, does not necessarily require production of the writing. Patterson v. Flanagan, 37 Ala. 513, 522; p. 635 of this vol. n. 2.

[2] A recital in a deed given under a decree, may be limited by the decree. McCall v. Carpenter, 18 How. U. S. 297.

[3] Carver v. Astor, 4 Pet. 1, and cas. cit.; Crane v. Morris, 6 Id. 598, 611, Story, J.; Torrey v. Bank of Orleans, 9 Paige, 649, and cas. cit.

[4] Hill v. Draper, 10 Barb. 454; Hardenburgh v. Lakin, 47 N. Y. 109.

[5] Schermerhorn v. Negus, 2 Hill, 335; McKinnon v. Bliss, 21 N. Y. 206, affi'g McKineron v. Bliss, 31 Barb. 180.

[6] Deery v. Cray, 5 Wall. 795, 805.

[7] Jackson v. Harrington, 9 Cow. 86. But, in such a case, since the claim of the party is not founded on the deed, the deed is not an estoppel (Champlain, &c. R. R. Co. v. Valentine, 19 Barb. 484), and the recital must be one which is competent as an admission of a predecessor in title or possession, under the rules already stated (page 712), and if the instrument containing it was not executed by him there must be evidence of his acceptance or of possession of it on the part of him or of them against whom it is adduced. Jackson v. Brooks, 8 Wend. 426. For this purpose their production of it is *prima facie* enough. Jackson v. Harrington (above).

[8] Huntington v. Havens, 5 Johns. Ch. 23; Dempsey v. Tylee, 3 Duer, 73.

[9] Stoughton v. Lynch, 2 Johns. Ch. 209.

32. *Estoppels.*]—A conveyance, which, expressly or by necessary implication, affirms that the grantor is seized of and conveys a fee simple, estops the grantor, and those claiming under him, from denying that he had that estate and passed it by the deed.[1] But a quitclaim, or a deed which does not, on its face, define the estate or interest conveyed or intended to be conveyed in the premises, does not estop either party from showing, in opposition to it, that no title passed, or from claiming under after-acquired title.[2] An estoppel against estoppel sets the matter at large.[3]

Evidence of an *equitable estoppel* is admissible under a denial, or by amendment, if the party is not misled.[4] Estoppel *in pais* cannot work a transfer of title to land;[5] but it may cut off a lien,[6] conclude a question of boundary,[7] or even preclude the true owner and those claiming under him from impeaching an adverse conveyance when taken on the faith of his disavowals.[8]

33. *Former adjudication.*]—A former judgment in ejectment, recovered under the new procedure, is evidence (and conclusive, except where the statute gives a new trial of course), against the parties, as in personal actions.[9] And against strangers who entered into possession after the former action was commenced, but not others.[10] The grounds of former judgment, if they do not fully appear from the record, may be shown by parol, provided that the matters alleged to have been passed upon are such as could legally have been given in evidence upon the trial, and that the verdict and judgment show that they must necessarily have been considered by the court and jury.[11] Judgment in summary proceedings,[12] or in a proceeding or action to determine conflicting claims,[13] is competent. Acquittal in forcible entry and detainer, is not.[14]

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[1] Van Rensselaer v. Kearney, 11 How. U. S. 297; Heath v. Crealock, L. R. 10 Chan. App. 22, s. c. 11 Moak's Eng. 416, and cas. cit.; and see House v. McCormick, 57 N. Y. 310; Gallup v. Albany Rev. 7 Lans. 471.

[2] Sparrow v. Kingman, 1 N. Y. 242, 247; Kingman v. Sparrow, 12 Barb. 201; Bigelow v. Finch, 11 Barb. 498. The estoppel which passes an after-acquired title, under a prior one, cannot be prejudiced by the admission of the party setting it up, that the grantor had no title when he conveyed. McCusker v. McEvey, 9 R. I. 528, s. c. 11 Am. R. 295.

[3] Branson v. Wirth, 17 Wall. 32.

[4] Rowan v. Kelsey, 4 Abb. Ct. App. Dec. 125.

[5] Babcock v. Utter, 1 Abb. Ct. App. Dec. 27; Hayes v. Livingston, 34 Mich. 384, s. c. 22 Am. R. 533.

[6] Markham v. O'Connor, 52 Geo. 183, s. c. 21 Am. R. 249.

[7] Corkhill v. Landers, 44 Barb. 218.

[8] Mattoon v. Young, 45 N. Y. 696, again, 2 Hun, 559. For the three propositions on equitable estoppel, see 12 Moak's Eng. 373, and cases collected; Id. 375 n.

[9] Sturdy v. Jackaway, 4 Wall. 174; Miles v. Caldwell, 2 Id. 35.

[10] Thompson v. Clark, 4 Hun, 165. Compare Sheridan v. Andrews, 49 N. Y. 479.

[11] Wood v. Jackson, 8 Wend. 9, rev'g 3 Id. 27, reviewing conflicting cases. Followed by NELSON, J., Lawrence v. Hunt, 10 Id. 81; s. p. Stedman v. Patchin, 34 Barb. 218; Miles v. Caldwell, 2 Wall. 35.

[12] Terrett v. Cowenhoven, 11 Hun, 320.

[13] Lessee of Parrish v. Ferris, 2 Black, 606.

[14] Peyton v. Stith, 5 Pet. 485.

To prove a judgment as an adjudication upon the title, or a link in its chain, the judgment roll must be produced.[1]

34. *Defendant's possession: Ouster.*]—The fact that defendant was in possession at the commencement of the action must be shown.[2] It may be proved by direct testimony;[3] or by declarations of the defendant;[4] or by his acts of dominion;[5] or by the fact that he procured himself to be made a party, in order to defend the title.[6] A variance as to his claim of title,[7] or the relative possession of several defendants,[8] is not fatal.

Proof of lease or entry is no longer required,[9] nor of ouster unless it is shown that defendant is a tenant in common or joint tenant with plaintiff, or holds under such a co-tenant of plaintiff.[10] In that case actual ouster is generally necessary.[11] It may be proved by showing that the defendant held adversely, or that he denied the title of the other co-tenants, or claimed the whole of the premises for himself, or denied possession to the other; or had the sole and undisturbed possession for a long course of years without payment of rent, and without any claim of any part of the profits by the other co-tenants during the whole of the time.[12] Presumption of ouster does not arise where the right exercised by the tenant in possession is consistent with the rights of his co-tenant.[13]

35. *Mesne profits.*]—Rents and profits cannot be recovered unless claimed in the complaint.[14] The claim is open to every equitable defense.[15]

36. *Defenses.*]—Defendant need not show title in himself, but may rest on showing title out of plaintiff, and even a mere possessor, without claim of title, may give evidence tending to raise

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[1] Harper v. Rowe, Cal. 1878, 7 Reporter, 174; and see Chapter XXIX. All the necessary or proper documents used in summary proceedings in a matter pending before a court of record, although not proceeding according to the course of the common law in that particular matter, unless otherwise declared by law, are competent and material to sustain the adjudication. Embury v. Conner, 3 N. Y. 511, rev'g 2 Sandf. 98.

[2] Abbey Homestead Ass. v. Willard, 48 Cal. 614.

[3] Van Rensselaer v. Vickery, 3 Lans. 57.

[4] See paragraph 31.

[5] Such as residence on the premises, or receipt of rents, or cutting down trees, and the like, or refusal of a demand for possession. Tyl. Ej. 473.

[6] Jackson v. Harrow, 11 Johns. 434; Den *dem.* Mordecai v. Oliver, 5 Hawks (N. C.), 479.

[7] Rose v. Bell, 38 Barb. 25.

[8] Fosgate v. Herkimer Mfg. & Hydraulic Co. 12 N. Y. 580, affi'g 12 Barb. 352.

[9] 2 N. Y. R. S. 306, §§ 26, 27.

[10] Gillet v. Stanley, 1 Hill, 121; Sharp v. Ingraham, 4 Id. 116.

[11] Sharp v. Ingraham (above); Tyl. Ej. 199.

[12] Tyl. Ej. 476.

[13] Butler v. Phelps, 17 Wend. 642. Compare Gregg v. Sayre, 8 Pet. 244; Clason v. Rankin, 1 Duer, 337.

[14] Larned v. Hudson, 57 N. Y. 151. As to damages, see Vandevoort v. Gould, 36 N. Y. 639.

[15] Jackson v. Loomis, 4 Cow. 168.

a presumption that the title under which the plaintiff claims is extinct.[1] If plaintiff has only shown a possessory title, it is enough for defendant to show a prior possession within the period fixed by the statutes of limitations. Under the new procedure, an equitable defense may be proved.[2] Under a general denial, defendant may controvert any fact which plaintiff is bound to establish to make out title and right of possession at the commencement of the action; but he cannot prove a discharge of a cause of action then existing in plaintiff against him.[3]

37. — *adverse possession.*]—Adverse possession must be shown to have been based on a claim of title. Oral claim without written foundation is not enough, except as to land of which actual occupation is shown.[4] The possession must be shown to have been open, visible, notorious, exclusive, and adverse to plaintiff's title. It must be such that owner may be presumed to know that there is possession adverse to his title; though actual knowledge is not necessary.[5] It is not made out by inference, but by clear and positive proof. Every presumption is in favor of possession in subordination to title of true owner.[6]

Ripe adverse possession, being shown, is not rebutted by a subsequent admission of not having title;[7] but oral admissions, though to a stranger, are competent to show an agreement to hold under the true owner.[8] Evidence of the manner of occupation and of the conduct of others, tending to negative the idea of a subordinate possession, is competent.[9]

38. *Bona fide purchaser.*]—The facts giving the right to protection must be proved; and must be alleged, to be admissible in evidence.[10] Subject to qualifications below stated, applicable where protection depends on the recording act, a party relying on the plea that he is a *bona fide* purchaser, entitled to hold notwithstanding fraud, must prove apparently perfect title to a vested estate, by a regular conveyance.[11] The statement of consideration

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[1] Tyl. Ej. 564. Compare Greenleaf v. Birth, 6 Pet. 302; Foster v. Joice, 3 Wash. C. Ct. 498.

[2] Crary v. Goodman, 12 N. Y. 266.

[3] Raynor v. Timerson, 46 Barb. 518. But compare Ford v. Sampson, 8 Abb. Pr. 332, s. c. 30 Barb. 183, 17 How. Pr. 447.

[4] The requisites of the claim and of the possession are prescribed by statute. See 1 Abb. N. Y. Dig. new ed. 39; Tyl. Ej. 859, &c.

[5] 2 Greenl. Ev. § 430.

[6] Id. 394, note 5.

[7] Stuyvesant v. Tompkins, 9 Johns. 61, affi'd in 11 Id. 569.

[8] Read v. Thompson, 5 Penn. St. 327; Moore v. Small, 9 Id. 194.

[9] Fellows v. Fellows, 37 N. H. 75, 86.

[10] Boone v. Chiles, 10 Pet. 177, 211. And see Frost v. Beekman, 1 Johns. Ch. 288.

[11] Boone v. Chiles, (above); Life Ins. & Trust Co. v. Cutler, 3 Sandf. Ch. 176. But color of title with adverse possession in the grantor is competent. Tompkins v. Anthon, 4 Sandf. Ch. 97. In case of purchase under a decree, regularity in the decree need not be shown. Gallatian v. Cunningham, 8 Cow. 361.

contained in the deed is not sufficient ;[1] but actual payment before notice must be shown.[2] An erroneous statement of consideration in the deed does not preclude evidence of the true consideration.[3] The valuable consideration requisite to be proved is of the same character as required in the case of negotiable paper.[4] If protection is claimed under a conveyance by way of security for a past indebtedness, an agreement for forbearance will not be presumed in support of the claim, but must be proved.[5] A release or quitclaim, if available at all for the purpose,[6] especially requires extrinsic evidence of consideration.[7] Want of notice must be proved, and must be alleged, or is not admissible.[8] Under an allegation relating to the principal, notice to his agent may be proved.[9] Allegation of want of notice on the part of one owner does not admit evidence of want of notice on the part of another.[10] Unless otherwise provided by statute, actual knowledge of an existing instrument is, in legal effect, the equivalent to notice by its record.[11] A purchaser who had knowledge of a fact sufficient to put him to inquiry, is presumed to have made inquiry, and is chargeable with notice of whatever it appears he could have ascertained by the inquiry upon which the circumstances should have put him.[12] This presumption may be rebutted by evidence that he made due inquiry, and failed to ascertain the fact.[13]

For the purpose of proving the grantee a *bona fide* purchaser within the meaning of the recording acts, the acknowledgment in the deed is *prima facie* evidence that the consideration, acknowledged to be paid, was paid.[14]

As between one claiming record title, and one claiming under a prior equity or unrecorded instrument, the burden is on the latter to show actual notice to the subsequent purchaser of his

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[1] Bolton v. Jacks, 6 Robt. 166, 234; Jackson v. Cadwell, 1 Cow. 622; Lloyd v. Lynch, 28 Penn. St. 419; Seymour v. Wilson, 19 N. Y. 417.

[2] Jewett v. Palmer, 7 Johns. Ch. 65.

[3] Paragraph 9, and cases cited.

[4] See Pickett v. Barron, 29 Barb. 505, and cases cited; De Lancey v. Stearns, 66 N. Y. 157.

[5] Cary v. White, 52 N. Y. 138.

[6] May v. Le Claire, 11 Wall. 217.

[7] Boone v. Chiles, 10 Pet. 177, 212.

[8] Atty.-Gen. v. Biphosphated Guano Co. 27 Weekly R. 621; Gallatian v. Cunningham, 8 Cow. 361; Balcom v. N. Y. Life Ins. & Trust Co. 11 Paige, 454; Boone v. Chiles (above).

[9] Griffith v. Griffith, Hoff. Ch. 153.

[10] Atty.-Gen. v. Biphosphated Guano Co. (above).

[11] Patterson v. De La Ronde, 8 Wall. 292; Crane v. Turner, 67 N. Y. 437, aff'g 7 Hun, 357.

[12] Reed v. Gannon, 50 N. Y. 345, rev'g 3 Daly, 414; Cordova v. Hood, 17 Wall. 1. And see Maxfield v. Burton, L. R. 17 Eq. 15, s. c. 7 Moak's Eng. 642. But compare Wilson v. Wall, 6 Wall. 83, 91; Acer v. Westcott, 46 N. Y. 384, rev'g 1 Lans. 193.

[13] Reed v. Gannon (above).

[14] See paragraph 9.

rights, or prove circumstances such as would put a prudent man upon his guard and from which actual notice may be inferred.[1] Actual, open and visible possession, inconsistent with the title of the apparent owner by the record, is evidence of notice;[2] not so of occupation which is equivocal, occasional, or for a special or temporary purpose. Constructive possession will not suffice.[3]

Conveyance taken for value and without notice may be presumed to have been taken in good faith, in the absence of other evidence.[4]

Record of an instrument within the purview of the statute,[5] and duly authenticated so as to be entitled to record, is, as the recording acts are usually framed, effectual notice, irrespective of omissions in spreading it upon the record,[6] or its omission from the index,[7] or the subsequent destruction of the record;[8] and is conclusive evidence of notice of the instrument from the time of such record, but is not necessarily notice of collateral facts stated in the instrument.[9] Evidence that a party actually saw, or had information of an instrument upon the record, is notice of it to him, although it was not legally entitled to record.[10]

The pendency of an action (without notice of *lis pendens* filed under the statute), is notice only during its pendency,[11] and of the right established by the decree finally made; not of collateral matters stated in the proceedings.[12]

II. Actions to determine conflicting claims.

39. *Mode of proof.*]—Plaintiff must show, by direct evidence,[13] an actual possession[14] existing for the statute period,[15] and continuing up to the time of commencing the action,[16] under

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[1] Brown v. Volkening, 64 N. Y. 76.

[2] Raynor v. Timerson 54 N. Y. 639.

[3] Brown v. Volkening, 64 N. Y. 76.

[4] See Franklin v. Osgood, 14 Johns. 527; New Orleans Canal and Banking Co. v. Montgomery, 95 U. S. (5 Otto), 16.

[5] Otherwise of instruments not authorized to be recorded. Boyd v. Schlesinger, 59 N. Y. 301; Washburne v. Burnham, 63 N. Y. 132.

[6] Riggs v. Boylan, 4 Biss. 445.

[7] Mutual Life Ins. Co. v. Dake, 1 Abb. New. Cas. 381.

[8] Shannon v. Hall, 72 Ill. 354, s. c. 22 Am. R. 146.

[9] Murray v. Ballou, 1 Johns. Ch. 566; Crofut v. Wood, 3 Hun, 571; Mills v. Smith, 8 Wall. 27.

[10] Cramer v. Lepper, 26 Ohio St. 59, s. c. 20 Am. R. 756.

[11] Leitch v. Wells, 48 N. Y. 585.

[12] Paige v. Waring, 8 Abb. New Cas.

[13] The presumption that possession existing at an earlier time continued, is not sufficient. Cleveland v. Crawford, 7 Hun, 616.

[14] Churchill v. Onderdonk, 59 N. Y. 134. The constructive possession which follows seizin in law, is not enough. Id.

[15] Three years, by 2 N. Y. R. S. 312; 3 Id. 6 ed. 579, § 1.

[16] Boylston v. Wheeler, 61 N. Y. 521; Haynes v. Onderdonk, 2 Hun, 619, s. c. 5 Supm. Ct. (T. & C.) 176; Brooks v. Calderwood, 34 Cal. 563.

a claim of title,[1] such as is specified by the statute;[2] and this makes a *prima facie* case, and compels defendants to show their title,[3] unless their answer disavows claim,[4] in which case plaintiff must prove the fact of their claim.[5]

If plaintiff's possession is under an unfounded claim, it is enough for defendant to show a prior possession.[6]

Title, claim of title and possession may be proved in the same manner as in ejectment.

III. Actions to remove cloud on title.

40. *Mode of proof.*]—Plaintiff's title, if in issue, must be proved.[7]

As to defendant's claim, evidence which would be appropriate to sustain ejectment,[8] or an action for the determination of conflicting claims,[9] is not enough. Plaintiff must show that the claim or lien[10] which he seeks to remove,[11] purports to affect injuriously[12] his real estate,[13] and appears on its face to be valid, and that the defect in it, on which he relies[14] to show its invalidity, can be made to appear only by extrinsic evidence,[15] and will not neces-

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[1] Mere possession is not enough. Stark v. Starrs, 6 Wall. 402. But possession under a void deed is. Ford v. Belmont, 69 N. Y. 567, 570, affi'g 35 Super. Ct. (J. & S.) 135; Schroeder v. Gurney, 10 Hun, 413.

[2] 2 N. Y. R. S. (above), and N. Y. L. 1860, p. 295, c. 173.

[3] Ford v. Belmont (above).

[4] Boylston v. Wheeler, 5 Supm. Ct. (T. & C.) 179, s. c. 2 Hun, 622.

[5] Davis v. Read, 65 N. Y. 566.

[6] Ford v. Belmont (above).

[7] Wing v. Sherrer, 77 Ill. 200. For the mode of proof, see the previous paragraphs of this chapter.

[8] Bockes v. Lansing, 13 Hun, 38, affi'd Id. iv.

[9] Bailey v. Briggs, 56 N. Y. 407.

[10] It is not essential however, that the claim or lien be wholly of record. Fonda v. Sage, 48 N. Y. 173.

[11] Or to prevent. Crook v. Andrews, 40 N. Y. 547, 551; N. Y. & H. R. R. Co. v. Trustees of Morrisania, 7 Hun, 652. If the action is to prevent the creating of cloud, he must show that there is a determination on defendant's part to create it. Danger that it may be created is not enough. Sanders v. Village of Yonkers, 63 N. Y. 489, 492.

[12] Hartman v. Reed, 50 Cal. 485.

[13] Smith v. Mayor, &c. of N. Y. 68 N. Y. 552. As to leasehold, see Hebrew Free School Ass. v. Mayor, &c. of N. Y. 4 Hun, 446.

[14] If a ground of invalidity which would not appear in the record of the claim or lien is proved, the relief may be granted although another ground of invalidity exists which would appear by the record. Boyle v. City of Brooklyn, 71 N. Y. 1, rev'g 8 Hun, 32.

[15] To illustrate: Absence of evidence of authority of an attorney to convey is an obvious defect, and a claim thus imperfect is not a cloud. Washburne v. Burnham, 63 N. Y. 132. And compare p. 696 of this vol. But the fact that a deed under which the claim is made was forged, but has nevertheless been proved and recorded, is a defect which must be shown by extrinsic evidence, because the certificates are presumptive evidence of genuineness; and therefore the deed is a cloud. Remington Paper Co. v. O'Dougherty, 16 Hun, 594. So of the fact that one claiming to be a *bona fide* purchaser took with notice of a lost deed under which plaintiff claims. Findlay v. Hinde, 1 Pet. 241. If the entire evidence is on record as a part of the title, the relief may be refused. Schroeder v. Gurney, 73 N. Y. 430, affi'g 10 Hun, 413.

sarily appear in proceedings by the claimant to enforce it.[1] If the objection appears on the face of the instrument or record,[2] or the claimant would necessarily develop it by the proof which he would be obliged to produce,[3] the action is not sustained, unless either the common law or a statutory presumption of the regularity of official acts would avail to make the claim presumptively valid.[4] When the necessary extrinsic evidence is wholly oral, the ground of relief becomes the stronger.[5]

IV. Actions of foreclosure.

41. *Forclosure of vendor's lien.*]—The law implies the lien against the purchaser, and against subsequent purchasers and incumbrancers, if they had notice, or if they took without consideration or assumption of liability. A recital in the deed, of a consideration to be paid at a future day, is enough to charge with notice.[6] The burden is on the purchaser to prove a waiver of the lien.[7] Any act which manifests the intent of the vendor, in conveying or in subsequently dealing with the claim, to waive or abandon the lien, is competent. Taking a personal obligation, payable to the vendor made by the purchaser alone, is no evidence of waiver.[8] Taking other security is not conclusive evidence of waiver, but throws the burden on the vendor to prove clearly that there was no intention to waive.[9] Plaintiff suing to foreclose his lien before conveyance, need not prove tender of a deed.[10]

42. *Foreclosure of mortgage.*]—The bond or note, if any, must be produced and proved, or be accounted for and secondary evidence given,[11] for this is the primary evidence of the debt.[12] The recital in the mortgage of the existence of the bond or note, is

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[1] The leading recent expositions of the general rule are: Marsh v. City of Brooklyn, 59 N. Y. 280, rev'g 2 Hun, 142, s. c. 4 Supm. Ct. (J. & C.) 413; and Guest v. City of Brooklyn, 69 N. Y. 506, affi'g 8 Hun, 97.

[2] Hannewinkle v. Georgetown, 15 Wall. 547.

[3] Guest v. City of Brooklyn (above); Howell v. City of Buffalo, 2 Abb. Ct. App. Dec. 412.

[4] Mayor, &c. of N. Y. v. North Shore, &c. Ferry Co. 9 Hun, 620.

[5] Marsh v. City of Brooklyn (above).

[6] Cordova v. Hood, 17 Wall. 1, 5.

[7] Garson v. Green, 1 Johns. Ch. 308.

[8] 6 Abb N. Y. Dig. new ed. 110; Cordova v. Hood, 17 Wall. 1, 6, and cases cited.

[9] Auburn v. Settle, 3 Supm. Ct. (T & C) 258; 42 Miss. 792, s. c. 2 Am. R. 669.

[10] Freeson v. Bissell, 63 N. Y. 168. Otherwise if neither party holds the legal title. Thomson v. Smith, 63 N. Y. 301.

[11] Chewning v. Procter, 2 M'Cord, 11. The mode of proving execution has been already stated. Pages 693, 504–8, of this vol. As to mortgage by religious corporation, see Moore v. Rector, &c. of St. Thomas' Ch. 4 Abb. New Cas. 51, and cases cited. As to assent of stockholders when required on a corporate mortgage, see Greenpoint Sugar Co. v. Whitin, 69 N. Y. 328, affi'g 7 Hun, 44. Plaintiff may prove that a deed, absolute in terms, was in fact a mortgage. Hughes v. Edwards, 9 Wheat. 489, 494, and see pp. 721, 722 of this vol. The burden is on him to show that the deed was taken for his benefit and as security. Fullerton v. McCurdy, 55 N. Y. 637.

[12] Jackson v. Blodgett, 5 Cow. 202, 206, and see Langdon v. Buel, 9 Wend. 80, 83.

secondary evidence of that fact,[1] but not conclusive.[2] A variance in the date[3] or in the allegation of the obligation or covenant,[4] is not fatal if defendant has not been misled. The bond and mortgage are presumptive evidence of consideration.[5] The law of the place where the contract was made, although without the State, may be proved on a question of usury.[6]

In those jurisdictions where a mortgage collateral to negotiable paper has the advantages resulting from negotiability in the hands of a *bona fide* transferee, such a mortgage[7] or deed of trust,[8] held by an assignee before maturity, is presumed to have been taken for value and in good faith.[9]

43. *Defendant's liability, demand and default.*]—A grantee of the premises taking merely subject to the mortgage, as distinguished from one taking subject to the *payment* of the mortgage, cannot be presumed to have assumed to pay the mortgage.[10] One who has effectually assumed payment in favor of plaintiff,[11] is estopped from questioning the validity of the mortgage,[12] but not from proving payment.[13] If two persons incumber their several lands by one mortgage, the debt is presumed that of both equally.[14]

Default in payment is sufficiently proved by production and proof of the bond and mortgage, if apparently overdue, even by default under the usual interest clause.[15] Payment of taxes and assessments may be proved by the official receipt. Payment of insurance should be proved by a witness and the receipts for premiums will then be competent but not essential.

On a question of priority of lien,[16] the relative dates of the instruments, and their acknowledgment are relevant but not conclusive.[17] The rule that acceptance of a beneficial instrument will

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[1] See Cooper v. Newland, 17 Abb. Pr. 343.

[2] Gaylord v. Knapp, 15 Hun, 87. Compare Burger v. Hughes, 5 Hun, 180.

[3] Ontario Bank v. Schermerhorn, 10 Paige, 109.

[4] Hadley v. Chapin, 11 Paige, 245.

[5] Russell v. Kinney, 1 Sandf. Ch. 34, s. c. 2 N. Y. Leg. Obs. 233, affi'd 2 Sandf. Ch. 81, note. As to estoppel by certificates or representations, see Lee v. Monroe, 7 Cranch, 366; and the defense of USURY.

[6] Lewis v. Ingersoll, 3 Abb. Ct. App. Dec. 55, s. c. 1 Keyes, 347; and see, as to law of place, Dickinson v. Edwards, 7 Abb. New. Cas. 65, rev'g 2 Abb. New. Cas. 300.

[7] Carpenter v. Longan, 16 Wall. 271, 278.

[8] New Orleans Canal and Banking Co. v. Montgomery, 95 U. S. (5 Otto), 16.

[9] See chapter on NEGOTIABLE PAPER.

[10] Tillotson v. Boyd, 4 Sandf. 516; Binsse v. Paige, 1 Abb. Ct. App. Dec. 138; Collins v. Rowe, 1 Abb. New. Cas. 97; Cashman v. Henry, 2 Abb. New. Cas. 230, s. c. 75 N. Y. 103. For the presumption as to price, in conveyance subject to mortgage, see Johnson v. Zink, 51 N. Y. 333, affi'g 22 Barb. 396.

[11] The Pennsylvania doctrine requires extrinsic evidence, that a grantee merely "subject to the payment" assumed liability. Thomas v. Wiltbank, 8 Reporter, 442.

[12] Hartley v. Harrison, 24 N. Y. 170; Smith v. Cross, 16 Hun, 487.

[13] Hartley v. Tatham, 2 Abb. Ct. App. Dec. 333.

[14] Hoyt v. Doughty, 4 Sandf. 462.

[15] Sowarby v. Russell, 4 Abb. Pr. N. S. 238, s. c. 6 Robt. 322.

[16] As to what claims are within the usual allegation, see Knick. Life Ins. Co. v. Nelson, 7 Abb. New. Cas. 170, and cases cited, affi'g 13 Hun, 321.

[17] Wyckoff v. Remsen, 11 Paige, 564.

be presumed, does not avail to give it priority, in the absence of evidence that the claimant had notice of its existence, with evidence of such additional circumstances as will afford a reasonable presumption of his acceptance of it.[1] A junior mortgagee who has foreclosed and bought in, is presumed to have bid to the value of the equity of redemption only; and will be deemed to hold subject to the senior mortgage.[2]

44. *Defenses.*]—A material fraudulent alteration of the bond or mortgage by the party is a bar.[3] Failure of title without eviction or disturbance of possession in case of a purchase money mortgage is not a defense,[4] unless fraud or misrepresentation is proved, and to be admissible these must be alleged.[5]

A contemporaneous oral agreement as to time of payment, contradictory to the terms of the mortgage, is not competent.[6] A collateral agreement for the application of a cross indebtedness may be proved,[7] but not so as to vary the contract by parol.[8] Where plaintiff is an assignee, the debtor may prove, in support of an allegation of payment, that he himself furnished the money with which the assignment was procured.[9] Intent to merge may be presumed from the act of the owner of the equity of redemption in taking an assignment of the mortgage;[10] but even his declaration that he is absolute owner is not conclusive.[11] The presumption of payment resulting from lapse of time,[12] may be repelled by evidence of part payment, or written acknowledgment, made by the debtor within twenty years, even though made after he had parted with his interest in the property.[13] Where the statute does not thus require particular evidence,[14] the presumption may be repelled by circumstances, even against a mortgagee or his assigns in possession.[15]

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[1] Bell v. Farmers' Bank of Kentucky, 11 Bush, 34, s. c. 21 Am. R. 205; Parmelee v. Simpson 5 Wall. 81, 85.

[2] Mathews v. Aiken, 1 N. Y. 595.

[3] Waring v. Smyth, 2 Barb. Ch. 119, 135, and see paragraph 7.

[4] Noonan v. Lee, 2 Black. 499; Farnham v. Hotchkiss, 2 Abb. Ct. App. Dec. 93.

[5] Noonan v. Lee (above).

[6] Hunt v. Bloomer, 5 Duer, 202. As to oral agreement to vary the consideration or condition, compare Townsend v. Empire Stone Dressing Co. 6 Duer, 208; Kimball v. Meyers, 21 Mich. 276, s. c. 4 Am. R. 487. As to effect of diversion of the proceeds, see Craver v. Wilson, 14 Abb. Pr. N. S. 374.

[7] Peck v. Minot, 3 Abb. Ct. App. Dec. 465; Hartley v. Tatham, 2 Abb. Ct. App. Dec. 333.

[8] Forsythe v. Kimball, 91 U. S. (1 Otto), 291.

[9] McLemore v. Pinkston, 31 Ala 266; and see pp. 4 and 8 of this vol. The rules as to proving payment are more fully stated in connection with PAYMENT as a defense.

[10] Gardner v. Astor, 3 Johns. Ch. 53; Starr v. Ellis, 6 Id. 393.

[11] James v. Morey, 2 Cow. 246, 285, 307, 313.

[12] A legal presumption independent of the Statute (see PAYMENT as a defense), and fixed by statute at twenty years (2 N. Y. R. S. 301, § 48), even in case of a mortgage to secure an unsealed note (Heyer v. Pruyn, 7 Paige, 465).

[13] New York Life Ins. & Trust Co. v. Covert, 3 Abb. Ct. App. Dec. 350.

[14] Hughes v. Edwards, 9 Wheat. 489, 497.

[15] Brobst v. Brock, 10 Wall. 519, and cas. cit.

Unconditional[1] tender by the debtor[2] of the whole debt[3] at a time when the creditor was bound to receive it[4] discharges the lien.[5] The twenty years limitation of the mortgage is not shortened by the fact that it was to secure a note, unsealed and barred in six years,[6] but a discharge[7] or release[8] of the bond or note discharges the mortgage.

Defendants, who do not set up any equities as against plaintiff, should not be allowed to delay his judgment by litigating issues between themselves, as to their priorities, or their equities as to the order of sale.[9]

V. Actions to redeem.

45. *Mode of proof.*]—Oral evidence is admissible, to show that a deed absolute on its face[10] was intended by the parties as a mere security, even though there were no agreement to repay.[11] Proof of the continued existence of the debt is influential evidence of a mortgage, but not essential.[12] So is the circumstance of continued possession by the claimant after apparent conveyance to the defendant.[13] Proof of fraud or mistake is not necessary.[14] The agreement of defeasance, if oral, must be shown to have been contemporaneous.[15] Loose, oral declarations of intention or understanding are not necessarily enough.[16] Evidence that the grantee was accustomed to lend on such absolute securities, is not relevant without anything to bring it home to the knowledge of the alleged borrower.[17] Evidence showing only a right to specific performance of a contract is a variance.[18]

A contemporaneous oral agreement, is no evidence of a waiver of the right of redemption inhering in a mortgage.[19] A subse-

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[1] Storey v. Krewson, 55 Ind. 397, s. c. 23 Am. R. 668.
[2] Harris v. Jex, 66 Barb. 232.
[3] Graham v. Linden, 50 N. Y. 547.
[4] Hartley v. Tatham, 2 Abb. Ct. App. Dec. 333.
[5] Fortright v. Cady, 21 N. Y. 343, rev'g 23 Barb. 490; s. c. 5 Abb. Pr. 358, affi'g 12 How. Pr. 424; Ketcham v. Crippen, 37 Cal. 223.
[6] Sparks v. Pico, 1 McAll. 497; Heyer v. Pruyn, 7 Paige, 465. Compare Jackson v. Sackett, 7 Wend. 94; explained in Belknap v. Gleason, 11 Conn. 160.
[7] Driggs v. Simpson, 3 Supm. Ct. (T. & C.) 786, affi'd in 60 N. Y. 641.
[8] Blodget v. Wadhams, Hill & D. Supp. 65.
[9] Smart v. Bement, 4 Abb. Ct. App. Dec. 253; N. Y. Code Civ. Pro. § 521; Newman v. Dickson, 1 Abb. New Cas. 307.
[10] Despard v. Walbridge, 15 N. Y. 374. Or a conditional sale for an agreed price. Russell v. Southard, 12 How. U. S. 139.
[11] Horn v. Keteltas, 46 N. Y. 605, s. c. 42 How. Pr. 138; compare Fullerton v. McCurdy, 55 N. Y. 637.
[12] Campbell v. Dearborn, 109 Mass. 130, s. c. 12 Am. R. 671, and cas. cit.
[13] Id.
[14] Strong v. Stewart, 4 Johns. Ch. 167; Hodges v. Tenn. &c. Ins. Co. 8 N. Y. 416.
[15] Barrett v. Carter, 3 Lans. 68.
[16] 1 Greenl. Ev. 13 ed. 331.
[17] Sugart v. Mays, 54 Geo. 554.
[18] Fullerton v. McCurdy, 55 N. Y. 637.
[19] Peugh v. Davis, 96 U. S. (6 Otto) 332. Or in an absolute deed and contemporane-

quent release cannot be inferred from equivocal circumstances and loose expressions, but must appear by express writing or by such facts as estop.[1] And it must be for an adequate consideration.[2] On this question the value of the property and the fact of possession and enjoyment are relevant.[3] The making of a payment is evidence against the payer, of his obligation, but is slight if any evidence, against the receiver, of the payer's title.[4]

VI. Actions of partition.

46. *Mode of proof.*]—Title may be proved as in ejectment.[5] This, with evidence of possession, actual or constructive,[6] (and possession may be proved under the general allegation of seizin[7]) is *prima facie* enough.[8] Proof of legal title, in the absence of any adverse possession, raises a sufficient presumption of possession.[9] A variance in stating the parties' interest,[10] or describing the premises,[11] is not fatal. In an action to test the validity of an alleged devise under the statute,[12] the burden is on plaintiff claiming against it to establish its invalidity.[13]

An ouster or adverse possession, relied on by a defendant, should be pleaded,[14] unless it appears in the complaint.[15] But the burden is still on plaintiff to prove seizin in common, if relied on.[16]

The relative claims and liens of defendants may be tried and settled under proper allegations.[17] A tenant in common claiming an allowance against his co-tenants for improvements made by

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ous written defeasance. Palmer v. Gurnsey, 7 Wend. 248. *Contra*, Cooper v. Whitney, 3 Hill, 95; Baker v. Thrasher, 4 Den. 493.

[1] Peugh v. Davis (above).

[2] Id.

[3] Id.

[4] James v. Biou, 2 Sim. & Stu. 600, 606.

[5] And in case of default this is enough. Griggs v. Peckham, 3 Wend. 436. Whether title may be litigated, compare Hosford v. Merwin, 5 Barb. 51; Sterricker v. Dickinson, 9 Id. 516; Van Schuyver v. Mulford, 59 N. Y. 426.

[6] This is necessary. O'Dougherty v. Aldrich, 5 Den. 385; Sullivan v. Sullivan, 66 N. Y. 37, rev'g 4 Hun, 198, s. c. 5 Supm. Ct. (T. & C.) 433. Unless, perhaps, where the parties are all mere remaindermen, constructive possession is enough. Beebe v. Griffing, 14 N. Y. 235.

[7] Jenkins v. Van Schaack, 3 Paige, 242.

[8] Clapp v. Bromaghan, 9 Cow. 530, 550, rev'g 5 Id. 295.

[9] Brownell v. Brownell, 19 Wend. 367.

[10] See Ferris v. Smith, 17 Johns. 221; Thompson v. Wheeler, 15 Wend. 340; Clapp v. Bromaghan, 9 Cow. 530, 566; Noble v. Cromwell, 3 Abb. Ct. App. Dec. 382, s. c. 27 How. Pr. 289, affi'g 26 Barb. 475, s. c. 6 Abb. Pr. 59.

[11] See Corwithe v. Griffing, 21 Barb. 9.

[12] N. Y. L. 1879, p. 400, c. 316; am'd'g L. 1853, p. 526, c. 238, § 2; Voessing v. Voessing, 12 Hun, 678.

[13] Id.

[14] Jenkins v. Van Schaack, 3 Paige 242; Sterricker v. Dickinson, 9 Barb. 516, 521.

[15] Burhans v. Burhans, 2 Barb. Ch. 398, 410.

[16] Clapp v. Bromaghan, 9 Cow. 530.

[17] Bogardus v. Parker, 7 How. Pr. 305, N. Y. Code Civ. Pro. § 521. For the rule where there are mortgages of one tenant's interest, see Green v. Arnold, 11 R. I. 364, s. c. 23 Am. R. 466.

him, need not show a request or promise;[1] otherwise of a stranger or sub-tenant who improved at his own risk.[2]

The mode of ascertaining present *value of life estates* is in some cases regulated by a statute or rule of court.[3] Where it is not, or if the statute or rule merely refers to the principles governing annuities, &c., any standard table, recognized by the court, or shown to be such by the testimony of a qualified witness, is competent;[4] and evidence that the condition of health and strength is substantially different from that usually enjoyed by persons of the same age is competent for the purpose of varying the conclusion drawn from the table;[5] in the absence of such evidence the tables will prevail.[6] The opinion of witnesses as to the cash value of a life estate is not admissible.[7]

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[1] Green v. Putnam, 1 Barb. 500.

[2] Scott v. Guernsey, 48 N. Y. 106, 123, affi'g 60 Barb. 163.

[3] See N. Y. L. 1840, p. 128, c. 177 (3 R. S. 6 ed. 592), N. Y. Rule of Court No. 76, of 1878 (formerly No. 85).

[4] The court may take judicial notice that the tables produced are approved standards. See McHenry v. Yokum, 27 Ill. 160; Donaldson v. R. R. Co. 18 Iowa, 280, 291; Wager v. Schuyler, 1 Wend. 553. American tables and experts in insurance testify to a probability of longer life than indicated in the Northampton Tables, and somewhat longer than indicated in the Carlisle.

The following tables have been recognized by the courts: *American Experience Table* (contained in the Michigan Insurance Company act. Comp. Laws, 997). Brown v. Bronson, 35 Mich. 415. Also contained in 2 N. Y. R. S. 6 ed. 678. *Wigglesworth's* (cited from 2 Am. Ac. of A. & S. 131). Estabrook v. Hapgood, 10 Mass. 313, 315; Mills v. Catlin, 22 Vt. 98, 106; also cited from Oliver's Conveyancer, in Mills v. Catlin, 22 Vt. 98, 106; reprinted in 3 Bush (Ky.), xii–xv; Alexander v. Bradley, Id. 667. *The Carlisle Tables.* Greer v. Mayor, &c. 1 Abb. Pr. N. S. 206, s. c. 4 Robt. 675; Donaldson v. R. R. Co. 18 Iowa, 180, 291; New Jersey Rule of Court, Nix. Dig. 1106, 1111. Also in 3 Bush (Ky.), xi. The original is in Milne on Annuities. *The Northampton Tables.* See cases on p. 602 of this vol. note, and N. Y. Rule of Court of 1878, No. 76; Geo. R. R. Co. v. Oaks, 52 Geo. 410. The original is in 2 Price on Reversionary Payments. The extract from the Northampton Tables, printed in the N. Y. Supreme Court rules (and copied in Gary's Probate Law, xl), is erroneous in stating the valuation opposite the years 6, and 73 to 80 inclusive. The first error is in substituting the terminal 6 for 0. The errors in the later period, consist in substituting the value appropriate for 7 per cent. in place of that for 6 per cent. *McKane's P. L. Tables. Hendry's Ann. T.* Jackson v. Edwards, 7 Paige, 386, 408.

For a notice of the origin of such tables, see William's Case, 3 Bland. Ch. 186, 221, 233, 238. Where the court do not take judicial notice of the work offered as containing the table, it should be admitted on the testimony of a witness that he has experience in the business of life insurance, and knows the volume produced to be the work containing the original tables, or a standard work recognized in a reputable life insurance office as containing a true copy of the tables.

[5] Alexander v. Bradley, 3 Bush (Ky.), 667; and see McLaughlin v. McLaughlin, 20 N. J. Eq. (5 C. E. Green), 190; Abercrombie v. Riddle, 3 Md. Ch. 320, 325; and is not necessarily incompetent even under a rule of court which makes a given table the guide. The rule is used merely as a means of approximation, and the circumstances and condition of the life in each case are relevant. Haulenbeck v. Cronkright, 23 N. J. Eq. 407, affi'd in 25 N. J. Eq. 159.

[6] Alexander v. Bradley, 3 Bush (Ky.), 667; Brown v. Bronson, 35 Mich. 415, 421. *Contra*, Shippen's Appeal, 80 Penn. St. 391, s. c. 2 Weekly N. 468. Extrinsic evidence is also proper as to the contingencies upon which an inchoate right may ripen (see Benedict v. Seymour, 11 How. Pr. 176), except that so far as it depends on survivorship among two or more joint lives the rules above stated apply. See Jackson v. Edwards, 7 Paige, 386, 408, affi'd in 22 Wend. 498. Possibility and likelihood of issue, when relevant, are subjects for expert testimony.

[7] Alexander v. Bradley, 3 Bush (Ky.), 667.

CHAPTER XLIX.

ACTIONS BETWEEN VENDOR AND PURCHASER.

1. The contract.
2. Oral evidence to explain.
3. Implied covenants: time.
4. Title.
5. Plaintiff's performance: breach.
6. Value.
7. Contract merged by deed.
8. Actions to recover back purchase-money.
9. Fraud or misrepresentation.
10. Specific performance: the contract.
11. — oral contract partly performed.
12. — plaintiff's title and performance.

1. *The contract.*]—The general rules as to the proof of execution and oral evidence to vary, have been already stated.[1] A variance in stating the contract in a respect which does not vary the resulting liability, is not material.[2]

If the contract is denied, plaintiff's evidence must satisfy the statute of frauds, or show that the case is not within the statute.[3] If defendant answers, and does not deny the contract, nor indicate that he relies on the statute, the statute does not avail to exclude oral evidence of the contract thus admitted.[4] An oral agreement may be proved, notwithstanding the statute of frauds, where plaintiff has parted with value on the faith of it, placing himself in a situation in which he would be defrauded by refusal to enforce the contract.[5]

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[1] *Order of proof*, p. 504; execution proved by certificate of *acknowledgment* or proof, p. 693, n.; proof by *subscribing witness*, p. 505; proof of *handwriting*, pp. 392–8; *seal*, pp. 392 and 506; execution by *corporation* and corporate seal, pp. 32–5; by religious corporation (Bowen v. Irish Presb. Cong. 6 Bosw. 245; Moore v. St. Thomas' Ch. 4 Abb. New Cas. 51, and cas.); authority of *agent*, p. 506 of this vol. (Savery v. Sypher, 6 Wall. 157); *date*, pp. 409 and 508 of this vol.; contract by *letter*, p. 289 (Nesham v. Selby, L. R. 13 Eq. Cas. 191, s. c. 1 Moak's Eng. 640; Crossley v. Maycock, L. R. 18 Eq. Cas. 180, s. c. 9 Moak's Eng. R. 727); contract by *telegram*, p. 290 (Godwin v. Francis, L. R. 5 C. P. 295; 39 L. J. C. P. 121); contract by *auction*, p. 327 (Elfe v. Gadsden, 2 Rich. (S. C.) 373; Torrance v. Bolton, L. R. 8 Ch. App. 118, s. c. 4 Moak's Eng. 800; Vandever v. Baker, 13 Penn. St. 121, 127; Phillips v. Higgins, 7 Lans. 314, affi'd in 55 N. Y. 663); execution in *duplicate or counterpart*, p. 523; subsequent *modification*, p. 510 (Benedict v. Lynch, 1 Johns. Ch. 370; Bradford v. Union Bank of Tennessee, 13 How. U. S. 57).

[2] Lobdell v. Lobdell, 36 N. Y. 327; 4 Abb. Pr. N. S. 56; 33 How. Pr. 347, s. c. 32 How. Pr. 1; Crary v. Smith, 2 N. Y. 60. As to variance, see, also, p. 522 of this vol.

[3] P. 522 of this vol.; Reynolds v. Dunkirk & State Line R. R. Co. 17 Barb. 613; Coquillard v. Suydam, 8 Blackf. (Ind.) 24, 30. Even if the answer sets up a different contract. Morrill v. Cooper, 65 Barb. 512, 516.

[4] Whiting v. Gould, 2 Wis. 552, 594.

[5] Dodge v. Wellman, 1 Abb. Ct. App. Dec. 512; Sandford v. Norris, 4 Abb. Ct. App. Dec. 144. Levy v. Brush, 45 N. Y. 589, is distinguished in Traphagen v. Burt, 67 N. Y. 30, as a case where plaintiff had taken nothing and parted with nothing. And see Baker v. Wainwright, 36 Md. 336, s. c. 11 Am. R. 495.

Where the parties make their contract in writing, delivery of the instrument is material.[1]

2. *Oral evidence to explain.*]—If the instrument, expressly or by description, shows who the parties are (an agent being considered as equivalent to a party, where the agreement purports to be made by him), extrinsic evidence is admissible to explain the situation and relations of these parties, their business, and the circumstances surrounding the transaction.[2] In application of what has been already said,[3] oral evidence is competent (it may, however, be wholly insufficient by reason of the statute of frauds[4]) to explain an ambiguity in reference to the premises described,[5] the covenants and stipulations,[6] the proportionate interest of purchasers,[7] and the like.[8]

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[1] Deitz v. Farish, 44 Super. Ct. (J. & S.) 190; see, also, p. 507 of this vol. Where they make an oral contract, a note or memorandum, relied on merely as evidence under the statute of frauds, may be sufficient without delivery to the other party. Parrill v. McKinley, 9 Gratt. 1, 7; Bowles v. Woodson, 6 Id. 78. Thus a letter written by one of the parties to a third person, may be a sufficient memorandum. Pomeroy Sp. Perf. 122, § 84; Rosc. N. P. 318.

[2] Pomeroy Sp. Perf. 127, § 88. Even for the purpose of making it appear which is the vendor and which is the purchaser. Id. As to oral evidence to show the true party, see, also, Briggs v. Partridge, 64 N. Y. 357, 364; Beardsley v. Duntley, 69 N. Y. 577, 581; Lynde v. Staats, 1 N. Y. Leg. Obs. 89, and cas. cit.; and see p. 509 of this vol.

[3] See pp. 295, 508 and 524 of this vol.

[4] Whelan v. Sullivan, 102 Mass. 204; 2 Whart. § 871; Wright v. Weeks, 25 N. Y. 153.

[5] Phillips v. Higgins, 7 Lans. 314, affi'd 55 N. Y. 663; Brinkerhoff v. Olp, 35 Barb. 27; s. p. Pettit v. Shepard, 32 N. Y. 97; Mead v. Parker, 115 Mass. 413, s. c. 15 Am. Rep. 110; Magee v. Lavell, L. R. 9 C. P. 107, s. c. 8 Moak's Eng. 423; Beaumont v. Field, 1 B. & Ald. 247; Rosc. N. P. 32, 35, 318. And so as to fixtures. Martin v. Cope, 3 Abb. Ct. App. Dec. 182.

When lands are bounded in such phrases as "by," or "upon," or "along," a highway or stream not navigable, unless by the terms of the grant or by necessary implication the highway or the bed of the stream are excluded, the intent to grant a title to the center of the highway or stream will be presumed. This depends upon the intent of the parties, to be gathered from the description of the premises read in connection with the other parts of the deed, and by reference to the situation of the lands and the condition and relation of the parties to those and other lands in the vicinity. An intent to exclude the highway or bed of the stream will not be presumed, but must appear from the terms of the deed as interpreted and illustrated by surrounding circumstances. Mott v. Mott, 68 N. Y. 246, 253.

[6] Page v. McDonnell, 55 N. Y. 299, affi'g 46 How. Pr. 52.

[7] Brothers v. Porter, 6 B. Monr. (Ky.) 106.

[8] Upon principles already stated (pp. 128, 698 of this vol.), the oral evidence cannot stand in the place of a writing to satisfy the statute of frauds, but the writing must be such that after receiving the extrinsic evidence the court can see with sufficient certainty that the writing itself means and expresses the contract alleged. For instance, a contract to sell a tract of land not identified except as being near the junction of two roads, is not alone sufficient to call for specific performance as to any particular tract. Dobson v. Litton, 5 Coldw. 616. But a contract to convey a lot situated on a street named, together with extrinsic evidence consistent with the writing that the vendor had one, and only one lot on that street, is enough. Harley v. Brown, 98 Mass. 545. On the other hand, a contract only designating the land as being the same conveyed by government to C. and D. and by C. and D. to A., cannot be varied by evidence that it was only intended to apply to land derived through C. alone or through D. alone. Marshall v. Haney, 4 Md. 498, 506.

3. *Implied covenants: time.*]—An executory contract for the sale of real estate implies (unless what is expressed indicates the contrary) a covenant for title, which continues till merged by conveyance.[1] If the language of the contract does not determine whether time is material, extrinsic evidence of surrounding circumstances is relevant. A subsequent agreement, extending time, will sustain an inference that it was material.[2]

4. *Title.*]—If plaintiff's title is in issue in an action on his executory contract to convey, the burden of proof is on him to show good title affirmatively,[3] or that the purchaser agreed to accept such title as he had.[4] A conveyance to him, with possession under it, is not enough under a direct issue on title.

The relation between vendor and purchaser does not estop the latter from disputing the former's title,[5] unless he gained and is retaining possession under the agreement.[6] On the question of plaintiff's title, his own declarations are competent in his favor, when part of the *res gestæ* of an act affecting the title, already properly in evidence.[7] An abstract of title furnished by the seller to the buyer to aid in his search is competent against the seller, as showing his claim of title, for the purpose of proving defects in such title.[8] The opinions of witnesses are not competent.[9]

5. *Plaintiff's performance: breach.*]—An allegation of performance of a condition,[10] does not admit evidence of a waiver or other excuse for non-performance.[11] But an allegation of tender, where it is not part of the contract, but an act *in pais*, does admit evidence of a waiver.[12] Tender to and refusal by joint-purchasers is proved by tender to and refusal by one. Omission to deny due allegation of a request and refusal, dispenses with

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[1] Burwell v. Jackson, 9 N. Y. 535; and see Thomas v. Bartow, 48 Id. 193; Leggett v. Mut. L. Ins. Co. of N. Y. 53 N. Y. 394, 398. So of a contract for sale of a leasehold interest, unless a tax lease. Boyd v. Schlesinger, 59 N. Y. 301, 307.

[2] Wiswall v. McGown, 2 Barb. 270, affi'd *sub. nom.* Price v. McGown, 10 N. Y. 465.

[3] Wilson v. Holden, 16 Abb. Pr. 133, 136.

[4] Negley v. Lindsay, 67 Penn. St. 217, s. c. 5 Am. R. 427; Wilson v. Holden (above). As to evidence of incumbrance, see Anonymous, 2 Abb. New Cas. 56; Riggs v. Pursell, 66 N. Y. 193; Reeder v. Scheider, 1 Hun, 121. As to offer to discharge. Rinaldo v. Housmann, 1 Abb. New Cas. 312.

[5] Blight v. Rochester, 7 Wheat. 535.

[6] See page 707 of this vol. Compare Coray v. Matthewson, 7 Lans. 80.

[7] Devling v. Little, 26 Penn. St. 502, 506. The rule as to admissions and declarations of predecessors in the title (stated at pp. 710, 711 of this vol.) applies. See Pearce v. Nix, 34 Ala. 183, 185; Vint v. King, 2 Am. Law Reg. 712.

[8] Hartley v. James, 50 N. Y. 38.

[9] Winter v. Stock, 29 Cal. 407, 412.

[10] As to the cases in which performance or tender must be proved, see Hartley v. Games, 50 N. Y. 38, 42; Doyle v. Harris, 11 R. I. 539; Delavan v. Duncan, 49 N. Y. 485; Burling v. King, 66 Barb. 633, 642, s. c. 2 Supm. Ct. (T. & C.) 545; McCotter v. Lawrence, 4 Hun, 107, s. c. 6 Supm. Ct. (T. & C.) 392; Hoag v. Parr, 13 Hun, 95, 100.

[11] Baldwin v. Munn, 2 Wend. 399; Oakley v. Morton, 11 N. Y. 25.

[12] Holmes v. Holmes, 9 N. Y. 525, affi'g 12 Barb. 137; Carman v. Pultz, 21 N. Y. 547. Compare pp. 337, 338 of this vol.

necessity of proving demand.[1] Evidence of the second demand, sometimes required, is admissible without being alleged.[2]

In general, proof of absolute refusal before the expiration of the time fixed for performance is not enough,[3] unless the party refusing had put it out of his power to perform,[4] or the refusal was communicated and was intended to, and did, influence the conduct of the other party, to his damage.[5]

6. *Value.*]—Upon principles already stated,[6] a witness, who is shown, to the satisfaction of the court, to have such conversance with the values of real property in the place as to enable him to form a reliable opinion, may testify to the value of the property, and to the effect on it of conditions involved in the litigation.[7] If the premises have a market value, a witness, conversant with market value, may give his opinion without having examined the premises.[8] If the qualification of a witness is conversance with value for certain purposes only,—as, for instance, a farmer in the vicinity who is deemed qualified to express an opinion of value for farming purposes,—he may express an opinion as to value for such purposes; but not an unqualified opinion if the property may be valuable for other purposes.[9] A witness, having properly testified to his opinion, may state the reasons of it. Evidence of the price brought by similar lands in the same vicinity is competent,[10] unless it involves such differences as to require evidence of the cost or condition of improvements for the purpose of computing the greater or less value of the premises in question. The evidence of value should relate to the time in question with reasonable proximity.[11]

7. *Contract merged by deed.*]—Acceptance of a deed under the contract, although it varies from it, is *prima facie* evidence of extinguishment of the vendor's obligations as to title, extent of possession, quantity and emblements.[12] In these respects, it is

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[1] Fagen v. Davison, 2 Duer, 153, 159.

[2] Pearsoll v. Frazer, 14 Barb. 564.

[3] Daniels v. Newton, 114 Mass. 530, s. c. 19 Am. R. 384.

[4] Sears v. Conover, 4 Abb. Ct. App. Dec. 179. This fact, if relied on, should be pleaded. Van Rensselaer v. Miller, Hill & D. Supp. 237.

[5] This seems to be the sound principle and goes far toward reconciling the cases, which, failing to express it, are often in apparently hopeless conflict. See pp. 338, and 384 of this vol.; Skinner v. Tinker, 34 Barb. 333; Thomas v. Wickman, 1 Daly, 58.

[6] See pp. 306, 348, 598 of this vol.

[7] Tucker v. Mass. Cent. R. R. Co. 118 Mass. 547.

[8] Lawrence v. City of Boston, 119 Mass. 126.

[9] Brown v. Prov. & Springf. R. R. Co. 8 Reporter, 376; Hawkins v. City of Fall River, 119 Mass. 94.

[10] Mains v. Haight, 14 Barb. 76.

[11] Sanford v. Shepard, 14 Kans. 228.

[12] Hunt v. Amidon, 4 Hill, 345; Smith v. Price, 39 Ill. 28; Lloyd v. Farrell, 48 Penn. St. 73, 78; 6 Abb. N. Y. Dig. new ed. 104, &c. It seems that the fact that a substituted covenant or conveyance was accepted in consummation of the covenant, may be proved by parol. Thomas v. Bartow, 48 N. Y. 193, 197.

presumed that the deed contains the final agreement of the parties,[1] and that the grantee intended to give up the benefit of covenants of which the conveyance is not a performance or satisfaction;[2] but the presumption may be rebutted by proof of the express agreement of the parties.[3]

8. *Actions to recover back purchase-money.*]—To recover back purchase-money, on the ground of failure of title,[4] the burden is on plaintiff[5] to prove the failure of title, or fraud alleged,[6] as well as the payments made.[7] In an action to recover back for a deficiency in the land, evidence as to what was said and done prior to the execution of the written contract and the deed is competent, not to contradict what is expressed, but to show intent and mistake.[8] Deficiency, if great, may sustain an inference of fraud, but is not conclusive.[9]

9. *Fraud or misrepresentation.*]—Under a denial of title, fraudulent misrepresentation involved in proof of a breach, is competent.[10] The test of materiality in a variance in dimensions is,—had the falsity been known, would the contract have been entered into?[11] False representations alleged as a ground of relief, should be proved as in an action for deceit.[12] Willful suppression of material evidence has peculiar significance, in an action for specific performance.[13]

10. *Specific performance: the contract.*]—The proof must be clear, definite and conclusive, and must show a contract, leaving

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[1] Murdock v. Gilchrist, 52 N. Y. 242, 246.

[2] Morris v. Whitcher, 20 N. Y. 41.

[3] Murdock v. Gilchrist, 52 N. Y. 242, 247. The purchaser is not necessarily presumed to know whether the deed accepted embraced all the land contracted for; and fraud in inducing the acceptance of a deed conveying only a part may be proved. Beardsley v. Duntley, 69 N. Y. 577, 581. So of mistake, where the grantor was intrusted to prepare the deed and untruly described the premises. Wilson v. Van Pelt, 2 Supm. Ct. (T. & C.) 414, and cas. cit. That both parties were ignorant of an incumbrance is not relevant, if both had equal and adequate means of information. Whittemore v. Farrington, 12 Hun, 349.

[4] As to the necessary facts, see Page v. McDonnell, 55 N. Y. 299, affi'g 46 How. Pr. 52; Thomas v. Barton, 48 N. Y. 193; Friedman v. Dewes, 33 Super. Ct. (1 J. & S.) 450; Wheeler v. Mather, 56 Ill. 241, s. c. 8 Am. Rep. 683.

[5] Treat v. Orono, 26 Me. (13 Shep.) 217.

[6] Fraud cannot be proved unless alleged. Noonan v. Lee, 2 Blackf. 499, 508, and cas. cit.

[7] O'Brien v. Cheney, 5 Cush. (Mass.) 148.

[8] Wilson v. Randall, 67 N. Y. 338, affi'g 7 Hun, 15; and see King v. Knapp, 59 N. Y. 462. The acceptance of the deed may be explained by parol evidence of an agreement to fix the amount of the purchase-money by a subsequent survey. Murdock v. Gilchrist, 52 N. Y. 242, 246.

[9] Kreiter v. Bomberger, 82 Penn. St. 59, s. c. 22 Am. R. 750, 2 Weekly Notes, 685, 687.

[10] Rose. N. P. 328.

[11] Stokes v. Johnson, 57 N. Y. 673.

[12] Chapter XXXIV; Casey v. Allen, 1 A. K. Marsh, 465; see, also, Chapter L. Inadequacy of price may raise an inference of fraud, or an inference that the parties allowed for a defect, and thus disprove an allegation of fraud. Waldron v. Zollikoffer, 3 Iowa, 108.

[13] Jenkins v. Eldredge, 3 Story, 181; Vint v. King, 2 Am. Law Reg. 712.

no *jus deliberandi*, or *locus pœnitentiæ*. It cannot be made out by mere hearsay, or evidence of declarations made to strangers.[1] Inadequacy of consideration is not now regarded as conclusive evidence of fraud, but raises a question of fact.[2] Whether the contract is executory or executed, the plaintiff may introduce parol evidence to show a mistake or fraud whereby the written contract fails to express the actual agreement, and to prove the actual modification necessary to be made therein, whether such variation consists in limiting the scope of the writing, or in enlarging it so as to embrace land which had been omitted through the mistake or fraud, and he may then obtain a specific enforcement of the contract thus varied; and such relief may be granted, although the contract is one which is required by the statute to be in writing.[3] Inadequacy of consideration is relevant, on the question of fraud; and may be so great as to be, alone, satisfactory evidence of fraud.[4] A plaintiff, who fails to establish the contract he has alleged, cannot rely on that alleged in the answer, without adopting it as constituting his case.[5] An optional contract may be proved, but if the time for the exercise of the option is limited, its exercise within that time must be shown.[6] And if personal, it must be exercised by the person entitled thereto.[7]

Plaintiff may prove a claim for damages, if he fails to show a right to specific performance.[8]

11. — *oral contract partly performed.*]—It is proper to prove the part performance first, as a foundation for letting in the oral contract.[9] The acts relied on for part performance must be such as to show that some contract existed, that they would not have been done but for the contract, and are not inconsistent with that alleged; and then additional oral evidence of its terms is competent, if the circumstances shown are such that to exclude it would be a fraud upon the plaintiff.[10] Payment of price is not, alone, enough.[11] Change of possession is usually enough,[12] except in case

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[1] Purcell v. Miner, 4 Wall. 513, 517.

[2] Pomeroy Sp Perf. 274, § 194.

[3] Pomeroy Sp. Perf. 347, § 264; and see Beardsley v. Duntley, 69 N. Y. 577, 583; Wilson v. Van Pelt, 2 Supm. Ct. (T. & C.) 414, and cas. cit.; Glass v. Hulbert, 102 Mass. 24.

[4] Pomeroy Sp. Perf. 270, § 193.

[5] Boardman v. Davidson, 7 Abb. Pr. N. S. 439.

[6] Codding v. Warmsly, 4 Supm. Ct. (T. & C.) 49, s. c. 1 Hun, 585, aff'd in 60 N. Y. 644.

[7] Mendenhall v. Klinck, 51 N. Y. 246.

[8] Beck v. Allison, 56 N. Y. 366, 373, rev'g 4 Daly, 421; s. p. Margraf v. Muir, 57 N. Y. 155, 159, and cas. cit. As to when may action be retained, to give damages, see Sternberger v. McGovern, 56 N. Y. 12, s. c. 15 Abb. Pr. N. S. 257, rev'g 4 Daly, 456. On prayer for performance as to part and deduction of price as to residue, performance as to whole cannot be decreed. Boyd v. Schlesinger, 59 N. Y. 301.

[9] Pomeroy Sp Perf. 151, § 107.

[10] Miller v. Ball, 64 N. Y. 286.

[11] Pomeroy Sp. Perf. p. 159–63, §§ 112–14. *Contra.* Morrill v. Cooper, 65 Barb. 512, and cas. cit.

[12] Pomeroy Sp. Perf. 164–78, §§ 115–25; and see Beardsley v. Duntley, 69 N. Y. 577. *Contra*, Purcell v. Miner (4 Wall. 513, 517), requiring also possession.

of a gift. The making of improvements is also enough.[1] In case of a gift both together are enough.[2]

To establish part performance, proof to a reasonable certainty is sufficient.[3]

12. —*plaintiff's title, and performance.*]—Plaintiff must show clearly that the purchaser will receive such a title as he contracted for.[4] A title which requires oral evidence to support it may be enough,[5] unless the purchaser stipulated for record title.[6] If the contract was by a trustee, plaintiff must show that it was such as he might properly have made, and as the court would have approved and authorized, had its authority been asked.[7] Good title at the time of trial is sufficient; but defects at the commencement of the action are relevant on the question of interest[8] and costs. Either party may show, by evidence which would be applicable in ejectment, that the vendor has a defective title, or none. It is enough for the purchaser, when sued by the vendor, that there is a reasonable doubt concerning the title, other than a pure question of law, which the court ought to determine.

Strict fulfillment in point of time on the part of the plaintiff, is not in general essential.[9] Unexcused long delay is a bar.[10] A change of circumstances, detrimental to defendant, will not be presumed from the mere fact of delay, but must be proved if relied on.[11] The statutory presumption of payment[12] of a sealed instrument, arising from the lapse of twenty years, is not sufficient evidence of payment.[13]

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[1] Pomeroy Sp. Perf. 178–86, §§ 126–32.

[2] Lobdell v. Lobdell, 36 N. Y. 327; 4 Abb. Pr. N. S. 56; 33 How. Pr. 347, rev'g 32 How. Pr. 1; Neale v. Neales, 9 Wall. 1.

[3] Neale v. Neales, 9 Wall. 1. *Contra*, it must be "indubitable." Grier, J., in Purcell v. Miner, 4 Wall. 513, 517. But see p. 495 of this vol.

[4] Hinckley v. Smith, 51 N. Y. 21, 25.

[5] Murray v. Harway, 56 N. Y. 337, 344. Compare Thorn v. Sheil, 15 Abb. Pr. N. S. 81.

[6] Coray v. Matthewson, 7 Lans. 80.

[7] Sherman v. Wright, 49 N. Y. 227.

[8] Jenkins v. Fahey, 73 N. Y. 355, rev'g 11 Hun, 351.

[9] Davidson v. Jersey Company, 71 N. Y. 333, 334, affi'g 6 Hun, 470.

[10] Finch v. Parker, 49 N. Y. 1; Merchants' Bank v. Thomson, 55 N. Y. 7, 12.

[11] Merchants' Bank v. Thomson (above).

[12] 2 N. Y. R. S. 201, § 48.

[13] Morey v. Farmers' Loan & Trust Co. 14 N. Y. 302. The limitation applicable is not that of actions on sealed contracts. Peters v. Delaplaine, 49 N. Y. 362, 372.

CHAPTER L.

ACTIONS FOR REFORMATION OR CANCELLATION OF INSTRUMENT.

1. Nature of the action.
2. The instrument impeached.
3. Grounds of impeachment.

1. *Nature of the action.*]—A ground of action substantially of the nature alleged, must be proved.[1] Thus an action to cancel for fraud is not sustained by evidence of a right to redeem.[2] It is enough that material allegations of fraud are proved, although other allegations of fraud remain unproved;[3] or although there is also a breach of warranty or other wrong on which plaintiff might recover damages.[4]

2. *The instrument impeached.*]—Plaintiff may prove the instrument in the usual way,[5] and then proceed to impeach it.[6] Several contracts having together the effect alleged, may be proved under an allegation of one contract.[7]

3. *Grounds of impeachment.*]—To avoid a contract, it must at least be shown that the minds of the parties never met. To reform the instrument, it must be shown that they did meet on other terms than those embodied in the writing, and that the intention of both was by mistake misrepresented in the writing.[8]

Fraud cannot be presumed or inferred without proof, in an equitable action, any more than in a common law action.[9] It is

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[1] Eyre v. Potter, 15 How. U. S. 42.

[2] Patterson v. Patterson, 1 Robt. 184, s. c. 1 Abb. Pr. N. S. 262. Nor an action to cancel, by proof of a right to specific performance. Fullerton v. McCurdy, 55 N. Y. 637.

[3] Moxon v. Payne, L. R. 8 Ch. App. 881, s. c. 7 Moak's Eng. 442.

[4] Smith v. Babcock, 2 Woodb. & M. 246, and cases cited; Boyce v. Grundy, 3 Pet. 210, 219.

[5] See Chapters I, XXVII and XLVIII.

[6] Bunce v. Gallagher, 5 Blatchf. 481; 7 Am. L. Reg. N. S. 32.

[7] Pierce v. Wilson, 34 Ala. 596, 607. And under a denial of a contract alleged, defendant may prove other contemporaneous and qualifying contracts. Marsh v. Dodge, 66 N. Y. 533; 4 Hun, 278; 6 Supm. Ct. (T. & C.) 568.

[8] The rules of proof for reformation have been already stated. P. 512 of this vol. See, also, Jackson v. Andrews, 59 N. Y. 244; Mead v. Westchester F. Ins. Co. 64 Id. 455; Bush v. Hicks, 60 Id. 298, 302, s. c. 2 Supm. Ct. (T. & C.) 356; Hoag v. Owen, 57 Id. 644, affi'g 60 Barb. 34; Boardman v. Davidson, 7 Abb. Pr. N. S. 439; Gillespie v. Moon, 2 Johns. Ch. 585, 597; Bryce v. Lorillard F. Ins. Co. 55 N. Y. 240, s. c. 46 How. Pr. 498, affi'g 35 Super. Ct. (3 J. & S.) 394. As to cogency of proof, see, also, Fishell v. Bell, Clarke, 37; Phœnix F. Ins. Co. v. Gurnee, 1 Paige, 278; Bryce v. Lorillard F. Ins. Co. 35 Super. Ct. (3 J. & S.) 394; Pomeroy Sp. Perf. 345, § 261. As to oral evidence that the terms of a trust were fixed under a misapprehension, or failed to express the settlor's intent, see Muloch v. Muloch, 9 Reporter, 350, and cases cited.

[9] Hager v. Thomson, 1 Black, 80; Warner v. Daniels, 1 Woodb. & M. 90, s. c. 9 Law Rep. 160, and cases cited. Compare Gallatian v. Cunningham, 8 Cow. 361. Courts of equity have repeatedly refused to sustain actions to set aside deeds for

enough to prove the suppression or misrepresentation of a material fact, though there were no intent to defraud.[1] If the parties to a written agreement stood on equal footing, dealing at arm's length, oral evidence is inadmissible to show that one represented to the other that the agreement would give to him something which by its terms it denied him, unless the latter shows that some part of the contract was omitted by fraud or mistake, which he supposed to have been included at the time of its execution.[2] Knowledge possessed[3] by the attorney or counsel employed by the party,[4] in a particular transaction for his client, is notice to his client, if the client take and profit by the fruits of the transaction.[5] Evidence of diligence in discovering the fraud is not required.[6] Evidence of diligence in rescinding after discovery is required.[7]

To rescind an executed contract[8] of an *insane* person who was apparently of sound mind when the contract was made, if the consideration has been enjoyed and cannot be restored (even though compensation might be awarded), the plaintiff must show fraud, undue advantage or imposition on the part of defendant,[9]

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fraud, unless there was proof beyond reasonable doubt. Gould v. Gould, 3 Story C. Ct. 516; Phettiplace v. Sayles, 4 Mas. 312; Garrow v. Davis, 10 N. Y. Leg. Obs. 225, and cases cited in note 3 on page 731; but see, on this subject, pp. 495 and 670 of this vol.

For the rules as to the mode of proving fraud and good faith respectively, see Chapters XVI, XXXIV and LI.

[1] Hammond v. Pennock, 61 N. Y. 145, 152, affi'g 5 Lans. 358; Smith v. Richards, 13 Pet. 26.

[2] Jarvis v. Palmer, 11 Paige, 650, 658. Compare, for a freer rule, where one had some right to rely on the other, Beardsley v. Duntley, 69 N. Y. 577.

[3] If previous knowledge is relied on, it should be shown to be within a time reasonable for presuming recollection.

[4] Otherwise of knowledge on the part of one employed by the agent or correspondent of the party. Hoover v. Wise, 91 U. S. (1 Otto), 308, rev'g Hoover v. Greenbaum, 61 N. Y. 305; 62 Barb. 188.

[5] May v. Le Claire, 11 Wall. 217.

[6] Baker v. Lever, 67 N. Y. 304, affi'g 5 Hun, 114.

[7] According to Lindsay Petroleum Co. v. Hurd, L. R. 5 P. C. 221, s. c. 8 Moak's Eng. 180, if defendant alleges laches in the other party, he must show when the latter acquired knowledge of the truth, and that he knowingly delayed asserting his right.

[8] So, also, according to the best considered recent authorities, of an executory simple contract. Lancaster Co. Bank v. Moore, 78 Penn. St. 407, s. c. 21 Am. R. 24 (approved in 78 Penn. St. 414). Compare Musselman v. Cravens, 47 Ind. 1. The contrary held of a power of attorney and conveyance thereunder. Dexter v. Hall, 15 Wall. 9, affi'g Hall v. Unger, 2 Abb. U. S. 502. See, also, Van Deusen v. Sweet, 51 N. Y. 378. In this case, however, the later English cases, applying the modern equitable rule, are not reviewed. See cases above cited, and Willard Eq. J. Chap. on Fraud; Ordronaux Jud. Aspects of Insan. pp. 300, 306, 309.

Lunacy is a shield, not a sword. Allen v. Berryhill, 27 Iowa, 534, s. c. 1 Am. R. 309. *Imbecility* is not of itself sufficient, but is material in connection with fraud or undue influence or advantage. Johnson v. Harmon, 94 U. S. (4 Otto), 371, 379.

[9] Young v. Stevens, 48 N. H. 133, s. c. 2 Am. R. 202; Molton v. Camroux, 2 Exch. 487, s. c. 4 Exch. 17, 18 Law Jour. Exch. 356; Elliott v. Ince, 7 De G., M. & G. 475–87; Behrens v. McKenzie, 23 Iowa, 333, 343; Scanlan v. Cobb, 85 Ill. 296; see 1 Story on Contr. 74; 1 Chitty on Contr. 191; Addison on Contr. 140; and see Allore v. Jewell, 94 U. S. (4 Otto), 506; Johnson v. Harmon, Id. 371.

or those under whom he claims. The burden is on plaintiff to show the insanity.[1] An inquisition had, at the time of or prior to the transaction, is *prima facie* evidence for this purpose. An inquisition, had on due notice to the subject,[2] and finding that lunacy existed at a certain time or for a specified period,[3] is presumptive evidence of incapacity to contract during that period,[4] and competent against all the world,[5] but is not conclusive evidence of lunacy prior to the day of the finding, against persons not parties to the proceedings, although they had actual notice of their pendency.[6] As to the time after the day of appointment of guardian or committee, it is conclusive.[7] A decree made by a probate court or on appeal from that court, adjudicating the insanity of a testator, is not competent evidence, even between the same parties, on a question of the validity of an act *inter vivos*.[8]

A general or habitual insanity[9] shown to have existed within a reasonable time before the act it is sought to annul, is presumed to have continued. Proof of insanity (other than idiocy) at a given time does not raise a presumption, and is not alone competent evidence, that the person was insane at a prior date.[10] A party who would take advantage of a lucid interval, must prove the interval.[11] But he is not bound to prove as perfect a state of mind as existed before the insanity.[12] It is enough to show a disposing mind.[13] The existence of a lucid interval may be inferred from the beneficial and advantageous character of the contract.[14] A witness, whether professional or not, may state the opinion formed by him, upon his own knowledge of facts, as to such

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[1] Even in case of a deed set up by defendant. Howe v. Howe, 99 Mass. 88, 98.

[2] Without such notice it is absolutely void. Hathaway v. Clark, 5 Pick. 490.

[3] Although admitting lucid intervals not specified. Goodell v. Harrington, 3 Supm. Ct. (T. & C.) 345. As to the jurisdiction, and the period, see the statute.

[4] And even at a time subsequent thereto. Hoyt v. Adee, 3 Lans. 173. *Contra*, Titcomb v. Vantyle, 84 Ill. 371, 373.

[5] Hoyt v. Adee (above); Goodell v. Harrington (above); 2 Whart. Ev. § 1254; Hart v. Deamer, 6 Wend. 497.

[6] Banker v. Banker, 63 N. Y. 409; affi'g 4 Hun, 259.

[7] See Gibson v. Soper, 6 Gray, 279, 286.

[8] Gray v. Thomas, 20 Miss. (12 Smed. & M.) 111; Den v. Ayres, 13 N. J. L. (1 Green), 152, 155; Bogardus v. Clarke, 4 Paige, 623, affi'g 1 Edw. Ch. 266. Unless the statutes have the effect to make it so.

[9] People v. Francis, 38 Cal. 183; Carpenter v. Carpenter, 8 Bush (Ky.), 283. So, also, of monomania. Thornton v. Appleton, 29 Me. 298. Otherwise of insanity of a temporary character, or shown to result from a transient cause. Stewart v. Redditt, 3 Md. 67, 81. A general request for an instruction that insanity (unqualified) is presumed to continue, should be refused. Stewart v. Redditt, 3 Md. 67, 81.

[10] Terry v. Buffington, 11 Geo. 342, cited in Ewell's Cases, 718. The competency of the state of mind after the transaction, depends on remoteness, and is somewhat in the discretion of the judge. White v. Graves, 107 Mass. 325, s. c. 9 Am. R. 38. And when it has been received from one side may be received from the other within reasonably similar limits. Walker v. Clay, 21 Ala. 797, 806.

[11] Cartwright v. Cartwright, 1 Phillimore, 90, 100; and see Ewell's Cases, 716, and cases cited.

[12] Dicken v. Johnson, 7 Geo. 488, and cases cited.

[13] *Exp.* Holyland, 11 Ves. 10; Atty.-Gen. v. Parnther, 3 Brown's Ch. 441, s. c. Ewell's Cases, 691; and see Lilly v. Waggoner, 27 Ill. 395, 399.

[14] Addison on Contr. 140.

grantor's state of mind; provided the opinion relate to matters of fact, and not of law, and he state the facts which he observed, in connection with his opinion.[1]

To rescind for *intoxication*, plaintiff must show that, as matter of fact, the intoxication, however produced, was such as to suspend or destroy the power of intelligent assent;[2] and that the consideration has been restored.[3]

To rescind on the ground of *infancy*, the burden is on plaintiff to prove his age;[4] and, in case of an executed transfer, the proper acts of disaffirmance on his part.[5] Confirmation may be proved by slighter evidence than disaffirmance.[6] Mere acquiescence is not of itself sufficient evidence of confirmation, but evidence showing clearly and unequivocally an intent to affirm is enough.

Where a *fiduciary relation*[7] is shown, the burden is on the trustee or other person owing the duty, to repel the presumption of fraud.[8] A witness cannot be allowed to testify directly to the question, whether defendant had undue influence.[9]

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[1] Thus, he may testify that "he thought" the grantor was growing childish, or, as "he took it," was a little light-headed. De Witt v. Barly, 17 N. Y. 340; limiting a previous decision in 9 Id. 371; Pelamourges v. Clark, 9 Iowa, 14. And see, to same effect, Stuckey v. Bellah, 41 Ala. 700, 707; Walker v. Walker, 14 Geo. 242; Doe v. Reagan, 5 Blackf. 217; Stewart v. Speddon, 5 Md. 433, 446; Dickenson v. Barber, 9 Mass. 225; McDougald v. McLean, 1 Winst. 120; Aiman v. Stout, 42 Penn. St. 114; Morse v. Crawford, 17 Vt. 499. The rule as to the testimony of experts is stated at p. 116 of this vol. Upon principles already stated (p. 115) declarations of the grantor are competent to show his state of mind (Howe v. Howe, 99 Mass. 88; Howell v. Howell, 47 Geo. 492), except declarations made after the act and offered to impeach it, for this might sanction fraud. Stewart v. Redditt, 3 Md. 67. As to allowing personal inspection by the court or jury, see Beaubien v. Cicotte, 12 Mich. 459.

[2] Johnson v. Harmon, 94 U. S. (4 Otto), 371, 380; 1 MacA. 139; and see Johns v. Fritchey, 39 Md. 258; Murray v. Carlin, 67 Ill. 286. As to the mode of proving intoxication, see Chapter LVI.

[3] Joest v. Williams, 42 Ind. 565.

[4] Compare Roof v. Stafford, 7 Cow. 179, 183; Gray v. Lessington, 2 Rosw. 257; Irvine v. Irvine, 5 Minn. 61. For mode of proof of age, see Chapter V.

[5] Voorhies v. Voorhies, 24 Barb. 150. Compare Miles v. Lingerman, 24 Ind. 385.

[6] Irvine v. Irvine, 9 Wall. 617, affi'g 5 Minn. 61. See *Infancy*, as a defense.

[7] Such as attorney and client (Bowen v. Bulkley, 14 N. J. Eq. 451, 458; Mason v. Ring, 3 Abb. Ct. App. Dec. 210; Widgery v. Tepper, 38 L. T. R. N. S. 436); principal and agent (Brooks v. Martin, 2 Wall. 70, 85; Eldridge v. Jenkins, 3 Story, 181); trustee and *cestui que trust* (Davoue v. Fanning, 2 Johns. Ch. 252, 260; Michoud v. Girod, 4 How. U. S. 544, 553; Gilman, &c. R. R. Co. v. Kelly, 77 Ill. 426); corporation and officer (Cumberland Coal Co. v. Sherman, 30 Barb. 553; The Same v. Parrish, 42 Md. 598); and the same rule is applied to some extent in the case of a conveyance by a child just of age to a parent (compare Turner v. Collins, L. R. 7 Chan. App. 329, s. c. 2 Moak's Eng. 290, with Taylor v. Taylor, 8 How. U. S. 183; Jenkins v. Pye, 12 Pet. 241); or a conveyance by an aged parent to one of several children (Lansing v. Russell, 3 Barb. Ch. 325; Siemon v. Wilson, 3 Edw. Ch. 36); and to those who deal with expectant heirs and reversioners (Earl of Aylesford v. Morris, L. R. 8 Ch. App. 484, s. c. 6 Moak's Eng. 443; compare Parmalee v. Cameron, 41 N. Y. 392).

[8] See Lewin on Trusts, 615, 858. Declarations of the grantee that he took the grant for the grantor's benefit, are admissible, not as proving a trust by parol, but as proving the pretended and the real intent. Platt v. Platt, 58 N. Y. 646, affi'g 2 Supm. Ct. (T. & C.) 25.

[9] Dean v. Fuller, 40 Penn. St. 474, 478. For the rule as to proof of undue influence, and of weakness of mind, see pp. 119–22 of this vol.

CHAPTER LI.

ACTIONS BY JUDGMENT CREDITORS.

1. Judgment.
2. Execution.
3. Indebtedness to plaintiff.
4. Fraud.
5. The consideration.
6. Indebtedness to other creditors.
7. Voluntary settlement.
8. Intention of the debtor.
9. — of his grantee.
10. Admissions and declarations.
11. *Defense.*
12. — evidence of consideration.

1. *Judgment.*]—The mode of proving the judgment has been already stated.[1] Docketing need not be shown,[2] unless execution or a lien is to be proved, or the judgment was in a justice's or district court.

2. *Execution.*]—The execution, with the sheriff's return and the date of filing endorsed thereon, is the primary evidence of its issue and return,[3] and, together with testimony of a witness that he had seen it on file in the clerk's office, is sufficient.[4] The residence of the debtor in the county where execution was issued may be inferred from circumstances.[5] Return before the expiration of sixty days, though made on plaintiff's request, is *prima facie* sufficient.[6]

3. *Indebtedness to plaintiff.*]—The plaintiff's judgment, unless recovered by confession,[7] is, both as against the judgment debtor and as against his grantees (even grantees by conveyances prior to the judgment), conclusive evidence of the existence and the amount of the indebtedness established thereby,[8] unless fraud

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[1] Chapter XXIX. Judgment on attachment without personal service (Thomas v. Merchants' Bank, 9 Paige, 216; compare Clarke, 234, 286), or an interlocutory decree not finally determining the question of liability (Public Works v. Columbia Coll. 17 Wall. 521, 530), is not enough.

[2] Youngs v. Morrison, 10 Paige, 325.

[3] Jones v. Green, 1 Wall. 330; Stahl v. Stahl, 2 Lans. 60; McElwain v. Willis, 9 Wend. 548, affi'g 3 Paige, 505. Lost execution may be proved by an alias, endorsed and filed pursuant to leave of court, Bradford v. Read, 2 Sandf. Ch. 163.

[4] Meyer v. Mohr, 1 Robt. 333, s. c. 19 Abb. Pr. 299.

[5] Such as the facts that the other parties resided there, and that the contract was made, for a long time performed, and finally sued on, in that county. Fox v. Moyer, 54 N. Y. 125.

[6] Forbes v. Waller, 25 N. Y. 430, s. c. as Forbes v. Walter, 25 How. Pr. 166, affi'g Forbes v. Logan, 4 Bosw. 475; Renaud v. O'Brien, 35 N. Y. 99, rev'g 25 How. Pr. 67. But, where return is necessary, it must have been made before the commencement of the present action. McCullough v. Colby, 5 Bosw. 477; compare 4 Id. 603.

[7] Botts v. Cozine, Hoff. Ch. 79. But see Magniac v. Thompson, 1 Baldw. 344, affi'd in 7 Pet. 348.

[8] Candee v. Lord, 2 N. Y. 269; Burgess v. Simonson, 45 N. Y. 225; Ludington's Petition, 5 Abb. New Cas. 307, and cases cited.

or collusion appears. It is not conclusive, except as to matters which appear to have been litigated and intelligently determined, or established by a default, in a court of competent jurisdiction; and even then may be impeached for fraud or collusion.[1]

If the indebtedness is not established by judgment, its nature and existence must be shown by other evidence.[2]

4. *Fraud.*]—The burden is on the plaintiff to show fraud,[3] clearly.[4] For this purpose circumstantial evidence is freely received,[5] and is sufficient to sustain a finding.[6] Evidence which is not altogether irrelevant, but can throw light upon the transaction, is competent, unless, taken with all other evidence offered, it could only raise a suspicion insufficient to sustain a verdict.

Character is not in issue.[7]

A secret trust for the debtor may be proved by any kind of evidence by which fraud may be proved, notwithstanding the statute of frauds, which usually requires written evidence to establish a trust.[8]

The retention of the possession of personal property after conveyance is *prima facie* evidence of intent to defraud existing creditors of the transferor;[9] and this presumption is sufficient against both parties to the transfer; but it may be rebutted by evidence of good faith, and any circumstances tending to show good faith are competent to go to the jury.[10] Retention of the possession of real property does not raise a presumption of fraud in a conveyance for value, but may go to the jury with other evidence. If the terms of even a recorded chattel mortgage allow the mortgagor to sell and substitute other goods, instead of applying pro-

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[1] Same cases. The competency of a judgment against the debtor's personal representative is stated in Chapter V.

[2] Elwell v. Johnson, 3 Hun, 558.

[3] Loeschigk v. Hatfield, 5 Robt. 26, s. c. as Loeschigk v. Addison, 4 Abb. Pr. N. S. 210, affi'd in 51 N. Y. 660. A mere right of priority, without evidence of fraud, is not enough. Skinner v. Stuart, 15 Abb. Pr. 391, s. c. 39 Barb. 206, 24 How. Pr. 489, rev'g 13 Abb. Pr. 442. Compare Shaw v. Dwight, 27 N. Y. 244.

[4] Townsend v. Stearns, 32 N. Y. 209. The weight of opinion is, that it need not be shown beyond reasonable doubt, but the presumption of innocence should be weighed with the testimony. See p. 495 of this vol. and cases cited at pp. 731, 733. The only available grounds of relief are those substantially stated in the pleadings. Rome Exchange Bank v. Eames, 4 Abb. Ct. of App. Dec. 83, s. c. 1 Keyes, 588.

[5] "In every transaction where fraud is imputed, it must be conceded to be of essential importance that the jury should be put in possession of every fact and circumstance tending to elucidate the question." GOLDTHWAITE, J., Goodgame v. Cole, 12 Ala. 80. The evidence of it is almost always circumstantial. Nevertheless, though circumstantial, it produces conviction in the mind often of more force than direct testimony. GRIER, J., Kempner v. Churchill, 8 Wall. 362.

[6] Hildreth v. Sands, 2 Johns. Ch. 35, affi'd in 14 Johns. 493; Booth v. Bunce, 33 N. Y. 139.

[7] See Johnson v. Carnley, 10 N. Y. 570.

[8] Bump Fraud. Conv. 542.

[9] For recent authorities, see 21 Alb. L. J. 10; 5 South. L. Rev. N. S. 617.

[10] Proof of good faith is sufficient, without proof of excuse, for not transferring possession. Mitchell v. West, 55 N. Y. 107.

ceeds in payment of the mortgage, it is conclusively presumed void, and good faith is irrelevant.[1] In the absence of such provisions in the mortgage, extrinsic evidence of intent is competent.[2]

5. *The consideration.*]—The recital of payment of a consideration, though inadequate or not even valuable, is not conclusive on defendant;[3] and plaintiff should be prepared with evidence, if he desires either to contradict the recital, or to support it against defendant's contradiction. Inadequacy may be shown by value proven by opinions of witnesses.[4]

6. *Indebtedness to other creditors.*]—The grantor's indebtedness to other creditors may be proved by parol, without producing the written obligations.[5] Judgments against him are competent in evidence for this purpose, without anything to connect the grantee with them.[6]

7. *Voluntary settlement.*]—A voluntary conveyance is not presumed fraudulent from the mere fact that the grantor was indebted.[7] *Prior* creditors make a *prima facie* case by showing that, at the time of the transfer, he was indebted to such an extent that, having regard to his property, the effect might be to delay, hinder and defraud the creditors.[8] A settlement made when insolvent is fraudulent.[9] This presumption may be explained and rebutted; for the fraud is always a question of fact with reference to the intention of the grantor.[10]

Where there are no prior creditors, a *subsequent* creditor (especially if impeaching a settlement on the children) must show that it was intended to defraud those who might become creditors.[11] Evidence that it was made just before entering a hazardous enter-

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[1] Robinson v. Elliott, 22 Wall. 513; Peiser v. Peticolas, 8 Reporter, 408.

[2] Southard v. Pinckney, 5 Abb. New Cas. 184; Peiser v. Peticolas (above).

[3] See paragraph 12. "Too commonly a fair debt is used as a little spark of honesty to animate a mass of collusion and falsehood." Cowen, J., Waterbury v. Sturtevant, 18 Wend. 353.

[4] Pages 636 and 637 of this vol. and notes; Dailey v. Grimes, 27 Md. 440, 448.

[5] Snodgrass v. Branch Bank of Decatur, 25 Ala. 161, 173.

[6] Hinde v. Longworth, 11 Wheat. 199. An expert cannot be asked whether the debtor's books showed that he was insolvent (Persse & Brooks Paper Works v. Willett, 1 Robt. 131, s. c. 19 Abb. Pr. 416), without producing the books or a statement drawn from them by the witness. Other rules as to proving insolvency have been already stated. Page 616.

[7] Dygert v. Remerschneider, 32 N. Y. 629, affi'g 39 Barb. 417.

[8] Schouler's Dom. Rel. 278. Embarrassed circumstances at the time cannot be inferred from the mere fact of insolvency at a later period. Sexton v. Wheaton, 8 Wheat. 229. As to conveyance by husband to wife, in fraud of his creditors, see p. 172, &c. of this vol.

[9] Cole v. Tyler, 65 N. Y. 73.

[10] Lloyd v. Fulton, 91 U. S. (1 Otto), 479, 485; 1 Bish. Marr. W. § 743; Dunlap v. Hawkins, 59 N. Y. 342, affi'g 2 Supm. Ct. (T. & C.) 292.

[11] Sexton v. Wheaton (above); Smith v. Vodges, 92 U. S. (2 Otto), 183; Zimmerman v. Schoenfeldt, 3 Hun, 692, s. c. 6 Supm. Ct. (T. & C.) 142. *Contra*, Redfield v. Buck, 35 Conn. 328.

prise, imposes upon the grantor the burden of proving that he was solvent and in a position to make it.[1]

8. *Intention of the debtor.*]—Where the facts in evidence do not raise a legal presumption of fraud, the debtor may be asked, as a witness, whether he intended to defraud,[2] and he may state the particular reasons which induced the act, and that he communicated those reasons to his creditors before the act.[3] His testimony, that he did not intend to defraud, is not conclusive.[4]

Subject to the qualifications below stated, in reference to the admissibility of the admissions and declarations of an assignor, other fraudulent transfers made by the same debtor, at about the same time, may be proved, for the purpose of showing his intent in the transfer in question, though there be no evidence that the grantee knew of them.[5] Such other frauds are only evidence for the jury, and do not raise a presumption of law.[6]

9. — *of his grantee.*]—To impeach a conveyance for valuable consideration,[7] or a mortgage for value,[8] or an assignment by way of lawful security,[9] or an ante-nuptial settlement,[10] it is necessary to show fraudulent intent on the part of the grantee,[11] or that he took with notice of the grantor's intent.[12] To establish notice to

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[1] Mackay v. Douglass, L. R. 14 Eq. C. 106, s. c. 3 Moak's Eng. 659.

[2] Seymour v. Wilson, 14 N. Y. 567, s. c. 15 How. Pr. 355; Pope v. Hart, 35 Barb. 630, s. c. 23 How. Pr. 215.

[3] Persse & Brooks Paper Works v. Willett, 1 Robt. 131, s. c. 19 Abb. Pr. 416. The belief of the debtor that his debt was paid at the time of his making conveyance is admissible. Stacy v. Deshaw, 7 Hun, 449.

[4] Newman v. Cordell, 43 Barb. 448; Bruce v. Kelly, 39 Super. Ct. (7 J. & S.) 27; Kimball v. Thompson, 58 Mass. (4 Cush.) 441.

[5] Foster v. Hall, 12 Pick. 89, 99; Cathcart v. Robinson, 5 Pet. 264; Van Kirk v. Wilds, 11 Barb. 520; Fuller v. Acker, 1 Hill, 473; Taylor v. Robinson, 2 Allen (Mass.), 562; and compare Reed v. Stryker, 4 Abb. Ct. App. Dec. 26. See Bump Fraud. Con. 544. According to some authorities, it should appear that all were a part of the same general plan. Angrave v. Stone, 45 Barb. 35, affi'g 25 How. Pr. 167; Lynde v. McGregor, 13 Allen, 172. See the same distinction at p. 618 of this vol., n. 10. Under the free rules of evidence now applied, it is consonant with general principles to allow evidence of any fraudulent transaction which indicates fraudulent intent on the part of the grantor in making the transfer in question; for proving fraud in one party is one step toward proving it in both. But it is only one step; and where it is necessary to prove fraud in the grantee, other fraudulent transfers in no wise connected do not avail as evidence against him, and there must be further proof not only of intent on his part, but proof competent against him of intent on the part of his grantor. In other words, plaintiff need not prove a common or communicated intent; and even where he must prove concurring intentions, he may prove each by independent evidence; and evidence which proves the intent of one party, is not inadmissible merely because it is no evidence of the intention of the other. A similar question as to the *res gestæ* of a payment remains somewhat unsettled. P. 245 of this vol.

[6] Livermore v. Northrup, 44 N. Y. 107.

[7] Waterbury v. Sturtevant, 18 Wend. 353.

[8] Carpenter v. Muren, 42 Barb. 300.

[9] Griffin v. Cranston, 1 Bosw. 281.

[10] Magniac v. Thompson, 7 Pet. 348, affi'g 1 Baldw. 344. But not other conveyances in consideration of love and affection only, even if impeached by subsequent creditors only. Savage v. Murphy, 34 N. Y. 508. *Contra*, Holmes v. Clark, 48 Barb. 237.

[11] Jackson v. Mather, 7 Cow. 301.

[12] So a creditor of a testator, who impeaches the validity of the mortgage or sale

a grantee, even for value, it is enough to show such circumstances as ought reasonably to have excited his suspicions and put him on inquiry; but proof of such circumstances is not conclusive; the grantee may show that he exercised due diligence, and failed to discover the prior right.[1] Evidence that the grantee had reasonable cause to believe the grantor insolvent is competent,[2] but not conclusive.[3] The grantee, like the grantor, may be examined as to his own intent.[4]

10. *Admissions and declarations.*]—In applying the general rules elsewhere stated,—which exclude admissions and declarations made by an owner, when offered to affect his successor's title to real,[5] but not to personal property or things in action,[6]—it should be observed that, in a creditor's suit, both grantor and grantee being parties (as is usually the case), the declarations of the grantor are usually admissible for the purpose of charging him,[7] whether they relate to realty or personalty; for what a party has said about his own case is always admissible against him. But it is not enough that there is such evidence of fraud on the part of the grantor, made competent against him. There must also be evidence of it, competent against the grantee.[8]

The doctrine of the New York courts is, that acts, admissions and declarations of the grantor, after he has parted with title,[9]

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by an executor for purposes of a misapplication, has the burden of proving that the mortgagee of the purchaser had notice of the true state of the facts. Corser v. Cartwright, L. R. 7 Ho. of L. 731, s. c. 14 Moaks' Eng. 115. Compare p. 716 of this vol.

[1] Williamson v. Brown, 15 N. Y. 354, 362; Herlich v. Brennan, 11 Hun, 194; and see Reed v. Cannon, 50 N. Y. 345.

[2] Lee v. Kilburn, 3 Gray, 594, 598. See p. 617 of this vol.

[3] Waterbury v. Sturtevant, 18 Wend. 353. Whether notice to an agent or attorney is competent and sufficient, see Weiss v. Brennan, 41 Super. Ct. (J. & S.) 177; Hoover v. Greenbaum, 62 Barb. 188, affi'd 61 N. Y. 305, affi'd *sub nom.* Hoover v. Wise, 91 U. S. (1 Otto), 308; May v. Le Claire, 11 Wall. 217; Foster v. Hall, 12 Pick. 89, 98; Lynde v. McGregor, 13 Allen, 172. As to competency of attorney as witness, see N. Y. Code Civ. Pro. § 835.

[4] Bedell v. Chase, 34 N. Y. 386.

[5] Page 711 of this vol.; Jackson v. Myers, 11 Wend. 533; Norton v. Pettibone, 7 Conn. 319.

[6] Page 11.

[7] Gamble v. Johnson, 9 Mo. 597, 615; Venable v. Bank of the U. S. 2 Pet. 107, 119.

[8] Even in case of an assignment for benefit of creditors, fraud on the part of the grantor must be established by evidence competent against the assignee. Evidence of the assignee's declarations such as are competent against him alone, or even against him and an assignee who has been removed, is not enough to sustain the action against the assignee. Cuyler v. McCartney, 40 N. Y. 221, rev'g 33 Barb. 165. And even where it is only necessary to prove fraud in the grantor, and his subsequent admissions are satisfactory evidence against himself, there must be evidence competent against the grantee; otherwise a grantor, having made a fair conveyance, could annul it by subsequent transactions or even admissions.

[9] This rule, while it admits declarations made after the executory contract to sell, excludes those made after the inception of the transfer. Vrooman v. King, 36 N. Y. 477, 485, and cases cited. Compare, for the distinction in various cases of incomplete execution or delivery, Wyckoff v. Carr, 8 Mich. 44; Bunker v. Green, 48 Ill. 243; McLanathan v. Patten, 39 Me. 142; McClellan v. Cornwall, 2 Coldw. (Tenn.) 298, 305; Goodgame v. Cole, 12 Ala. 77, 82.

are not competent against the grantee, unless there be independent evidence of fraud to connect the two, and bring them within the rule as to confederates. But for this purpose independent evidence that the grantor, after selling, continued in a possession which is presumptively fraudulent, is enough to let in declarations made during its continuance.[1] The declarations cannot aid the proof of combination. If there be not independent evidence of combination, the assignor should be offered as a witness, instead of resorting to proof of his declarations.[2]

If there is independent evidence connecting the grantor and grantee in an attempt to defraud, the acts, admissions and declarations of either are admissible against the other, within the limits already stated;[3] and it need not be shown that the latter had any knowledge of them.[4]

But the acts, admissions and declarations of grantor or grantee, though made while holding title and possession, are not evidence in his favor, or in favor of those claiming under him, to disprove fraud, unless part of the *res gestæ*,[5] or where the making of the declaration, and not its truth, is the relevant fact.[6]

11. Defense.]—Defendant may show any ground of equitable impeachment of the judgment.[7] But mere irregularity in it, or in the execution,[8] is no defense, nor is the fact that the execution was returned in less than sixty days, unless shown to have been done in bad faith.[9] Neither a second execution, levied after commencement of action, nor a second judgment, is necessarily a bar; it depends on whether the circumstances will sustain an inference of satisfaction.[10]

The grantee may prove the circumstances and the advice on which he took the transfer, for the purpose of showing good faith.[11]

12. — *evidence of consideration paid.*]—The recital, in a conveyance sought to be impeached, of payment of a valuable consideration, is presumptive evidence of its payment.[12] Its inade-

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[1] Lee v. Huntoon, Hoffm. 447, 453; Adams v. Davidson, 10 N. Y. 309; Newlin v. Lyon, 49 Id. 661. A possession resumed, after delivery once made and continued, is not enough. Tilson v. Terwilliger, 56 N. Y. 273.

[2] Cuyler v. McCartney, 40 N. Y. 221, 226.

[3] Page 190 of this vol.; Cuyler v. McCartney, 40 N. Y. 221; Newlin v. Lyon, 49 N. Y. 661.

[4] Nudd v. Burrows, 91 U. S. (1 Otto), 421, 438. Declarations made before the combination are not made competent. Legg v. Olney, 1 Den. 202.

[5] Ward v. Saunders, 6 Ired. (N. C.) L. 382, 387; Badger v. Story, 16 N. H. 168; Hale v. Stone, 14 Ala. 803, 806; Tevis v. Hicks, 41 Cal. 128.

[6] Place v. Gould, 123 Mass. 347, and cases cited.

[7] Smith v. Crocheron, 2 Edw. Ch. 501; and see Mandeville v. Reynolds, 68 N. Y. 528, 5 Hun, 338; Teed v. Valentine, 65 N. Y. 471. *Contra*, Mattingly v. Nye, 8 Wall. 370.

[8] 2 Abb. N. Y. Dig. new ed. 478, 482, 483.

[9] 2 Id. 487, 490.

[10] 2 Abb. N. Y. Dig. new ed. 477.

[11] Norton v. Mallory, 63 N. Y. 434, aff'g 1 Hun, 499, s. c. 3 Supm. Ct. (T. & C.) 640; Goodgame v. Cole, 12 Ala. 77, 80; Fisher v. True, 38 Me. 535.

[12] Thallhimer v. Brinckerhoff, 6 Cow. 90; Jackson v. McChesney, 7 Id. 360; Car-

quacy is material only on the question of fraudulent intent.[1] In case of a mortgage, the bond[2] or note[3] to which it is collateral, if produced and proved,[4] and shown to be connected with the mortgage,[5] is presumptive evidence of a just debt. After plaintiff has given evidence of fraud, defendant should give extrinsic evidence of consideration, if he relies on that. A conveyance purporting to have been voluntary, can not be contradicted by evidence that it was for value.[6] But the indebtedness to the grantee may be shown as evidence rebutting extrinsic evidence of fraud in fact.[7] If plaintiff has disproved the pecuniary consideration recited, defendant may prove the actual pecuniary consideration in support of the instrument.[8] Payment since commencement of the action is inadmissible.[9] The payment may be proved by a witness, without accounting for receipts shown to have been taken;[10] or by the previous transactions between the parties to the instrument,[11] and the state of their accounts.[12] The existence of an indebtedness having been shown, the debtor may testify directly that he was indebted to the grantee.[13]

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penter v. Freeland, Hill & D. Supp. 37; Foster v. Hall, 12 Pick. 89, 92. *Contra*, Kimball v. Fenner, 12 N. H. 248.

[1] Jackson v. Peek, 4 Wend. 300; Twyne's Case, 1 Smith's L. Cas. 33, 47.

[2] Dunham v. Gates, 3 Barb. Ch. 196.

[3] Dunham v. Whitehead, 3 Abb. Pr. 207.

[4] As to mode of proof, see pp. 392–8 and 504–7 of this vol.

[5] Baskins v. Shannon, 3 N. Y. 310.

[6] Potter v. Gracie, 58 Ala. 303, s. c. 29 Am. R. 748; Bump Fraud. Conv. 555, 558.

[7] Hinde v. Longworth, 11 Wheat. 199.

[8] McKinster v. Babcock, 26 N. Y. 378, rev'g 37 Barb. 265.

[9] Angrave v. Stone, 45 Barb. 35, affi'g 25 How. Pr. 167.

[10] Johnson v. Cunningham, 1 Ala. 249, 257; Planters' Bank v. Borland, 5 Id. 531, 543.

[11] Jaycox v. Caldwell, 51 N. Y. 395, affi'g 37 How. Pr. 240. So, also, in rebuttal. Treat v. Barber, 7 Conn. 274.

[12] De Forest v. Bacon, 2 Conn. 633. Compare Isham v. Schafer, 60 Barb. 317.

[13] Jaycox v. Caldwell (above).

CHAPTER LII.

ACTIONS FOR DIVORCE.

1. Marriage.
2. Fraud.
3. Impotence.
4. Adultery.
5. — circumstantial evidence.
6. — cogency of proof.
7. — opinions of witnesses.
8. — limits of the issue of adultery in respect to time and place.
9. — and as to paramour.
10. — delay.
11. — character.
12. Cruelty.
13. Witnesses.
14. Confessions and admissions.
15. Condonation.

1. *Marriage.*]—There must be evidence of actual marriage. Cohabitation and repute is relevant, but not alone enough.[1]

2. *Fraud.*]—The fraud proved must be that alleged.[2] Express representation of chastity need not be proved to substantiate an allegation that the woman fraudulently induced plaintiff to believe her chaste.[3] Admissions, especially if tacit, are not alone sufficient to establish fraud as a ground of divorce.[4]

3. *Impotence.*]—The burden of proving impotence as a ground of action is on plaintiff, and increases with the lapse of time from the date of marriage to the bringing of the action.[5]

4. *Adultery.*]—Actual marriage and cohabitation with a second spouse, is conclusive evidence of sexual intercourse.[6] Residence of man and woman in the same house,[7] holding each other out as man and wife, is not necessarily *prima facie* evidence of it.[8]

Birth of a child, or pregnancy, is not evidence of adultery without clear proof of the husband's non-access,[9] by witnesses who have means of knowledge.[10]

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[1] 2 Bish. Marr. & Div. § 266, &c.; p. 79, &c. of this vol. The mode of proving the material facts essential to the jurisdiction has already been stated. See chap. V.

[2] Klein v. Wolfsohn, 1 Abb. N. C. 134.

[3] Donovan v. Donovan, 9 Allen, 140.

[4] Montgomery v. Montgomery, 3 Barb. Ch. 132.

[5] M. v. C., L. R. 2 P. & D. 414, s. c. 4. Moak's Eng. 650. Continuance must be shown. As to surgical examination, see Devanbagh v. Devanbagh, 5 Paige, 554; 6 Id. 176; Newell v. Newell, 9 Id. 25. Where the only evidence is the conflicting testimony of the parties, the lapse of time is a very strong circumstance against the case. Cuno v. Cuno, L. R. 2 S. & D. App. 300, s. c. 6 Moak's Eng. 73.

[6] Clapp v. Clapp, 97 Mass. 531.

[7] Pollock v. Pollock, 71 N. Y. 137.

[8] Hart v. Hart, 2 Edw. 207. But see Hoffm. on Ref. 115. As to presumption of death from absence, see p. 73 of this vol.

[9] Van Aernam v. Van Aernam, 1 Barb. Ch. 375. See pp. 88 and 89 of this vol.

[10] See Turney v. Turney, 4 Edw. 566, and p. 89 of this vol. By N. Y. Rule 82, legitimacy, if not questioned in pleading, cannot be questioned on the trial.

A husband's consorting with *prostitutes* is competent as evidence of his adultery.[1] A woman's visiting a house of prostitution with a man other than her husband is competent evidence of her adultery. Continuation of an intercourse formerly adulterous, without anything to indicate a change, will sustain an inference of continued adultery.[2] A husband's having the venereal *disease*, long after marriage, is *prima facie* evidence of his adultery.[3] Defendant's physician is not competent as to facts derived from him in professional confidence.[4] The wife's disease is not evidence of the husband's infidelity.[5]

5. — *circumstantial evidence.*]—To establish adultery by circumstantial evidence, the circumstances are to be taken together and when combined must tend to establish the following three facts: 1. The lustful disposition of the party charged, towards the alleged paramour; 2. A like disposition on the part of the latter; 3. The opportunity to commit the act.[6]

These three facts must be reasonably approximate in point of time.[7] The proof must sustain an inference of actual connexion but it is not essential that it identify time and place,[8] unless these have been made part of the issue by the pleadings.

Circumstances susceptible of a reasonable interpretation consistent with innocence, and which do not lead to guilt by a fair inference as a necessary conclusion, are insufficient.[9]

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[1] But whether sufficient, depends on evidence of disposition and opportunity. See Ciocci v. Ciocci, 26 Eng. Law & Eq. R. 604; Platt v. Platt, 5 Daly, 295; Van Epps v. Van Epps, 6 Barb. 320; Hoffm. on Ref. 155.

[2] Smith v. Smith, 4 Paige, 432; Van Epps v. Van Epps, 6 Barb. 320.

[3] Johnson v. Johnson, 14 Wend. 637, rev'g 4 Paige, 460. Compare Ferguson v. Ferguson, Seld. Notes, 249 (No. 6, p. 77), modifying effect of 1 Barb. Ch. 604; 3 Sandf. 307.

[4] N. Y. Code Civ. Pro. § 834; Hunn v. Hunn, 1 Supm. Ct. (T. &. C.) 499; and see p. 501 of this vol.

[5] Homburger v. Homburger, 46 How. Pr. 346.

[6] Westmeath v. Westmeath, 4 Eng. Ecc. 438; followed in Inskeep v. Inskeep, 5 Clarke (Iowa), 204, and Freeman v. Freeman, 31 Wis. 535.

[7] Thayer v. Thayer, 101 Mass. 111. Opportunity must be proved by evidence that the parties were in some place together where adultery might probably have been committed. Otherwise guilty intention might be mistaken for actual guilt. Caton v. Caton, 7 Notes Ecc. & Mat. Cas. 16.

[8] Hamerton v. Hamerton, 2 Hagg. Ecc. 8; Grant v. Grant, 2 Curt. Ecc. Ct. 16.

[9] Moser v. Moser, 29 Ala. 313; Inskeep v. Inskeep (above); Ferguson v. Ferguson, 3 Sandf. 307. The following cases illustrate the application of this principle, by indicating, not rules of law, but situations which the courts have held would sustain a finding of fact. Great intimacy and opportunity; not proof. Faussett v. Faussett, 7 Notes Ecc. & Mat. Cas. 88. Kissing, letters and opportunity; not proof. Hamerton v. Hamerton, 2 Hagg. Ecc. 8. Intimacy, indecorous freedom, without indecent familiarities, but with opportunity; not proof. Caton v. Caton, 7 Notes Ecc. & Mat. Cas. 16. Willing receipt of letters of solicitation, suspicious intimacy and opportunity; not proof. Hamerton v. Hamerton (above), approved in Caton v. Caton, 7 Notes Ecc. & Mat. Cas. 16. Criminal disposition and attempt to gain opportunity; not proof. Caton v. Caton (above). Opportunity alone; not proof. Hamerton v. Hamerton (above). Opportunity must be connected with design. Mayer v. Mayer, 21 N. J. Eq. (6 C. E. Green), 246. Indecent familiarities, clandestine interviews, love letters expressing desire, followed by opportunity; held to be proof. Grant v. Grant, 2 Curt. Ecc. Ct. 16, 71; and see Lockyer v. Lockyer, 1 Edm. Sel. Cas. 107.

The social habits of the parties and of the community of which they were a part,[1] and any circumstances giving an innocent character to the intimacy,[2] are relevant.

6. — *cogency of proof.*]—Nothing is to be taken in favor of plaintiff by presumption or intendment, even in the case of a default.[3] The evidence must be such as would lead the guarded discretion of a reasonable and just man to the conclusion of guilt, for it is not to lead a rash and intemperate judgment, moving upon appearances that are equally capable of two interpretations, neither is it to be a matter of artificial reasoning, judging upon such things differently from what would strike the careful and cautious consideration of a discreet man.[4] It must be a conclusion so far inevitable as that the supposition of innocence cannot by any just course of reasoning be reconciled with it.[5]

7. — *opinions of witnesses.*]—The opinions of witnesses as to guilt or guilty intent are not competent.[6] But the impression or belief produced in the mind of the witness at the time of what he saw, may be called for by the court,[7] or on cross-examination.[8]

8. — *limits of the issue of adultery in respect to time and place.*]—In connection with proof of at least improper familiarities within the time alleged, evidence of acts of adultery, with the same paramour, previous to the time alleged, is admissible to give significance to those familiarities.[9] Evidence of adulterous acts subsequent to the time alleged, is not admissible because it raises no presumption that the prior familiarities were accompanied with an adulterous act within the period alleged.[10] If presumptive evidence of an act of adultery, within the period alleged, has been given, evidence of an act, with the same paramour, subsequent to the period but reasonably proximate in time, may be proved in corrob-

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[1] Inskeep v. Inskeep, 5 Clarke (Iowa), 204; Gethin v. Gethin, 2 Sw. & Tr. 560–3.

[2] Dunlap v. Robinson, 2 Ala. N. S. 100; Berckmans v. Berckmans, 17 N. J. Eq. (2 C. E. Green), 453, affi'g 16 Id. 122; King v. King, 4 Scotch Sess. Cas. 2d series, 583.

[3] Linden v. Linden, 36 Barb. 61.

[4] Lovedon v. Lovedon, 2 Hagg. Cons. 3; Ferguson v. Ferguson, 3 Sandf. 307; Freeman v. Freeman, 31 Wis. 235; Mosser v. Mosser, 29 Ala. N. S. 313; Day v. Day, 3 H. W. Green Ch. (N. J.) 444.

[5] Anon., 17 Abb. Pr. 48, and cas. cit. Proof beyond reasonable doubt is required in Berckmans v. Berckmans, 17 N. J. Eq. (2 C. E. Green), 453, affi'g 16 Id. 222; Freeman v. Freeman (above). Compare p. 495 of this vol. For various forms of stating the rule requiring proof beyond a mere preponderance of probability, see Miller v. Miller, 4 Sw. & Tr. 427; Clare v. Clare, 19 N. J. Eq. (4 C. E. Green), 37; Cooper v. Cooper, 10 La. O. S. 249; Edmond's Appeal, 57 Penn. St. 232; Caton v. Caton, 7 Notes Ecc. & Mat. Cas. 16; Day v. Day, 3 Green Ch. (N. J.) 444; Purcell v. Purcell, 4 Henn & M. 511; Meble v. Lapeyrollerie, 16 La. Ann. 4.

[6] See Cox v. Whitfield, 18 Ala. 738, 741.

[7] Crewe v. Crewe, 3 Hagg. Ecc. 129, cited in Macq. on Marr. & D. 213.

[8] See 3 Abb. New Cas. 234, note.

[9] Lockyer v. Lockyer, 1 Edm. Sel. Cas. 107.

[10] Freeman v. Freeman, 31 Wis. 235. There should be leave to amend or file supplemental pleading.

oration.[1] Upon the same principles, *prima facie* proof of commission of adultery at the place alleged, may be corroborated by evidence of other acts of adultery at other places not alleged;[2] but such evidence is not competent as an independent charge.[3]

9. — *and as to paramour.*]—An allegation of adultery with a person named, is not sustained by proof of adultery with another person,[4] or with a person unknown;[5] but, under an allegation of adultery with a person unknown, or of adultery with a person named and others unknown (with proper allegations of inability to state name), adultery with a person not named, whether known or unknown, may be proved.[6]

10. — *delay.*]—The husband's delay to proceed after having what he claims as proof, is strong evidence in the wife's favor.[7] The wife's delay is not equally strong evidence.[8] Aversion to publicity or to involving children, does not excuse the husband's delay, as it does the wife's.[9] Explanations of delay are admissible.[10]

11. — *character.*]—The defendant's character is not in issue.[11] But unquestionably good character appearing incidentally from otherwise competent evidence, may be considered as a circumstance in defendant's favor, aiding the presumption of innocence.[12] The unchaste character of a servant employed for household purposes, is not alone competent.[13]

12. *Cruelty.*]—The mode of proving facts such as constitute cruelty and their effects, has been stated in other chapters.[14] Defendant's conviction on a plea of guilty,[15] or his plea of guilty[16] to an indictment for cruelty, is competent against him; but a conviction on a plea of not guilty is not.[17] A defendant offering to prove, in his justification, plaintiff's ill-conduct, is restricted to what preceded or was contemporaneous with his own cruelty or misconduct.[18]

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[1] See reasoning in Lawson v. The State, 20 Ala. N. S. 65.
[2] Thayer v. Thayer, 101 Mass. 111.
[3] Green v. Green, 26 Mich. 437.
[4] See cases cited and limited in Mitchell v. Mitchell, 61 N. Y. 398.
[5] Bokel v. Bokel, 3 Edw. 376.
[6] Mitchell v. Mitchell, 61 N. Y. 398.
[7] Berckmans v. Berckmans, 16 N. J. Eq. (1 C. E. Green), 122, aff'd in 17 Id. 435.
[8] Newman v. Newman, L. R. 2 Pr. & D. 157.
[9] Cummins v. Cummins, 15 N. J. Eq. (2 McCarter), 138.
[10] Leary v. Leary, 18 Geo. 696.
[11] Humphrey v. Humphrey, 7 Conn. 116; Washburn v. Washburn, 5 N. H. 195; Lockyer v. Lockyer, 1 Edm. Sel. Cas. 107.
[12] Alexander v. Alexander, 2 Sw. & Tr. 95.
[13] Carter v. Carter, 62 Ill. 439.
[14] Pages 179, 599, 648, 682, 685 of this vol.
[15] 1 Greenl. Ev. (13 ed.) 570, § 527a, note.
[16] Page 649 of this vol.
[17] Id.
[18] Bihin v. Bihin, 17 Abb. Pr. 19.

13. *Witnesses.*]—The competency of the parties has been stated.[1] Plaintiff's testimony alone may, in the discretion of the court, in a perfectly clear case, be sufficient if other evidence does not exist or cannot be obtained.[2] A child, if of a competent age and intelligence to be a witness, may testify against its parent.[3] Testimony of a prostitute,[4] or an alleged paramour,[5] or the keeper or a servant of a house of prostitution,[6] is not sufficient to prove adultery. That of a witness employed to watch and detect is not incompetent, but is to be received with great caution and scrupulously scrutinized.[7] At least two witnesses are generally required.

Satisfactory testimony of the defendant and the alleged paramour, to their innocence, though of little weight against clear proof, should prevail against merely circumstantial evidence or unsatisfactory testimony making a doubtful case.[8]

14. *Confessions and Admissions.*]—A confession, not connected with other proof, is not competent.[9] However explicit, it will not alone justify a decree;[10] but may, in the discretion of the court, be sufficient when clearly proved, if accompanied with evidence effectually repelling all suspicion of collusion,[11] or corroborated by other evidence of guilt,[12] and free from any appear-

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[1] Pages 165 and 166 of this vol. N. Y. Rules 78–80 provide for their examination in certain cases.

[2] Robbins v. Robbins, 100 Mass. 150; Kaiser *v.* Kaiser, 16 Hun, 602, 605. The N. Y. courts usually require further evidence. Compare U. v. J., L. R. 1 Pr. & M. 460.

[3] Lockwood v. Lockwood, 2 Curteis, 281. The omission to call a child of tender years is approved in Kneale v. Kneale, 28 Mich. 344, COOLEY, J.; s. p. Tobey v. Leonards, 2 Wall. 423, WAYNE, J.

[4] Turney v. Turney, 4 Edw. Ch. 566. Compare Ciocci v. Ciocci, 26 Eng. L. & Eq. 604, s. c. 18 Jur. 194.

[5] Ginger v. Ginger, L. R. 1 Pr. & D. 37, and see Simons v. Simons, 13 Tex. 558.

[6] Platt v. Platt, 5 Daly, 295, 297.

[7] Anon. 17 Abb. Pr. 48.

[8] Mayer v. Mayer, 21 N. J. Eq. 240; Larrison v. Larrison, 20 Id. 100.

[9] Doe v. Roe, 1 Johns. Cas. 25; Betts v. Betts, 1 Johns. Ch. 197; Miller v. Miller, 1 H. W. Green Ch. (N. J.) 139; Searle v. Price, 2 Hagg. Cons. 189; Macqueen's Pr. in H. of L. 606; 1 Tayl. Ev. 673; and see White v. White, 45 N. H. 121. *Contra*, Sheffield v. Sheffield, 3 Tex. 79; Williams v. Williams, 35 L. J. Mat. C., s. c. 8 L. R. 1 Pr. & D. 29; 13 L. T. R. N. S. 610; Robinson v. Robinson, 1 Sw. & Tr. 562; Vance v. Vance, 8 Greenl. (Me.) 132.

[10] Lyon v. Lyon, 62 Barb. 138, and cases above cited. By the N. Y. Statute "no sentence of nullity of marriage shall be pronounced solely on the declarations or confessions of the parties; but the court shall in all cases require other satisfactory evidence of the existence of the facts on which the allegation of nullity is founded." 2 N. Y. R. S. p. 144, § 36; 3 Id. (6th ed.) 155. But the rule is not dependent on the statute, but is one of public policy. True v. True, 6 Minn. 458. On the infirmity of evidence of confessions, see Lench v. Lench, 18 Ves. 511; Smith v. Burnham, 3 Sumn. 435; 1 Greenl. on Ev. (Redf. ed.) 229, § 200; State v. Fields, Peck (Tenn.), 141; Malin v. Malin, 1 Wend. 625, 652; Getman v. Getman, 1 Barb. Ch. 499, 504; Law v. Merrills, 6 Wend. 268, rev'g 9 Cow. 65; Garrison v. Aiken, 2 Barb. 25, 27; Rex v. Simons, 6 C. C. & P. 541; Rex v. Coleman, Remarkable Trials, 1162, cited in Joy on Confessions, 108.

[11] Billings v. Billings, 11 Pick. 461; Fullerton v. Fullerton, 11 Scotch Ct. of Sess. Cas. 3d series, 720; Armstrong v. Armstrong, 32 Miss. 279.

[12] Cases above; Clutch v. Clutch, 1 Saxt. N. J. 474; Lyon v. Lyon, 62 Barb. 138;

ance of collusion.[1] A confession in ambiguous language suggestive of guilt, but consistent with there having been no actual adultery, is not enough ;[2] but is competent, and may be sufficient in connection with other proof.[3]

Confessions or declarations by the alleged paramour are no evidence against the defendant,[4] unless brought to the knowledge of defendant and proved as a foundation for showing defendant's tacit or express confession.[5] Admissions or declarations of a third person, though made when acting for the defendant, are not competent as a confession unless shown to have emanated from the defendant.[6]

If the confession or admission received, is contained in a writing, the party against whom a part is read has a right to have the whole put in evidence.[7]

15. *Condonation.*]—Condonation may be proved by the voluntary cohabitation of the parties, with the knowledge of the fact of adultery.[8] Condonation may be conditional. Cohabitation is not conclusive proof of condonation of cruelty.[9]

Sawyer v. Sawyer, Walk. Ch. 52; Baxter v. Baxter, 1 Mass. 346; Matchin v. Matchin, 6 Penn. St. 332.

[1] Doe v. Roe, 1 Johns. Cas. 25; Hoffm. on Ref. 157..

[2] Winscome v. Winscome, 3 Sw. & Tr. 380; Williams v. Williams, 1 Hagg. Cons. 302; Caton v. Caton, 7 Notes of Ecc. & Mat. Cas. 16.

[3] Faussett v. Faussett, 7 Notes of Ecc. & Mat. Cas. 88; Grant v. Grant, 2 Curt. Ecc. 16.

[4] Montgomery v. Montgomery, 3 Barb. Ch. 132; Leary v. Leary. 18 Geo. 696; Hobby v. Hobby, 64 Barb. 277.

[5] Burgess v. Burgess, 2 Hagg. Cons. 223; Croft v. Croft, 3 Hagg. Ecc. 310.

[6] Faussett v. Faussett, 7 Notes Ecc. & Mat. Cas. 88.

[7] Forrest v. Forrest, 6 Duer, 102, 132, affi'd in 25 N. Y. 501. As to correspondence, see p. 677 of this vol.

[8] 2 N. Y. R. S. p. 145, § 42; 3 Id. (6th ed.) 156. And this is conclusive. See Sewall v. Sewall, 122 Mass. 156, s. c. 23 Am. R. 299; Reynolds v. Reynolds, 4 Abb. Ct. App. Dec. 35.

[9] Reynolds v. Reynolds (above); and see Perkins v. Perkins, 6 Mass. 69.

CHAPTER LIII.

ACTIONS OF QUO WARRANTO.

1. Office. 2. Corporations.

1. *Office.*]—The claimant to office must show a good title, not a colorable one, nor one resting upon his own neglect.[1] If he claims by appointment, the title of the appointing power must be shown.[2] Preliminary explanation is not required of an alteration in a public document produced from the custody of the proper officer.[3]

The *election* return of the local canvassers is competent evidence of the number of votes cast.[4] But no canvasser's certificate is conclusive; it may be disproved,—for instance, by proof that votes were improperly registered or received at the election.[5] And for this purpose oral evidence is competent.[6] He who impeaches the certificate must show that the votes were untruly canvassed, or that some facts exist which show that the certificate does not truly state the result of the popular will. It is not enough to show irregularities in the constitution of the board of inspectors, or the mode of receiving votes, &c., if no illegal votes were received, and no legal ones were excluded.[7] This burden is on him, even though it require proving a negative.[8] The certificate may be contradicted by producing the ballots, if it appear that they have been preserved in the manner and by the officers prescribed in the statute, and that, while in such custody, they have not been so exposed to the reach of unauthorized persons as to afford a reasonable probability of their having been changed or

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[1] People *ex rel.* Garmo v. Bartlett, 6 Wend. 422.

[2] People *ex rel.* Steinert v. Anthony, 6 Hun, 142. For the mode and effect of resignation and of revocation of it, see State v. Ferguson, 31 N. J. L. 107; State v. Hauss, 43 Ind. 105; State v. Fitts, 49 Ala. 402; also 3 Nev. 566; 1 Cranch, 137; 6 Cal. 26.

[3] People *ex rel.* Stone v. Minck, 21 N. Y. 539; Devoy v. Mayor, &c. of N. Y. 35 Barb. 264, s. c. 22 How. Pr. 226.

[4] Upon general principles, even though there be no express statute. People *ex rel.* Stone v. Minck, 21 N. Y. 539. Otherwise of a town clerk's certificate. People v. Cook, 14 Barb. 259, affi'd in 8 N. Y. 67.

[5] People v. Cook (above); People v. Van Slyck, 4 Cow. 297; People v. Vail, 20 Wend. 12. Otherwise of minutes of town meeting, kept by the town clerk pursuant to requirement of law. If erroneous, they must be corrected by a direct proceeding. People v. Zeyst, 23 N. Y. 140, and cases cited; 1 Dill. M. C. 350, § 236. As to the power of the clerk or board to amend the records, see 1 Dill. M. C. 346, §§ 233, 234.

[6] People *ex rel.* Stemmler v. McGuire, 2 Hun, 269, 274, 277, s. c. 4 Supm. Ct. (T. & C.) 658, affi'd in 60 N. Y. 640.

[7] People v. Cook, 8 N. Y. 67, affi'g 14 Barb. 259.

[8] People *ex rel.* Smith v. Pease, 27 N. Y. 45, s. c. 25 How. Pr. 495, affi'g 30 Barb. 588.

tampered with.[1] Writing, on the ballot, controls print.[2] To show that one voted, the poll list is admissible, though not authenticated nor filed.[3] A voter may testify, as a witness, how he voted.[4] If he refuses to disclose, or fails to remember, for whom he voted, circumstantial evidence is competent to raise a presumption as to that fact.[5] The declarations of a voter, although hearsay, are received on the question of his qualification, for the purpose of sustaining or annulling his vote, but not to set aside the election on other grounds.[6] One, alien born, who voted, must be presumed to have been naturalized, in absence of evidence to the contrary;[7] but if there is *prima facie* evidence that he was never naturalized, the burden is shifted.[8]

Defendant cannot have judgment for the office by showing possession in himself, even though the relator fail to prove title.[9]

2. *Corporations.*]—If the proceeding, founded on alleged usurpation of power, is by the State, not on the relation of a private person, the burden of proof is on the defendant to disclaim or to justify, and the State is not bound to make affirmative proof.[10] If the corporation is shown once to have existed, its continuance is presumed, until the contrary is shown.[11] An official certificate, sanctioning the construction of defendants' works, and allowing them to exercise their franchise, is not conclusive against the people.[12] Where it is discretionary with the court to declare a forfeiture or not, there should be some evidence of existing danger or inconvenience to the community, requiring it.[13] Where the action depends on the breach of a condition subsequent, a failure to comply with it literally, is not enough.[14] A substantial performance will prevent forfeiture.[15]

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[1] Hudson v. Solomon, 19 Kans. 177, s. c. 16 Alb. L. J. 349.

[2] People v. Saxton, 22 N. Y. 309. As to pasters, see People *ex rel.* Gregory v. Love, 63 Barb. 535.

[3] People *ex rel.* Smith v. Pease, 27 N. Y. 45, s. c. 25 How. Pr. 495, affi'g 30 Barb. 588.

[4] People *ex rel.* Judson v. Thacher, 55 N. Y. 525; reported below in 7 Lans. 274, s. c. 1 Supm. Ct. (T. & C.) 158. But his intention is to be learned, not from his testimony to the mental purpose, but by a reasonable construction of his acts. People v. Saxton, 22 N. Y. 309.

[5] People *ex rel.* Smith v. Pease (above).

[6] Id.

[7] Id. Parol evidence is not admissible to impeach the record of naturalization by showing that the preliminary steps were not taken. People *ex rel.* Brackett v. McGowan, 77 Ill. 644, s. c. 20 Am. R. 254.

[8] People *ex rel.* Smith v. Pease (above).

[9] People *ex rel.* Judson v. Thacher, 55 N. Y. 525.

[10] Ang. & A. on C. § 756; People v. Utica Ins. Co. 15 Johns. 358; High on Ex. R. § 652.

[11] Ang. & A. on C. § 757; People v. Manhattan Co. 9 Wend. 351, 378.

[12] People v. Fishkill & Peekman Plankroad Co. 27 Barb. 445.

[13] Ang. & A. on C. § 775; State v. Essex Bank, 8 Vt. 489.

[14] Thompson v. People, 23 Wend. 537, 586, rev'g 21 Id. 235; People v. Williamsburgh Turnpike Co. 47 N. Y. 586, 592.

[15] Id.

CHAPTER LIV.

ACTIONS FOR INFRINGEMENT OF TRADE MARKS.

1. Plaintiff's title.
2. Resemblance of defendant's mark.
3. Intent.
4. Damages.
5. Witnesses.
6. Defenses.

1. *Plaintiff's title.*]—Title may be shown by evidence of invention or composition (by plaintiff or his servants,[1] or grantors),[2] and an appropriation and adoption[3] in a general use antedating defendant's use. The fact that an article was known in a trade in a certain way, is one to which qualified witnesses may testify directly;[4] and even negative evidence from such witnesses is competent.[5] In an action in a State court, registration under the act of Congress[6] is not a ground of right or relief.[7] In an action in the United States courts, a certification of registration is not conclusive evidence that the mark is a proper trade mark, or that plaintiff has prior right.[8] Unsustained claim of copyright is not relevant.[9]

2. *Resemblance of defendant's mark.*]—It is not necessary to prove the use of a mark in all respects like the original. It is sufficient if the resemblance is such as to show an intention to deceive,[10] or a degree of imitation so resembling the mark of the plaintiff, as that ordinary purchasers, buying with ordinary caution, are likely to be misled.[11] Variations that a comparison with the original would instantly disclose, do not protect defendant, if it appears that the ordinary mass of purchasers, paying that attention which such persons usually do in buying the article, would prob-

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[1] Caswell v. Davis, 58 N. Y. 223.

[2] Cong. & Emp. Spring Co. v. High Rock Cong. Spring Co. 10 Abb. Pr. N. S. 348, s. c. 45 N. Y. 291, rev'g 57 Barb. 526; Fulton v. Sellers, 4 Brewst. (Penn.) 72.

[3] As to how far proof of association of the plaintiff's article, and his only, with the word adopted by him, will serve to show origin and ownership, see Smith v. Reynolds, 10 Blatchf. 100; Morrison v. Case, 9 Id. 548; Meriden Britannia Co. v. Parker, 39 Conn. 450; Canal Co. v. Clark, 13 Wall. 311; same cases, Codd. Dig. L. of Tradem. §§ 261, 694, 716, 759, 1010.

[4] Pollen v. Le Roy, 30 N. Y. 549.

[5] Wilkinson v. Greely, 1 Curt. C. Ct. 439.

[6] U. S. R. S. § 4937.

[7] Popham v. Wilcox, 14 Abb. Pr. N. S. 206. Though it may be a relevant fact on the question of adoption and priority of claim.

[8] Moorman v. Hoge, 2 Sawyer, 78.

[9] Wolfe v. Barnett, 24 La. Ann. 97, s. c. 13 Am. R. 111.

[10] Wotherspoon v. Currie, L. R. 5 H. of L. 508, s. c. 3 Moak's Eng. 29.

[11] McLean v. Fleming, 96 U. S. (6 Otto), 245, 251.

ably be deceived.[1] Evidence that any one has been actually deceived, or has bought goods with the defendant's mark, under the belief that they were manufactured by the plaintiff, is not necessary, provided the resemblance is such as would be likely[2] to cause the one mark to be mistaken for the other.[3] Probability of deception is generally shown by resemblance and by the opinions of experts. Resemblance as shown by inspection is, however, the primary test and criterion, and proof by experts is seldom resorted to.

3. *Intent.*]—Evidence that defendant intentionally, either uses or closely imitates plaintiff's trade mark, raises a legal, but not conclusive, presumption of a fraudulent purpose of deceiving the public; and in such case, even at law, nominal damages will be given, though no specific injury be proved.[4] To obtain an injunction, fraud need not be proved. An infringement inadvertently commenced may be enjoined.[5] Intent is generally immaterial in equity cases, except upon the question of damages.[6] Presumption of fraudulent intent, arising from resemblance, is very strong where it is shown that the defendant himself places the mark upon the articles; but in suits against a dealer who buys and sells them with the marks already affixed, knowledge must be clearly proved to make him liable to account.

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[1] Meriden Britannia Co. v. Parker, 39 Conn. 450; Partridge v. Menck, 1 How. App. Cas. 548, affi'g 2 Sandf. Ch. 622, 2 Barb. Ch. 101; Davis v. Kendall, 2 R. I. 566; Fetridge v. Wells, 4 Abb. Pr. 144, s. c. 13 How. Pr. 385; Braham v. Bustard, 9 L. T. R. N. S. 199, s. c. 1 H. & M. 447, 11 W. R. 1061, 2 New. 572; Swift v. Dey, 4 Robt. 611; Seixo v. Provezende, L. R. 1 Ch. 192, s. c. 12 Jurist (N. S.), 215, 14 W. R. 357, 14 L. T. R. N. S. 314; Gillott v. Esterbrook, 48 N. Y. 374, affi'g 47 Barb. 455; Blackwell v. Crabb, 36 L. J. Ch. N. S. 504; Rowley v. Houghton, 2 Brews. 303, s. c. 7 Phil. 39; Filley v. Fassett, 44 Mo. 168; McCartney v. Garnhart, 45 Id. 593; Hostetter v. Vowinkle, 1 Dill. 329; Blackwell v. Armistead, 5 Am. L. T. 85; Burke v. Cassin, 45 Cal. 467; Bradley v. Norton, 33 Conn. 157; Amoskeag Mfg. Co. v. Garner, 4 Am. L. T. N. S. 176; Leather Cloth Co. &c. v. American Leather Cloth Co. &c. 11 H. of L. Cas. 523, 35 L. J. Ch. N. S. 53, 13 W. R. 873, 12 L. T. R. N. S. 742, 6 New. 209, 11 Jur. N. S. 81; Bass v. Dawber, 19 L. T. R. N. S. 626; same cases, Codd. Dig. L. of Tradem. §§ 289, 339–401

[2] In many of the cases even the *possibility* of misleading the public is held sufficient. See Amoskeag Mfg. Co. v. Garner, 4 Am. L. T. N. S. 176; Cope v. Evans, L. R. 18 Eq. 138, s. c. 30 L. T. R. N. S. 292, 22 W. R. 453; Meriden Britannia Co. v. Parker (above).

[3] Abbott v. Bakers, &c. Ass'n, 1872, Weekly Notes, 31; Braham v. Bustard (above); Partridge v. Menck (above); Shrimpton v. Laight, 18 Beav. 164; Filley v. Fassett (above); same cases, Codd. Dig. L. of Tradem. §§ 286, 349, 360, 377, 389; but see, also, §§ 288, 296, 327, 352, 361, 395.

[4] Browne on Tradem. § 501. Otherwise of an ignorant violation. Weed v. Peterson, 12 Abb. Pr. N. S. 178. On the other hand, malicious use of same name, if it be not a trade mark, is not actionable. See Glendon Iron Co. v. Uhler, 75 Penn. St. 467.

[5] Singer Manufacturing Co. v. Wilson, 26 Weekly R. 664, 667; McLean v. Fleming, 96 U. S. (6 Otto), 245.

[6] Millington v. Fox, 3 Mylne & Cr. 338; Coats v. Holbrook, 2 Sandf. Ch. 586, s. c. *sub nom.* Coats v. Shepard, 3 N. Y. Leg. Obs. 404; Taylor v. Carpenter, 11 Paige, 292, s. c. 2 Sandf. Ch. 603; Coffeen v. Brunton, 4 McLean, 516; Amoskeag Mfg. Co. v. Spear, 2 Sandf. Ch. 599; and other cases in Codd. Dig. L. of Tradem. §§ 450–84.

4. *Damages.*]—In an action for an injunction, it is not necessary to prove damage, if the evidence satisfies the court that the thing done has a tendency to enable defendants to deceive by selling, as and for the plaintiff's, their own goods.[1] In an action for damages, evidence of actual damage is not necessary in order to entitle plaintiff to recover nominal damages.[2] Evidence that plaintiff's sales fell off is received.[3] In equity, the proof of damages should be directed to ascertaining the profits which the plaintiff would have realized, if he had sold of his own goods the same quantity which the defendant sold with the spurious marks thereon.[4] It is immaterial what the defendant made or lost.[5] Vindictive damages are not allowed,[6] nor the expense of procuring an injunction.[7] The relative quality of the plaintiff's and the defendant's goods is immaterial.[8]

5. *Witnesses.*]—A party claiming a trade mark may be compelled to testify as to the process of his manufacture, so far as relevant;[9] and the alleged infringer may be compelled to testify,[10] and to produce his books, shown to have a tendency to prove the infringement,[11] subject to his privilege against being required to criminate himself[12] in reference to a criminal offense not statute barred.[13] Defendant may be compelled to disclose the names of all persons to whom he has sold the goods.[14]

6. *Defenses.*]—Neither alienage of the person whose trademarks are simulated, nor the fact that he resides in a foreign

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[1] Braham v. Beachim, 26 Weekly R. 654, 656.

[2] Blofield v. Payne, 1 N. & M. 353, s. c. 4 B. & A. 410, 3 L. J. N. S. 68; Reeves v. Denicke, 12 Abb. Pr. N. S. 92; Singer Mfg. Co. v. Kimball, 10 Scottish L. R. 173, s. c. 45 Scottish Jurist, 201; Thompson v. Winchester, 19 Pick. 214; Rodgers v. Nowill, 11 Jurist. 1037, s. c. 5 C. B. 109, 17 L. J. N. S. C. P. 52; same cases, Codd. Dig. L. of Tradem. §§ 235, 432, 435, 928, 929.

[3] Hostetter v. Vowinkle, 1 Dill. C. Ct. 329.

[4] Hostetter v. Vowinkle (above); Burnett v. Phalon, 11 Abb. Pr. 157, s. c. 19 How. Pr. 530; Faber v. Hovey, Codd. Dig. L. of Tradem. § 249. And see Marsh v. Billings, 7 Cush. 322; Leather Cloth Co. &c. v. Hirschfield, 13 L. T. R. N. S. 427, s. c. L. R. 1 Eq. 299; same cases, Codd. Dig. L. of Tradem. §§ 239, 244, 247.

[5] Peltz v. Eichele, 62 Mo. 171; but see Howe v. McKernan, 30 Beav. 547. The above rules seem to govern the proper mode of assessing the damages; although, in some of the cases, the profit realized by the defendant from the sales of the spurious articles under the simulated trademark, has been held to be the measure. Taylor v. Carpenter, 2 Woodb. & M. 1; Edelsten v. Edelsten, 10 L. T. R. N. S. 780; Graham v. Plate, 40 Cal. 593.

[6] Taylor v. Carpenter, 2 Woodb. & M. 1.

[7] Burnett v. Phalon, 12 Abb. Pr. 186, s. c. 21 How. Pr. 100.

[8] Blofield v. Payne (above); Taylor v. Carpenter (above).

[9] Byrne v. Judd, 11 Abb. Pr. N. S. 390; Burnett v. Phalon, 11 Abb. Pr. 157, s. c. 19 How. Pr. 530; Burnett v. Phalon, 12 Abb. Pr. 186, s. c. 21 How. Pr. 100.

[10] Byass v. Sullivan, 21 How. Pr. 50; s. p. Byass v. Smith, 4 Bosw. 679.

[11] Byass v. Sullivan (above).

[12] P. 620 of this vol.; Byass v. Sullivan (above); s. p. Byass v. Smith (above).

[13] Wolf v. Goulard, 15 Abb. Pr. 336.

[14] Howe v. M'Kernan, 30 Beav. 547; Orr v. Diaper, 46 L. J. Ch. N. S. 41; and see Carver v. Pinto Leite, 20 W. R. 134, s. c. 41 L. J. Ch. N. S. 92, L. R. 7 Ch. 90, 20 L. T. R. N. S. 722; same cases, Codd. Dig. L. of Tradem. §§ 270, 271, 272, 274.

country, nor the fact that the goods were manufactured or the mark affixed abroad, constitute a defense.[1] It is wholly immaterial, whether the simulated article is or is not of equal goodness or value with the genuine article.[2] The want of intent to deceive or defraud is not a defense,[3] nor is it any answer that the maker of the spurious goods, or the jobber who sells them to the retailers, informs those who purchase that the article is spurious or an imitation.[4] The weight of authority is that acquiescence by the plaintiff, in an infringement of his mark, is no more than a revocable license, and that, to constitute a defense, the evidence must be strong enough to show either an abandonment or a dedication to the public. Knowledge of the piratical use of the mark must, in all cases, be brought home to the owner, where this defense is taken.[5] Proof of a custom abroad to violate plaintiff's trade mark is not alone admissible for defendant.[6] The fact that plaintiff's hands are not clean, and his trade mark is used to deceive or impose upon the public, or is used upon a spurious, worthless or deleterious compound, is competent, although the defendants' conduct be also fraudulent and their goods spurious, and although they deceive the public.[7]

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[1] Taylor v. Carpenter, 3 Story, 458; Taylor v. Carpenter, 2 Sandf. Ch. 603, aff'g 11 Paige, 292; Taylor v. Carpenter, 2 Woodb. & M. 1; Collins Co. v. Brown, 3 Kay & J. 423, s. c. 3 Jurist N. S. 929; Collins Co. v. Cowen, 3 Kay & J. 428, s. c. 3 Jurist, 929; Collins Co. v. Reeves, 28 L. J. Ch. 56; same cases, Codd. Dig. L. of Tradem. §§ 111–15, 458.

[2] Blofield v. Payne 1 N. & M. 353, s. c. 4 B. & A. 410, 3 L. J. N. S. 68; Taylor v. Carpenter, 11 Paige, 292, s. c. 2 Sandf. Ch. 603.

[3] See the cases cited under *Intent* (above).

[4] Chappell v. Davidson, 2 Kay & J. 123, s. c. 8 De G., M. & G. 1; Edelsten v. Edelsten, 9 Jurist N. S. 479, s. c. 1 De G., J. & S. 185, 11 W. R. 328, 1 New. 300, 7 L. T. R. N. S. 768; Shrimpton v. Laight (above); Clark v. Clark, 25 Barb. 76; Sykes v. Sykes, 3 B. & C. 541, s. c. 5 Dowl. & R. 292; same cases, Codd. Dig. L. of Tradem. §§ 255, 256, 280, 349, 356, 360.

[5] This defense is discussed in the following cases: Motley v. Downman, 3 Myl. & Cr. 1, s. c. 6 L. J. Ch. N. S. 308; Taylor v. Carpenter, 3 Story, 458; Taylor v. Carpenter, 2 Woodb. & M. 1; Flavell v. Harrison, 10 Hare, 467, s. c. 19 Eng. L. & Eq. 15, 17 Jurist, 368; McCardel v. Peck, 28 How. Pr. 120; Gillott v. Esterbrook, 47 Barb. 455, affi'd in 48 N. Y. 374; Filley v. Fassett, 44 Mo. 168; Amoskeag Mfg. Co. v. Garner, 55 Barb. 151, s. c. 6 Abb. Pr. N. S. 265; but see s. c. 4 Am. Law T. N. S. 176; Delaware and Hudson Canal Co. v. Clark, 7 Blatchf. 112; Hovenden v. Lloyd, 18 W. R. 1132; Isaacson v. Thompson, 20 W. R. 196; Rodgers v. Rodgers, 31 L. T. R. N. S. 285, s. c. 22 W. R. 887; Browne v. Freeman, 12 W. R. 305, s. c. 4 New, 476; same cases, Codd. Dig. L. of Tradem. §§ 55–76.

[6] Taylor v. Carpenter, 2 Woodb. & M. 1.

[7] Pidding v. How, 8 Sim. 477; and see Codd. Dig. L. of Tradem. §§ 530–43.

CHAPTER LV.

ACTIONS FOR INFRINGEMENTS OF PATENTS AND COPYRIGHTS.

I. Patents.
1. Burden of proof: General evidence of validity.
2. Novelty of invention.
3. Utility.
4. Patentee the original and first inventor.
5. Specifications: Construction: Extent of claim.
6. Title.
7. Extension: Renewal: Reissue.
8. State of the art.
9. Infringement.
10. Witnesses: Models.
11. Admissions and declarations.
12. Certified copies.
13. Damages.
14. *Defenses.* General issue: Burden of proof.

I. Patents—*continued.*
15. — title: license.
16. — defendant's patent.
17. — the statute.
18. — fraud.
19. — description in printed publication.
20. — prior knowledge or use.
21. — public use or sale before application; abandonment.
22. — requisites of the statutory notice or answer.
23. — plaintiff's failure to mark.

II. Copyrights.
24. Plaintiff's rights.
25. Infringments.

I. Patents.

1. *Burden of proof: General evidence of validity.*]—The burden is on plaintiff to prove that he, or the patentee under whom he claims, was the original inventor, within the statute;[1] but the production of the patent,[2] if in due form, affords *prima facie* evidence of its correctness, which, in the absence of opposing proof, is sufficient.[3] A renewal or reissue adds to the presumption of validity.[4] As will be seen below, this presumption is not conclusive in respect to any question depending on the patentable character of the device, or the right of the patentee as inventor.[5] Accepting and acting under a license from the patentee

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[1] Plaintiff cannot abandon at the trial a part of a combination claimed in the pleading, and rely on the other parts. Vance v. Campbell, 1 Black. 427, 429.

[2] Including the specification and drawings. Cahoon v. Ring, 1 Fish. Pat. Cas. 397, 403, Clifford, J. And whether the patent be original or reissued. Sewell v. Collins, 1 Fish. Pat. Cas. 289, 291. And though not containing any recitals. Gear v. Grosvenor, 6 Id. 314.

[3] Philadelphia, &c. R. R. Co. v. Stimpson, 14 Pet. 458; Mitchell v. Tilghman, 19 Wall. 287. If plaintiff rests on this presumption, in support of a matter on which the patent is not impeached, he cannot in rebuttal give other evidence in support of the same. But evidence on another ground, in respect to which the patent has been impeached, is not to be excluded merely because it bears indirectly on the former ground. Judson v. Cope, 1 Fish. Pat. Cas. 615, 619, 620.

[4] Ransom v. The Mayor, &c. of New York, 1 Fish. Pat. Cas. 252, 259.

[5] Union Sugar Refinery v. Matthiessen, 2 Fish. Pat. Cas. 600, 607. How far it is conclusive in respect to the formalities required by the law, has been the subject of

estops from questioning the validity of the patent as against him.[1] The patentee's disclaimer, in his description, of what is found in another patent, is an admission of the validity of the latter.[2]

2. *Novelty of invention.*]—The patent is itself sufficient *prima facie* evidence of novelty,[3] but is not conclusive.[4] Extension, without modification, enhances the presumption of novelty.[5] Negative evidence by calling witnesses who might have known of the thing, had it pre-existed, is competent;[6] so is the testimony of experts;[7] and in case of serious doubt, proof of the actual performance of the thing itself is competent to go to the jury on the question of novelty.[8] Parol evidence is not admissible to show at what time the patent was applied for.[9]

3. *Utility.*]—The patent is sufficient *prima facie* evidence of utility,[10] but not conclusive.[11] Utility may be shown by direct testimony of witnesses.[12] Producing old results, substantially better, faster or cheaper, is sufficient evidence of utility.[13] For the purpose of proving utility, it is competent to show defendant's use of the invention;[14] a former license[15] or contract[16] between the plaintiff and the defendant, allowing the latter to use it; the fact that defendant had advertised and sold it as useful;[17] or that plaintiff had carried on a large and long continued manufacture;[18] had received large orders,[19] and had given licenses.[20] The fact that

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some difference of opinion, and is not perhaps fully settled, unless it may be in reference to reissues. "It has come to be regarded as the better opinion," says CLIFFORD, J., "that all matters of fact involved in the hearing of an application to reissue a patent, and in granting it, are conclusively settled by the decision of the commissioner granting the application. Seymour v. Osborne, 11 Wall. 516, 545; and see p. 759, n. 5.

[1] Kinsman v. Parkhurst, 18 How. U. S. 289, aff'g 1 Blatchf. 488.

[2] Waterbury Brass Co. v. N. Y. & Brooklyn Brass Co. 3 Fish. Pat. Cas. 43, 48.

[3] Corning v. Burden, 15 How. U. S. 252, 270. So, also, of the novelty of a combination (Waterbury Brass Co. v. N. Y. & Brooklyn Brass Co. 3 Fish. Pat. Cas. 43, 48); and that the device required invention. Potter v. Holland, 1 Fish. Pat. Cas. 382, 387.

[4] Reckendorfer v. Faber, 92 U. S. (2 Otto), 347.

[5] Whitney v. Mowry, 3 Fish. Pat. Cas. 157, 162. In such case evidence of want of novelty must be strong and conclusive. Id. 161. Cook v. Ernest, 5 Fish. Pat. Cas. 396.

[6] Curt. on Pat. 625, § 473.

[7] See, for instance, Rubber-Coated, &c. Co. v. Welling, 97 U. S. (7 Otto), 7, 8.

[8] Judson v. Cope, 1 Fish. Pat. Cas. 615, 624.

[9] Wayne v. Winter, 6 McLean, 344.

[10] Corning v. Burden, 15 How. U. S. 252, 270.

[11] Reckendorfer v. Faber, 92 U. S. (2 Otto), 347.

[12] Curt. on Pat. 629, § 477.

[13] Murray v. Clayton, L. R. 7 Ch. App. 570, s. c. 3 Moak's Eng. 515; Wilbur v. Beecher, 2 Blatchf. 132.

[14] Simpson v. Mad River R. R. Co. 6 McLean, 603.

[15] Lee v. Blandy, 1 Bond, 361, s. c. 2 Fish. Pat. Cas. 89.

[16] Id.

[17] Stanely v. Whipple, 2 McLean, 35, 39.

[18] Whitney v. Mowry, 3 Fish. Pat. Cas. 157, 162.

[19] Curt. on Pat. 629, § 477.

[20] Id.

both parties claim the right to manufacture is sufficient evidence of utility.[1]

4. *Patentee the original and first inventor.*]—The patent is sufficient *prima facie* evidence that the patentee was the original and first inventor,[2] but is not conclusive.[3] This presumption, in the absence of the application for the patent, extends back only to the date of the patent.[4] If the application is produced, the presumption extends back to the time when the application was filed, and no further.[5] To show that the invention was prior to the filing of his original application, he must prove, by competent and sufficient evidence, both that he made the invention at the time suggested, and that he reduced it to practice as an operative machine.[6] The plaintiff may prove his own conversations and declarations made during the progress of his invention, to show its date and character, these being regarded as part of the *res gestæ* of the process, and an assertion of claim, which he may prove in his own favor.[7]

5. *Specifications: Construction: Extent of claim.*]—The patent is *prima facie*,[8] if not conclusive, evidence that the specification, when delivered, was accompanied with such drawings and written references thereto as were required by the statute,[9] and that the specification contained a description, in such full, clear and exact terms as will enable any one skilled in the art to which it appertains, to put it in practice from the description contained in the specification.[10] A certified copy of the drawings deposited, and references thereon, is, with the patent, *prima facie* evidence of the particulars of the invention patented.[11] The models and drawings accompanying the application for a patent, and referred to in the specification, constitute a part of it, and may be resorted to to aid the description, and to distinguish the thing patented.[12]

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[1] Middletown Tool Co. v. Judd, 3 Fish. Pat. Cas. 141, 144.

[2] Seymour v. Osborne, 11 Wall. 516, 538; Smith v. Goodyear Dental Vulcanite Company, 93 U. S. (3 Otto), 486.

[3] Union Sugar Refinery v. Matthiessen, 2 Fish. Pat. Cas. 600, 607.

[4] Wing v. Richardson, 2 Fish. Pat. Cas. 535, 537.

[5] Id.; White v. Allen, 2 Fish. Pat. Cas. 440, 444.

[6] Johnson v. Root, 2 Cliff. 116, s. c. 2 Fish. Pat. Cas. 291, 297; Jones v. Sewall, 6 Fish. Pat. Cas. 343, 358.

[7] Philadelphia & Trenton R. R. Co. v. Stimpson, 14 Pet. 448, 462. Compare Pennock v. Dialogue, 4 Wash. C. Ct. 538; Evans v. Hettich, 3 Wash. 408, affi'd in 7 Wheat. 453.

[8] Winans v. N. Y. & Erie R. R. Co. 1 Fish. Pat. Cas. 213, 214.

[9] See pp. 755, n. 5, and 759, n. 5.

[10] Poppenhusen v. N. Y. Gutta Percha Co. 2 Id. 62, 67.

[11] Winans v. N. Y. & Erie R. R. Co. 1 Id. 213, 214.

[12] 1 Abb. U. S. Pr. 309. Curtis says, that where the invention is at all complicated, or terms of art or science are made use of, requiring the exercise of technical knowledge to determine whether the specification is sufficient, it is at least advisable, if not necessary, for the plaintiff, in opening his case, to give some evidence that his specification can be applied by those to whom the law supposes it to be addressed. Slight evidence of sufficiency is all that is necessary to be offered at first in order to make it incumbent on the defendant to falsify the specification. Curt. on Pat. 630.

Inadequacy of specification cannot be proved unless alleged.[1] The correspondence between the office and the patentee is sometimes referred to for the purposes of construction;[2] but neither such correspondence, nor the proceedings in the patent office, are admissible to enlarge, diminish or vary the language of the claim.[3] The testimony of qualified witnesses,[4] and inspection of the old and new machine, and the models,[5] are competent on the question of sufficiency of the specification. The state of the art is competent evidence in the construction of an ambiguous claim.[6] But evidence introduced for this purpose can have no bearing on a question not in issue.[7] The opinions of scientific witnesses, that a particular means which might be used to carry out the general directions of a specification, would succeed, are competent without showing that that means had actually been tried and had succeeded.[8] The question which should be propounded to them, in cases where there is a recognized class of practical workmen who would be called upon to apply the directions of the specification, is whether a person of that class, of ordinary skill, could practice the invention from those directions.[9]

6. *Title.*]—A certified copy of an assignment is *prima facie* evidence of the genuineness of the original,[10] without accounting for the original, or proving execution.[11] A patent on its face, issued to an assignee, is sufficient evidence of the assignee's title.

7. *Extension: Renewal: Reissue.*]—Extension,[12] renewal,[13] and reissue,[14] are each *prima facie* or conclusive evidence of its own validity. In an action for the infringement of a reissued patent, plaintiff is not bound to produce the original,[15] and if he does not, defendant must put it in evidence if he desires to object that the reissue was not for the same invention.[16] The presumption aris-

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[1] Rubber Co. v. Goodyear, 9 Wall. 788, 793.

[2] Pike v. Potter, 3 Fish. Pat. Cas. 55; Decker v. Grote, 6 Id. 143, 150; Pettibone v. Derringer, 4 Wash. C. Ct. 215. *Contra*, Westlake v. Cartter, 6 Fish. Pat. Cas. 519, 521.

[3] Clifford, J., Goodyear Dental Vulcanite Co. v. Gardner, 5 Fish. Pat. Cas. 224, 227.

[4] Washburn v. Gould, 3 Story C. Ct. 122, 138. As a general rule, the proper witnesses to determine on the sufficiency of a specification are practical workmen of ordinary skill in the particular branch of industry to which the patent relates, because it is to them that the specification is supposed to be addressed. Curt. on Pat. 631.

[5] 1 Abb. U. S. Pr. 309.

[6] Rubber-Coated, &c. Co. v. Welling, 97 U. S. (7 Otto), 7, 8.

[7] Middletown Tool Co. v. Judd, 3 Fish. Pat. Cas. 141, 144.

[8] Curt. on Pat. 642, § 481.

[9] Id. 636, § 481.

[10] Lee v. Blandy, 1 Bond. 361, s. c. 2 Fish. Pat. Cas. 89.

[11] Id.; Brooks v. Jenkins, 3 McLean, 432, 436.

[12] Clum v. Brewer, 2 Curt. C. Ct. 506.

[13] Allen v. Blunt, 2 Woodb. & M. 121, 138; Stimpson v. Westchester R. R. Co. 4 How. U. S. 380.

[14] Seymour v. Osborne, 11 Wall. 516, 541.

[15] Id. 546.

[16] Id.

ing from the decision of the commissioner of patents, granting the reissue of letters patent, that they are for the same invention which was described in the specification of the original patent, is not conclusive, but can only be overcome by clearly showing, from a comparison of the original specification with that of the reissue, that the former does not substantially describe what is described and claimed in the latter;[1] and on this question the testimony of experts is competent.[2] Nor is it conclusive on the question of fraud.[3] It is *prima facie* evidence that there had been no abandonment.[4] The reissue is also *prima facie*[5] evidence that everything necessary to justify the commissioner in granting the reissue had been produced before the grant was made.[6] A recital that the necessary oaths were taken by the applicants is conclusive.[7] A recital that an assignment had been made to the one receiving the reissue, is *prima facie* evidence of the right of the assignee.[8]

8. *State of the art.*]—Evidence of the state of the art is admissible in actions at law, under the general issue, without a special notice, and in equity cases, without any averment in the answer touching the subject. It consists of proof of what was old and in general use at the time of the alleged invention. It is received for three purposes, and none other,—to show what was then old; to distinguish what was new; and to aid the court in the construction of the patent.[9] The court can take judicial notice of a device in common knowledge and use of people throughout the country,—such as the ice-cream freezer,—and give it the same effect as if it had been alleged and proved.[10]

9. *Infringement.*]—The burden of proving infringement is on the plaintiff.[11] The declarations and conduct of a workman made while manufacturing the infringing article, in the course of his employment, are competent against the employer to show in-

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[1] Smith v. Goodyear Dental Vulcanite Co. 93 U. S. (3 Otto), 486. If this appear it is void, for excess of authority. Russell v. Dodge, 93 U. S. (3 Otto), 460.

[2] Seymour v. Osborne, 11 Wall. 516.

[3] Goodyear v. Berry, 3 Fish. Pat. Cas. 439, 447; Swift v. Whisen, 3 Id. 343, 351.

[4] Hoffheins v. Brandt, 3 Fish. Pat. Cas. 218, 239.

[5] If not conclusive. FIELD, J., in Russell v. Dodge (above). See p. 755, n. 5.

[6] Hoffheins v. Brandt, 3 Fish. Pat. Cas. 218, 219. According to Blake v. Stafford, 3 Fish. Pat. Cas. 294, 300, and House v. Young, Id. 335, 338, the reissue of a patent is at law conclusive evidence of its own validity, except as against fraud and collusion; irregularity or excess of authority, apparent on the face of the patent; and clear repugnance.

[7] Seymour v. Osborne, 11 Wall. 516, 541.

[8] Hoffheins v. Brandt, 3 Fish. Pat. Cas. 218, 241; Middletown Tool Co. v. Judd, 3 Fish. Pat. Cas. 141.

[9] Brown v. Piper, 91 U. S. (1 Otto), 37, 41; Vance v. Campbell, 1 Black, 427, 430. But a prior patent, introduced without notice, to show the state of the art, cannot avail as evidence to anticipate the patented invention. Am. Saddle Co. v. Hogg, 5 Fish. Pat. Cas. 353.

[10] Brown v. Piper (above).

[11] Hudson v. Draper, 5 Fish. Pat. Cas. 256, 259.

fringement.[1] Similarity of the articles produced, without other evidence of similarity of process, is not alone sufficient evidence of infringement of process.[2] If the alleged infringement is of a combination only, and use of a part only is shown, evidence that the other part claimed is immaterial, is not competent.[3]

Testimony of experts is not competent directly to the question whether there has been an infringement. On this question their testimony is admissible for two purposes: 1. To point out and explain the points of actual resemblance or difference; 2. To state, as matter of opinion, whether those resemblances or differences are material; whether they are important or unimportant; whether the changes introduced are merely the substitution of one mechanical or chemical equivalent for another, or whether they constitute a real change of structure or composition, affecting the substance of the invention.[4]

10. *Witnesses: Models.*]—The competency of witnesses depends on the laws of the State in which the court is held.[5]

The testimony of experts is competent to show the state of the art at a given time,[6] to explain the meaning of terms of art,[7] to explain the drawings, models and machines exhibited, and their operation, and to point out the identity, resemblance or difference of the mechanical device involved,[8] but not to tell what the patent is for, nor whether it has been violated.[9] The machines themselves, or the models showing them, are the most cogent kind of evidence.[10]

11. *Admissions and declarations.*]—Admissions and declarations by the assignor of a patent made after transfer, are not competent against those claiming under him.[11]

12. *Certified copies.*]—Written or printed copies of any records, books, papers, or drawings belonging to the Patent Office, and of letters patent, authenticated by the seal and certified by the commissioner or acting commissioner, are evidence in all cases wherein the originals could be evidence.[12] Copies of the

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[1] Aiken v. Bemis, 3 Woodb. & M. 348.

[2] Curt. on Pat. 414, § 313. But see Waterbury Brass Co. v. N. Y. & Brooklyn Brass Co. 3 Fish. Pat. Cas. 43, 50.

[3] Coolidge v. McCone, 2 Sawy. 571.

[4] Curt on Pat. 648, § 489.

[5] U. S. R. S. § 858. Except that there can be no exclusion for color, and that the incompetency to testify, against executors, &c., is specially regulated by the statute quoted at p. 70 of this vol.

[6] Paragraph 8.

[7] See pp. 484, 485 of this vol.

[8] Corning v. Burden, 12 How. U. S. 252; Hudson v. Draper, 5 Fish. Pat. Cas. 256, 259; and see paragraphs 2, 5, 7 and 9.

[9] Waterbury Brass Co. v. N. Y. & Brooklyn Brass Co. 3 Fish. Pat. Cas. 43, 54.

[10] Morris v. Barrett, 1 Fish. Pat. Cas. 461, 463.

[11] Wilson v. Simpson, 9 How. U. S. 109; Many v. Jagger, 1 Blatchf. 372; Page 11 of this vol.

[12] R. S. U. S. § 892.

specifications and drawings of *foreign* letters patent, certified as above, are *prima facie* evidence of the fact of the granting thereof, and of the date and contents.[1] The printed copies of specifications and drawings of patents, which the commissioner of patents is authorized to print for gratuitous distribution, and to deposit in the capitals of the States and Territories, and in the clerk's offices of the District Courts, are, when certified by him and authenticated by the seal of his office, competent evidence of all matters therein contained.[2] As to the genuineness of the original, the certified copy is presumptive evidence.[3] As to the accuracy of the copy, it is conclusive,[4] subject to correction by producing another certified copy,[5] with corroborative proof of its superior correctness. The court will take judicial notice as to who was commissioner,[6] or acting commissioner.[7]

13. *Damages.*]—A plaintiff seeking to recover more than nominal damages must show his damages by evidence.[8] The law does not presume that sales made by the infringer would otherwise have been made by the patentee.[9]

14. Defenses: *General issue: Burden of proof.*]—The enumeration of defenses in the statute does not exclude evidence of other defenses not mentioned, such as that defendant has a prior patent;[10] or a license from the patentee;[11] or that he never did the acts charged;[12] or that there is a substantial difference in their devices;[13] or that the patentee is an alien.[14] These may be given in evidence at common law under the general issue.

Plaintiff's patent, title, &c., having been proved, the *burden* is on a defendant setting up insufficient specification;[15] or prior description in a printed publication;[16] or prior use or sale;[17] or abandonment,[18] to establish it affirmatively.

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[1] R. S. U. S. § 893.
[2] Id. § 894.
[3] Parker v. Haworth, 4 McLean, 370.
[4] Id.
[5] Brooks v. Jenkins, 3 McLean, 432, 434; and see Woodworth v. Hall, 1 Woodb. & M. 248, 269; Emerson v. Hogg, 2 Blatchf. 1, 12.
[6] York & Maryland R. R. Co. v. Winans, 17 How. U. S. 30.
[7] Woodworth v. Hall, 1 Woodb. & M. 248, 389.
[8] Philp v. Nock, 17 Wall. 460, 462; Blake v. Robertson, 94 U. S. (4 Otto), 728.
[9] Seymour v. McCormick, 16 How. U. S. 480, rev'g 2 Blatchf. 240. As to the measure of damages, see Burdell v. Denig, 92 U. S. (2 Otto), 716, and cases cited; Birdsall v. Coolidge, 93 Id. 64, and cases cited; Cawood Patent, 94 Id. 695, and cases cited; Am. Law Review, vol. xiii, No. 1, p. 1.
[10] Gray v. James, Pet. C. Ct. 394, 400; Corning v. Burden, 15 How. U. S. 252.
[11] Whittemore v. Cutter, 1 Gall. 429, 435.
[12] Id.
[13] Evans v. Hettich, 7 Wheat. 453, 469.
[14] Id.; Kneass v. Schuylkill Bank, 4 Wash. C. Ct. 9 In case of this defense the burden is on defendant to show the neglect or refusal to sell. Tatham v. Lowber, 2 Blatchf. 49.
[15] Brooks v. Jenkins, 3 McLean, 432, 445, 447.
[16] Cohn v. U. S. Corset Co. 12 Blatchf. 225, 231.
[17] Am. Hide & Leather, &c. Co. v. Am. Tool & Machine Co. 5 Fish. Pat. Cas. 284.
[18] Id.; Johnsen v. Fassman, 1 Wood, 138.

15. — *title; license.*]—One who relies on an equitable title against the legal title, has the burden of alleging and proving it.[1] In the absence of anything to indicate the contrary, a license is presumed to relate only to the existing right.[2] Admissions of the owner to defendant, that a third person granting defendant a license had the right to do so, will estop the owner as to subsequent acts done in reliance on these admissions and before notice of withdrawal.[3] If the only issues are on the validity of plaintiff's patent and on infringement, the fact that the defendant is the licensee of the owner of another patent, and that his machine is constructed in accordance with that patent, is irrelevant.[4]

16. — *defendant's patent.*]—If defendant has a patent for the alleged infringement, he may put it in evidence; and it raises the general presumptions in its own favor, already stated in treating of plaintiff's evidence;[5] but if later than plaintiff's, the patent does not overcome the presumption of novelty, originality and priority, raised by the earlier.[6]

On a question of interference, the subsequent patent granted by the same official experts, is *prima facie* evidence that the latter does not interfere with the former.[7] A comparison of the things or machines,[8] and the testimony of experts,[9] are competent; and the question is one of evidence for the jury.[10] Evidence of the relative superiority of defendant's invention is not competent except for the purpose of showing a substantial difference.[11]

17. — *the statute.*[12]]—"In any action for infringement, the defendant may plead the general issue, and, having given notice in writing[13] to the plaintiff or his attorney, thirty days before,[14] may prove on trial any one or more of the following special matters:

"*First.* That for the purpose of deceiving the public, the description and specification filed by the patentee in the Patent Office was made to contain less than the whole truth relative to his invention or discovery, or more than is necessary to produce the desired effect; or,

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[1] Curt. on Pat. 625, § 472; Gibson v. Cook, 2 Blatchf. 144, 151. If he relies on plaintiff's contract he must prove performance of conditions precedent. Brooks v. Stolley, 2 McLean, 523.

[2] Gibson v. Cook, 2 Blatchf. 144.

[3] Gear v. Grosvenor, 6 Fish. Pat. Cas. 314, 323.

[4] Blanchard v. Putnam, 8 Wall. 420, 426. Otherwise on motion for injunction.

[5] Corning v. Burden, 15 How. U. S. 252, 271.

[6] Goodyear Dental Vulc. Co. v. Gardner, 5 Fish. Pat. Cas. 224, 229.

[7] Westlake v. Cartter, 6 Fish. Pat. Cas. 519, 526, 527.

[8] Evans v. Hettich, 7 Wheat. 453, 469.

[9] Bischoff v. Wethered, 9 Wall. 812, 814, and authorities cited.

[10] Id.

[11] Alden v. Dewey, 1 Story C. Ct. 336. s. c. 3 Law Rep. 383. As to what is a substantial difference, see Seymour v. Osborne, 11 Wall. 516, 556.

[12] U. S. R. S. p. 952, § 4920.

[13] The burden is on defendant to show that the required notice was given. Blanchard v. Putnam, 8 Wall. 420; Phila. & Trenton Railroad Co. v. Stimpson, 14 Pet. 448.

[14] In the eighth circuit, the first day of term is regarded as the day of trial within this rule. Westlake v. Cartter, 6 Fish. Pat. Cas. 519, 521.

"*Second.* That he had surreptitiously or unjustly obtained the patent for that which was in fact invented by another, who was using reasonable diligence in adapting and perfecting the same; or,

"*Third.* That it had been patented or described in some printed publication prior to his supposed invention or discovery thereof; or,

"*Fourth.* That he was not the original or first inventor or discoverer of any material and substantial part of the thing patented; or,

"*Fifth.* That it had been in public use or on sale in this country for more than two years before his application for a patent, or had been abandoned to the public.

"And in notices as to proof of previous invention, knowledge, or use of the thing patented, the defendant shall state the names of patentees and the dates of their patents, and when granted, and the names and residences of the persons alleged to have invented, or to have had the prior knowledge of the thing patented, and where and by whom it had been used; and if any one or more of the special matters alleged shall be found for the defendant, judgment shall be rendered for him, with costs.

"And the like defenses may be pleaded in any suit in equity for relief against an alleged infringement; and proofs of the same may be given upon like notice in the answer of the defendant, and with the like effect."

18. —*fraud.*]—Fraud in obtaining the patent is not admissible in a collateral proceeding, except in a case within U. S. R. S. § 4920,[1] or in equity in a case within § 4918.[2]

19. — *description in printed publication.*]—The publication may be proved orally or by the production of the book.[3] But the work is evidence only of the fact of description contained in it. Its statements are not evidence, for instance, of continuous use.[4] If the publication describes the thing sufficiently to show its structure, the existence of the thing as described need not be proved.[5]

20. —*prior knowledge or use.*]—The claim of original inven-

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[1] Paragraph 17; and see Rubber Co. v. Goodyear, 9 Wall. 788, 797; Gear v. Grosvenor, 6 Fish. Pat. Cas. 314, 316.

[2] Rubber Co. v. Goodyear (above); Gear v. Grosvenor (above).

[3] Allen v. Hunter, 6 McLean, 303, 314. As to the sufficiency of a description in a prior printed publication for this purpose, compare Seymour v. Osborne, 11 Wall. 516, 555; Cohn v. U. S. Corset Co. 93 U. S. (3 Otto), 366, 377.

[4] Seymour v. McCormick, 19 How. U. S. 96. And evidence that it was in use at a later period will not alone sustain a finding that it had been in continuous use since the time of the description. Id. As to what is evidence of publication, for this purpose, see Plimpton v. Malcolmson, 3 Chan. Div. 531, s. c. 18 Moak's Eng. 649; Brooks v. Norcross, 2 Fish. Pat. Cas. 661. As to notice of publication. Silsby v. Foote, 14 How. U. S. 218, affi'g 1 Blatchf. 445.

[5] Cohn v. U. S. Corset Co. 12 Blatchf. 225, 234.

tion is not defeated by showing the construction of the improvement before the patent issued; but it must be shown that the construction preceded the invention of the patentee; that is, was before the conception of the improvement was applied in practice.[1] Evidence that the thing existed is not enough, without evidence to show that it was not of plaintiff's invention.[2] Evidence of prior existence by the invention of some one other than the patentee, is enough without evidence that the thing was ever used.[3] Prior knowledge and use, though by but a single individual, is enough.[4] A prior patent, describing the thing, is competent without explanation of the cancellation.[5] The omission to produce the alleged prior device corroborates a denial of its existence.[6] Evidence that plaintiff had admitted the prior existence of a device of the same general nature is not sufficient, unless the admission excluded any field of invention within which his patent can be sustained.[7] Every reasonable doubt should be resolved against an infringer setting up that the patentee was not the original and first inventor.[8] One witness is enough to sustain a finding of priority.[9] The court ought to be fully convinced by a clear preponderance of evidence.[10]

21. — *public use or sale before application; abandonment.*]— Public use, &c., if relied on must be alleged. Defendant must show that the invention, as finally perfected, was on sale and in public use more than two years before application.[11]

Abandonment if relied on must be alleged. Distinct evidence of it is necessary; the presumption being that an inventor of a machine would not give it to the world. The inventor is not estopped by licensing a few persons to use his invention, to ascertain its utility, or by any such acts of peculiar indulgence and use, as may fairly consist with the clear intention to hold the privilege;[12] but, if clear acts of abandonment are shown, the men-

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[1] Brodie v. Ophir Silver Mining Co. 5 Sawy. 608, s. c. 4 Fish. Pat. Cas. 137.

[2] Treadwell v. Bladen, 4 Wash. C. Ct. 703.

[3] Parker v. Ferguson, 1 Blatchf. 407. But failure to prove general use corroborates a denial. Sayles v. Chic. & N. W. R. R. Co. 5 Fish. Pat. Cas. 584.

[4] Coffin v. Ogden, 18 Wall. 124, and cases cited. So held under Act of 1836.

[5] Delano v. Scott, Gilp. 489.

[6] Chase v. Wesson, 6 Fish. Pat. Cas. 517; Blake v. Eagle Works Mfg. Co. 5 Id. 591.

[7] Turrill v. Mich. So., &c. R. R. Co. 1 Wall. 491, 501. Defendant's circulars, announcing the device as new, may countervail oral testimony to earlier use. Masury v. Tiemann, 5 Fish. Pat. Cas. 524.

[8] Coffin v. Ogden, 18 Wall. 124; Washburn v. Gould, 3 Story C. Ct. 122, 142.

[9] Whitney v. Emmett, Baldw. 303, 310.

[10] Gear v. Grosvenor, 6 Fish. Pat. Cas. 314.

[11] Agawam Co. v. Jordan, 7 Wall. 583, 609.

[12] 1 Abb. U. S. Pr. 324 [537]; Hovey v. Henry, 3 West. Law J. 155; Pitts v. Hall, 2 Blatchf. 229. Evidence that the inventor of a pavement frequently visited and examined an experimental block, laid to test its durability, and inquired how people liked it, and stated that this was his first experiment with it; that the place where it was laid was well calculated to give it a thorough and severe trial; and that it was laid at his own expense, is, when corroborated, sufficient to show that it was

tal intent is not material.[1] Mere delay, which does not amount to gross laches, is not sufficient.[2]

Abandonment of an invention never patented, may be proved by showing that the inventor, after constructing it and before reducing it to practice, broke it up as something requiring more thought and experiment, and laid the parts aside as incomplete, provided it appears that those acts were done without any definite intention of resuming his experiments and of restoring the machine, with a view to apply for letters patent.[3] Oral declarations by the owner of a patent, of intention to abandon or dedicate to the public, are competent, but not alone sufficient evidence of abandonment.[4]

Abandonment, whether before[5] or after[6] the issue of patent, should be pleaded if relied on.

22. — *requisites of the statutory notice or answer.*]—Substantial compliance with the requirement of notice is enforced.[7] A notice that fairly puts an adversary in the way that he may ascertain all that is necessary to his defense or answer, is enough to admit the evidence.[8]

23. — *plaintiff's failure to mark.*]—If failure to mark is relied on, it must appear that the plaintiffs have made or sold articles under the patent, and have failed to mark them as required. This would throw on the plaintiffs, in an action at law for damages, the burden of showing that before suit was brought, the defendants were duly notified that they were infringing the patents,

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intended as an experiment to test its usefulness and durability merely, and not an abandonment to public use. Elizabeth v. Pavement Co. 97 U. S. (7 Otto), 126, 134, 135.

[1] 1 Abb. U. S. Pr. 324 [537]. Testimony on the trial, that he never did intend to abandon it, is entitled to very little consideration, in view of undisputed acts which were very cogent evidence of abandonment. Bevin v. East Hampton Bell Co. 5 Fish. Pat. Cas. 23, 29.

[2] Johnsen v. Fassman, 1 Wood, 138.

[3] Seymour v. Osborne, 11 Wall. 516, 552; Parkhurst v. Kinsman, 1 Blatchf. 488, 494; affirmed on other points, 18 How. U. S. 289.

[4] Pitts v. Hall, 2 Blatchf. 229.

[5] Agawam Co. v. Jordan 7 Wall. 609; Union Paper Bag Co. v. Newell, 11 Blatchf. 549.

[6] Wyeth v. Stone, 1 Story C. Ct. 273, a. c. 4 Law Rep. 54.

[7] Thus evidence that the thing was first invented by another person, admitted under an unsuccessful averment of fraud upon such person, cannot avail as proof that the complainant was not the original and first inventor under a general denial of the allegation that he was, and without notice. Agawam Co. v. Jordan, 7 Wall. 583, 596.

[8] Wise v. Allis, 9 Wall. 737, 740; Smith v. Frazer, 5 Fish. Pat. Cas. 543, 547. As to requisite notice of the *names*, &c., of witnesses, see Treadwell v. Bladen, 4 Wash. C. Ct. 703; Many v. Jagger. 1 Blatchf. 372; Evans v. Kremer, Pet. C. Ct. 215; Blanchard v. Putnam, 8 Wall. 420; Decker v. Grote, 6 Fish. Pat. Cas. 143, 144; Judson v. Cope, 1 Id. 615, 617; Union Paper Bag Co. v. Newell, 11 Blatchf. 549; Collender v. Griffith, 11 Id. 212; Am. Hide & Leather Spl. & Dr. Mach. Co. v. Am. Tool & Mach. Co. 5 Fish. Pat. Cas. 284, 305; Wilton v. Railroads, 1 Wall. Jr. C. Ct. 192. As to *places* of use, see Evans v. Eaton, 3 Wheat. 454; Dixon v. Moyer, 4 Wash. C. Ct. 68. Patents may be given in evidence to show the state of the art, without notice, but printed publications cannot. Westlake v. Cartter, 6 Fish. Pat. Cas. 519.

and that they continued, after such notice, to make or vend the article patented.[1]

II. Copyrights.

24. *Plaintiff's right.*]—The burden is on plaintiff to prove both his copyright[2] and the infringement.[3] A duly authenticated certificate of the deposit of title, is *prima facie* evidence of deposit in due form.[4] Sale of a book is *prima facie* evidence of publication.[5] Assignment of the right to copy a picture may be proved by oral evidence.[6]

25. *Infringement.*]—A general allegation of infringement admits evidence of the parts which are piratical.[7] Substantial identity or striking resemblance will sustain a presumption of unlawful copying.[8] Occurrence of the same inaccuracies in the two works is evidence of copying;[9] and if such passages are numerous, they will sustain the further inference that other passages which are the same with passages in the original book, were likewise copied.[10] Resemblances striking enough to warrant the inference of piracy, may cast the burden on defendant to show that they were not the result of copying.[11] Defendant's evidence that the passages in question are to be found in other works than the plaintiff's, is not enough, without showing that he actually got the matter from the common source,[12] unless the other works were prior to plaintiff's; nor even then if the method and course of selection in defendant's work resembles that of plaintiff's. If a clear infringement is shown, innocent intent is not material.[13]

Where the defense is delay or acquiescence, the burden of showing plaintiff's knowledge of the piratical publication is on defendant.[14] So, where the defense is that the common law right to a dramatic composition has been lost by publication, the burden of showing that the publication was authorized, is on the defendants.[15]

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[1] Goodyear v. Allyn, 3 Fish. Pat. Cas. 374, 376.

[2] Jollie v. Jaques, 1 Blatchf. 627; Drone on Copyr. 498, and cases cited. Under a completed entry. Keene v. Wheatley, 9 Am. Law Reg. 45.

[3] Drone on Copyr. 478.

[4] Roberts v. Meyers, 13 Law Rep. N. S. 396. As to certified copies, see paragraph 12.

[5] Baker v. Taylor, 2 Blatchf. 82.

[6] Parton v. Prang, 3 Cliff. 537, s. c. 5 Am. L. T. R. 105.

[7] Drone on Copyr. 512, 513.

[8] Id. 400, and cases cited.

[9] Curt. on Copyr. 254, 255, citing Longman v. Winchester, 16 Ves. 269; see, also, Drone on Copyr. 428.

[10] Curt. on Copyr. 255.

[11] Drone on Copyr. 430.

[12] Id. 431.

[13] 2 Abb. Nat. Dig. 6; Webb v. Powers, 2 Woodb. & M. 512, 524; Millett v. Snowden, 1 West. L. J. 240; Drone on Copyr. 401–3. Mode of proof of infringement of drama. Boucicault v. Fox, 5 Blatchf. 87.

[14] Drone on Copyr. 505; Chappell v. Sheard, 1 Jur. N. S. 997.

[15] Drone on Copyr. 578, 579; Boucicault v. Wood, 2 Biss. 34.

CHAPTER LVI.

ACTIONS FOR VARIOUS CAUSES CREATED OR DEFINED BY STATUTE.

I. Mechanic's lien.
1. Mode of proof.

II. Individual liability of stockholders and trustees of corporations and joint stock companies.
2. Incorporation: Bankruptcy.
3. Defendant a stockholder.
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III. Penalties.
5. Statute.
6. Municipal ordinance.
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25. Connecting sale with intoxication.
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31. Actual damages.
32. — to the person.
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35. Exemplary damages.
36. *Defenses;*—limitations.
37. — sale for medicine.
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39. — plaintiff's connivance or negligence.
40. — former adjudication: satisfaction.

V. Proceedings in rem for forfeiture.
41. Burden of proof.
42. Knowledge and notice.
43. Admissions and declarations.
44. Cogency of proof.

VI. Actions on recognizances.
45. Mode of proof.

I. Mechanic's lien.

1. *Mode of proof.*]—The essential facts, and the burden of proof, depend upon the statute.[1] The notice of lien is not proved by the county clerk's certified copy;[2] but his certificate proves the filing. Mortgagees and others acquiring interest in property against which the lien is claimed, have a right to call for strict proof of all that is essential to the creation of the lien; and this

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[1] For the mode of proving a right of action for goods or services, see Chapters XVI, XIX.

[2] Unless the statute so provides. Sampson v. Buffalo, N. Y. & Phila. R. R. Co. 4 Supm. Ct. (T. & C.) 600.

includes proof of the commencement of the work, of its character and of its completion.[1]

II. Individual liability of stockholders and trustees of corporations and joint stock companies.

2. *Incorporation: Bankruptcy.*]—The incorporation may be proved in the manner stated in Chapter III. Proof of a certificate of organization in which defendant joined, duly verified and filed, and of user under it by acts in which he joined, is conclusive evidence of incorporation as against the defendant.[2] A general averment of dissolution admits evidence of the grounds of dissolution.[3]

Proof of *bankruptcy*, or the appointment of and transfer of all assets to a receiver, and inadequacy of assets,[4] dispenses with a statutory requirement of prior action against the company.[5]

3. *Defendant a stockholder.*]—A charter duly proved is *prima facie* evidence of the membership of one named therein as a member at the commencement of the corporate existence. The stock subscription paper,[6] shown to have been signed by defendant,[7] or the book containing a list of stockholders, kept under the statute,[8] is competent. In the absence of such a statute, the corporation books are not, alone, competent evidence against a stranger to prove him a stockholder.[9] Active participation as a stockholder in corporate meetings and transactions is presumptive evidence that he was a stockholder at that time.[10] Evidence that defendant was a trustee is presumptive evidence that he was a stockholder.[11] One who has purchased stock, and suffered his name to appear on the books of the association, is estopped from impeaching his own title.[12] Defendant may show an apparently absolute assignment of stock to have been made and taken as collateral only.[13]

The burden is on plaintiff to show that the debt was contracted by the corporation.[14] Judgment against the company is not even *prima facie* evidence of the indebtedness as against the stock-

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[1] Davis v. Alvord, 94 U. S. (4 Otto), 545, 547.
[2] Priest v. Essex Hat Mfg. Co. 115 Mass. 380.
[3] Thomps. Liab. of St. 379, § 312.
[4] Id. 388, §§ 321–3.
[5] Id. 384, § 318. For the mode of proving exhaustion of remedy, see p. 736 of this vol.
[6] Partridge v. Badger, 25 Barb. 146, 171.
[7] Corse v. Sanford, 14 Iowa, 235, 239.
[8] Johnson v. Underhill, 52 N. Y. 203; Shellington v. Howland, 53 N. Y. 371.
[9] Thomps. Liab. of St. 430, § 370.
[10] Id. 197, § 165.
[11] Butterfield v. Radde, 38 Super. Ct. (J. & S.) 44, s. c. 47 How. Pr. 535.
[12] Thomps. Liab. of St. 194, § 162; 202, § 171.
[13] McMahon v. Macy, 51 N. Y. 155.
[14] Dabney v. Stevens, 10 Abb. Pr. N. S. 39; Strong v. Wheaton, 38 Barb. 616.

holder.[1] For this purpose, the transactions between the corporation and their creditor are competent;[2] and the usual presumption supporting the validity of corporate contracts applies.[3]

To recover against the members of a *joint stock company*, after recovery and execution unsatisfied against the president or treasurer under the statute,[4] plaintiff must prove his original cause of action,[5] and also the judgment; and the issue and return of execution unsatisfied.[6] Those proceedings, although against a person named as president or treasurer under the statute, are competent, if it appears from the whole record that it was the association who was the party.[7] The judgment against the association does not preclude the defendants from contesting the original liability.[8]

4. *Defendant a director or trustee.*]—Production of the certificate of incorporation, duly filed and certified, naming defendants as trustees, with evidence that the company acted under the corporate name; that they became indebted to plaintiff; and that no statement was filed as required by the act, makes out a *prima facie* case.[9] It is enough to show that defendant was a trustee *de facto*, under color of title to an otherwise vacant office.[10] Election to office is not enough, even though it be re-election, after having acted as director in the previous year. Assent must be shown by some positive act.[11] To charge with holding over, evidence of an act as director, after expiration of term, is necessary.[12] Resignation may be proved by parol, without proof of

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[1] This is the New York rule. McMahon v. Macy, 51 N. Y. 155, questioned in Thomps. Liab. of St. 394, § 330. *Contra*, Thayer v. New England Lithog. Co. 108 Mass. 523. In those jurisdictions where the judgment is competent, extrinsic evidence is admissible, and may be necessary, to ascertain whether the cause of action was one for which a stockholder is liable.

[2] Partridge v. Badger, 25 Barb. 146. As to the corporate books, see p. 46 of this vol., and Hager v. Cleveland, 36 Md. 476.

[3] Belmont v. Coleman, 21 N. Y. 96, affi'g 1 Bosw. 188. See p. 33 of this vol.

[4] N. Y. L. 1849, c. 258, §§ 1 and 4 as amended by L. 1853, c. 153.

[5] Witherhead v. Allen, 4 Abb. Ct. App. Dec. 628, rev'g 28 Barb. 661. As to the mode of proof, see Chapter II of this vol. A different ground of liability from that alleged is a fatal variance. Allen v. Clark, 65 Barb. 563, 567.

[6] As to execution, see p. 736 of this vol.

[7] National Bk. of Schuylerville v. Lasher, 1 Supm. Ct. (T. & C.) 313.

[8] Allen v. Clark (above).

[9] Squires v. Brown, 22 How. Pr. 35, 42.

[10] As where, after the term expired, there was no new election, and he did some act as trustee thereafter. Deming v. Puleston, 55 N. Y. 655, affi'g 35 Super. Ct. (J. & S.) 309; Reed v. Keese, 60 N. Y. 616, affi'g 37 Super. Ct. (J. & S.) 269. Otherwise, where there was legally no vacancy. Craw v. Easterly, 54 N. Y. 679, affi'g 4 Lans. 513.

[11] Osborne, &c. Co. v. Croome, 14 Hun, 164. *Contra*, Nimmons v. Tappan, 2 Sweeny, 652.

[12] Reed v. Keese, 37 Super. Ct. (5 J. & S.) 269, affi'd in 60 N. Y. 616; Deming v. Puleston, 35 Super. Ct. (J. & S.) 309, affi'd in 55 N. Y. 655. Evidence that defendant was present and took part at a meeting of the board, is not enough, unless it appear that he did so as a director. Deming v. Puleston, 33 Super. Ct. (J. & S.) 231, 238; 35 Id. 309; 55 N. Y. 655.

acceptance, unless the statute or by-laws are to the contrary.[1] On the question whether the defendant was a director, testimony of witnesses though without record, or the record, or the inspector's certificate made at the time of election, are each competent.[2] A judgment against the corporation is not competent.[3]

Neglect to file report in one year does not raise presumption of neglect in subsequent years.[4]

III. Penalties.

5. *Statute.*]—The officially printed volume is presumptively correct; the original act, conclusive.[5]

6. *Municipal ordinance.*]—Corporation ordinances must be pleaded to be admissible,[6] and must be proved.[7] At common law, the originals, or the books in which they are registered, are the primary evidence.[8] By the New York statute,[9] "any act, ordinance, resolution, by-law, rule or proceeding of the common council of a city, or of the board of trustees of an incorporated village, or of a board of supervisors of any county within this State, and any recital of occurrences taking place at the sessions of any thereof, may be read in evidence on any trial, examination or proceeding, whether civil or criminal, either from a copy thereof certified by the clerk of the city, village, common council or board of supervisors, or from a volume printed by authority of the common council of the city, or board of supervisors of the county, or of the board of trustees of any incorporated village." Copies of papers duly filed, and of records in the office of the clerk of a board of supervisors, certified by such clerk, with the

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[1] Chandler v. Hoag, 2 Hun, 613, s. c. 5 Supm. Ct. (T. & C.) 197, affi'd in 12 Alb. L. J. 351. Express resignation and abandonment of incorporation rebuts the presumption of holding over, which perhaps might arise from failure to hold new election. Wade v. Baker, 14 Hun, 615.

[2] Partridge v. Badger, 25 Barb. 146, 172.

[3] Miller v. White, 50 N. Y. 137, rev'g 59 Barb. 434, s. c. 10 Abb. Pr. N. S. 385; 57 Barb. 504; 8 Abb. Pr. N. S. 46. Except, perhaps, where it is made so by connecting defendant personally with its recovery.

[4] Whitney Arms Co. v. Barlow, 41 Super. Ct. (J. & S.) 220, affi'd in 68 N. Y. 34.

[5] Purdy v. Com. of Highways, 54 N. Y. 276; p. 21 of this vol.; State v. Swift, 10 Nev. 176, s. c. 21 Am. R. 721. *Contra*, that it is conclusive only against oral evidence, Berry v. Baltimore & Drum Point R. R. Co. 41 Md. 446, s. c. 20 Am. R. 69. See the conflicting cases on this question in 3 Abb. New Cas. 372, note. The date, if stated, is conclusive (Lapeyre v. United States, 17 Wall. 191), and if not, may be proved by extrinsic evidence. Gardner v. The Collector, 6 Wall. 499, 511.

[6] Harker v. Mayor, &c. of N. Y. 17 Wend. 199. But the existence of the conditions under which the corporation were authorized by statute to pass the ordinance need not be. Stuyvesant v. Mayor, &c. of N. Y. 7 Cow. 588; Rector, &c. of Trinity v. Higgins, 4 Robt. 1, and cases cited.

[7] Except that a court of the same municipality may judicially notice them. 1 Whart. Ev. 269, § 293.

[8] 1 Dill. M. C. 443, § 355. And these, together with proof of the mayor's approval or other complete adoption, are sufficient, even in an action between third persons. Kennedy v. Newman, 1 Sandf. 187.

[9] N. Y. L. 1878, p. 273, c. 219; amended L. 1879, p. 290, c. 211, § 1.

seal of the office, are evidence like the originals.[1] Promulgation of the ordinance need not be proved, unless specially required.[2] Posting of copies, when required, may be proved by parol, without producing the copies.[3] In the absence of anything to indicate the contrary, the court may presume an ordinance to have been regularly passed.[4] If the plaintiff's authority to sue depends upon the making or filing of a resolution or other document of a municipal body, the document itself, or a certified copy, with proof of execution and filing, is the primary evidence.[5] In prosecutions to enforce ordinances, the ordinary rules of evidence apply, except so far as specially modified by statute; and it is not competent for a municipal corporation, without express authority, to make or alter the rules of evidence or of law.[6]

7. *Violation.*]—Plaintiff must show facts bringing the case clearly within the terms of the statute or ordinance,[7] fairly and reasonably construed.[8] The conditions upon which the penalty attaches must be affirmatively shown to have existed.[9] If the penalty is imposed for conduct or neglect in a particular capacity, —for instance, on a toll gatherer exacting tolls wrongfully,—evidence that defendant was acting in that capacity is *prima facie* sufficient.[10] Under an allegation that defendant did the act, evidence that he caused or procured it to be done is competent.[11]

8. *Excepted cases.*]—Where the language of the enacting clause prohibits the act, except under specified circumstances, the burden is on plaintiff to negative those circumstances,[12] unless they are peculiarly within defendant's knowledge.[13] Thus, the burden of showing that he had a license is on defendant.[14] Where the excepted cases are not actually incorporated into the enacting

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[1] N. Y. L. 1855, p. 384, c. 249, § 2.

[2] City Council v. Chur, 2 Bailey (S. C.), 164.

[3] Teft v. Size, 5 Gilm. (Ill.) 432.

[4] Buffalo Railroad v. Buffalo, 5 Hill, 209, 211. *Contra*, see Eldred v. Lehay, 31 Wis. 546.

[5] Thompson v. Smith, 2 Den. 177.

[6] 1 Dill. M. C. 440, § 350.

[7] In illustration of this principal, see Allen v. Stevens, 29 N. J. L. (5 Dutch.) 509; Mayor, &c. of N. Y. v. Walker, 4 E. D. Smith, 258.

[8] Verona Cent'l Cheese Factory v. Murtaugh, 50 N. Y. 314, 317, rev'g 4 Lans. 17.

[9] Commissioners of Pilots v. Vanderbilt, 31 N. Y. 265.

[10] Trowbridge v. Baker, 1 Cow. 251, s. p. People v. Gilbert, Anth. N. P. 261. So evidence that defendant was master of a boat during the season, and on the day in question, is sufficient to go to the jury, in the absence of evidence to the contrary, to charge him with a penalty for racing. People v. Roe, 1 Hill, 470.

[11] Gaffney v. Colvill, 6 Hill, 567, 576, 580.

[12] Copley v. Burton, L. R. 5 C. P. 489, explained in Roberts v. Humphreys, L. R. 8 Q. B. 483, s. c. 7 Moak's Eng. 93.

[13] Compare Blann v. Beal, 5 Ala. 357; Medlock v. Brown, 4 Mo. 379; Conyers v. The State, 50 Geo. 103, s. c. 15 Am. R. 686. As to the effect of evidence that the defendant held himself out generally, without regard to the exception, see The Sunswick, 9 Ben. 112.

[14] Potter v. Deyo, 19 Wend. 361; Mayor, &c. of N. Y. v. Mason, 4 E. D. Smith, 142, s. c. 1 Abb. Pr. 344.

clause giving the action, but in a proviso or subsequent exemption, whether in the same[1] or subsequent sections, the burden is on defendant to bring himself within the exception.

9. *Knowledge of the law.*]—Knowledge of the law is not presumed as a matter of fact;[2] but ignorance of it is irrelevant.[3]

10. *Knowledge of facts.*]—Whether it is necessary to prove that defendant knew the facts relevant to liability, depends on the language of the statute,[4] in connection with its general intent, and the nature of the fact.[5]

If a notice be required by the statute as preliminary to a penalty, it must be strictly proved; but if it is not the foundation of the action, and merely relates to some collateral fact, its contents may be proven by parol.[6]

11. *Knowing or intentional violation.*]—If the statute forbids the doing of the act knowingly, or with intent, or for the purpose, &c., or the like, there must be some evidence tending to show knowledge or intent.[7] Where the penalty is in the nature of an indemnity for a fraud, knowledge of one partner, or an agent or servant, may be proved against the other, or the principal,[8] if he retains the fruit of the transaction.[9] If there is evidence of habitual or repeated acts, knowledge in the particular one is not essential.[10] It is sufficient to prove knowledge that his servants or agents violated the act; and a general authority to do acts in violation is enough, but not conclusive.[11] The person who

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[1] Teel v. Fonda, 4 Johns. 304; People *ex rel.* Cook v. Board of Police, 16 Abb. Pr. 337; and the rule is the same, though the enacting clause contain a reference to the subsequent exception. Hart v. Cleis, 8 Johns. 41.

[2] Black v. Ward, 27 Mich. 191, s. c. 15 Am. R. 162.

[3] Hyde v. Melvin, 11 Johns. 521. Misapprehension of it is equally irrelevant. Sherman v. Spencer, 1 N. Y. Leg. Obs. 172. Hence even the opinion of a public officer, expressed at the time of the act, that it was not a violation, is incompetent. Fire Department v. Bubler, 35 N. Y. 177, s. c. 33 How. Pr. 373, rev'g 1 Daly, 391. So of the command of a superior officer. Hyde v. Melvin, 11 Johns. 521.

[4] Verona Cent'l Cheese Fact. v. Murtaugh, 50 N. Y. 314; Bayard v. Smith, 17 Wend. 88, 90; Gaffney v. Colvill, 6 Hill, 567, 576; Nichols v. Hall, L. R. 8 C. P. 322, s. c. 5 Moak's Eng. 300; Fitzpatrick v. Kelly, L. R. 8 Q. B. 337, s. c. 6 Moak's Eng. 94; Roberts v. Humphreys, L. R. 8 Q. B. 483, s. c. 7 Moak's Eng. 93.

[5] Hassenfratz v. Kelly, 13 Johns. 466, 468; Etheridge v. Cromwell, 8 Wend. 629.

[6] McFadden v. Kingsbury, 11 Wend. 667. Thus, in an action for disobeying a subpœna, the writ, if in plaintiff's possession, is the primary evidence, and cannot be proved by defendant's admissions. Hasbrouck v. Baker, 10 Johns. 248. But his non-attendance may be proved by parol. Cogswell v. Meech, 12 Wend. 147.

If the law requires a notice the terms of which must be judicially fixed by a board of officers, evidence of a notice by their president merely, is not enough, though they referred it to him to give notice. Comm'rs of Pilots v. Vanderbilt, 31 N. Y. 265, affi'g 2 Robt. 367.

[7] Verona Cent'l Cheese Fact. v. Murtaugh (below); and see Davies v. Harvey, L. R. 9 Q. B. 433, s. c. 9 Moak, 367. Compare Chesley v. Brown, 11 Me. (2 Fairf.) 143.

[8] Davies v. Harvey (above).

[9] Stockwell v. U. S. 13 Wall. 531. In other penal actions such imputation of knowledge is not generally allowable. Id. 563.

[10] Verona Cent'l Cheese Fact. v. Murtaugh, 50 N. Y. 314, 316, 318, rev'g 4 Lans. 17.

[11] Id., and cases cited.

did the act may, as a witness, testify to his intent.[1] He may be asked whether he did the act in good faith,[2] or whether he supposed he was violating the statute.[3]

Other similar violations he committed during the same period, especially if in the same business and premises, are competent, and, in the absence of other evidence, are *prima facie* evidence of intent.[4] Acts in a different season and circumstances, not affording reasonable presumption of similar result, are not competent.[5]

12. *Admissions and declarations.*]—The admissions or declarations of the defendant's agent or servant are not competent against defendant.[6] In the case of several defendants, the admissions and declarations of one are competent against himself, but not necessarily against the other.[7] Where several offenses are charged, a general admission of having committed offenses, not showing what offense, and to what penalty the defendant intends the admission to apply, is not enough.[8]

13. *Character.*]—Character is not in issue.[9]

14. *Cogency of proof.*]—A private action for penalty does not require proof beyond reasonable doubt;[10] otherwise of an action by the government for a penalty.[11]

15. *Obstructing highways.*]—To entitle plaintiff to a verdict, it is sufficient to prove a highway *de facto*, by evidence that the obstruction complained of was placed in a road which had been traveled by the public as a highway more than six years before the time of the trial, and more than a year before it was fenced up;[12] and that, while it was being so used, it was obstructed by defendant. This entitles him to a verdict.[13]

Under plea of title, defendant may give in evidence his title deeds, or show himself in possession of the adjacent land, and then rest.[14]

The burden is then thrown on plaintiff to prove that the alleged highway has been duly laid out by the commissioner, or

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[1] Supt. of Cortland v. Supt. of Herkimer, 44 N. Y. 22.
[2] Id.; see, also, pp. 618, 620 of this vol.
[3] Stearns v. Ingraham, 1 Supm. Ct. (T. & C.) 218; see, also, Chapter LIX.
[4] Lilienthal's Tobacco v. U. S. 97 U. S. (7 Otto), 237, 267.
[5] Stearns v. Ingraham (above).
[6] Clay v. Swett, 4 Bibb (Ky.), 255. Unless part of the *res gestæ*, or made within the scope of authority. See p. 44 of this vol.
[7] Compare rules stated on pp. 11 and 711 of this vol., and Aiken v. Peck, 22 Vt. 255; Nichols v. Hotchkiss, 2 Day (Conn.), 121.
[8] Mayor, &c. of N. Y. v. Walker, 4 E. D. Smith, 258.
[9] 1 Whart. Ev. 63, § 47, citing Att'y-Gen. v. Bowman, 2 B. & P. 53, n. a.
[10] Hitchcock v. Munger, 15 N. H. 97. *Contra*, White v. Comstock, 6 Vt. 405.
[11] Chaffee v. U. S. 18 Wall. 516, 545. Compare paragraph 44, and p. 495 of this vol.
[12] Little v. Denn, 34 N. Y. 452. But in applying this rule, the statutes in force at the time should be consulted. See, also, as to dedication, cases collected in 2 Abb. New Cas. 400, note.
[13] Little v. Denn (above).
[14] Id.

that it is a highway by dedication or twenty years' use.[1] If he produces the record of the establishment of the road as a public highway, and proves that it was opened and used, he need not prove all the proceedings preliminary to the laying out of the road.[2] It is for defendant to show them irregular.[3]

16. *Selling liquors.*]—The overseers of the poor suing for a penalty under the liquor laws, may prove their character by general reputation.[4] Plaintiff may make a *prima facie* case of sale, by circumstantial evidence.[5] Evidence of keeping as for sale is competent on the question of sale.[6] So is the fact of keeping a bar with bottles in it,[7] and the fact that it was a place of resort, and that persons went in sober and came out drunk.[8] The presence of *indicia* of the business—decanters, glasses, pitchers, beer-pump, &c.,—is competent evidence,[9] and the names of liquors marked on the vessels may be proved without producing the vessels or labels.[10] The fact that defendant kept tavern and displayed an innkeeper's sign, is not alone relevant on the question of sale,[11] but there being other evidence of sale, the existence of and inscription on his sign is competent to show his business and identity.[12] So is his business card,[13] and cards attached to jugs, &c., on his premises.[14] Evidence of the moving of liquor casks,[15] and of having empty vessels which recently contained intoxicating liquors,[16] is competent.

An ordinary witness may testify directly that a liquor was gin, brandy, or other. It does not require an expert.[17] The name by which a beverage was called for or served, is also competent evidence.[18]

Sale of liquor by a servant is *prima facie* evidence of sale by the

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[1] Little v. Denn, 34 N. Y. 452. In a justice's court, defendant cannot show that he is owner of the fee, not having actual possession of the *locus in quo*.

[2] Sage v. Barnes, 9 Johns. 365.

[3] Chapman v. Gates, 46 Barb. 313, 320.

[4] Blatchley v. Moser, 15 Wend. 215, 218.

[5] People v. Hulbert, 4 Den. 133, 137; State v. O'Conner, 49 Me. 594; State v. Hynes, 66 Me. 114; Commonw. v. Cotter, 97 Mass. 336.

[6] State v. Wentworth, 65 Me. 234.

[7] People v. Hulbert, 4 Den. 133, 137; Vallance v. Everts, 3 Barb. 553; Commonw. v. Jennings, 107 Mass. 488.

[8] Commonw. v. Stone, 97 Mass. 548; Commonw. v. Kennedy, Id. 224.

[9] Commonw. v. Lamere, 11 Gray, 319.

[10] Commonw. v. Blood, 11 Gray, 74.

[11] Commonw. v. Madden, 1 Gray, 486.

[12] State v. Wilson, 5 R. I. 291.

[13] Commonw. v. Twombly, 119 Mass. 104.

[14] Commonw. v. Dearborn, 109 Mass. 368.

[15] Commonw. v. Davenport, 2 Allen, 299.

[16] Commonw. v. Timothy, 8 Gray, 480.

[17] Commonw. v. Timothy (above).

[18] Testimony that in a business house one of a party called for whiskey, and that some liquid in a bottle was set out to them by the proprietor, of which they drank, is sufficient to go to the jury as evidence of a sale of whiskey. State v. Jarrett, 55 Mo. 357.

master.[1] Evidence of the precise day of committing the offense is not essential.[2] Sales, and seizures, made a short time prior to the day pleaded, are competent evidence tending to prove that the keeping on the day named was with intent to sell, &c.[3]

IV. Actions (under civil damage law) for causing intoxication.[4]

17. *Ground of action.*]—The action is given by statute;[5] and a case clearly within the terms of the statute must be shown.[6] But this rule does not require any peculiar cogency of proof, but only that every element implied in the statute must be supported by preponderance of evidence.[7] The "cause of action" is not the tort committed by the intoxicated person: it is the furnishing of intoxicating liquor[8] to a person capable of its abuse and actually abusing it to the damage of the plaintiff in person, property, or means of support. The tort, if any, committed by the intoxicated person is referred to for the purpose of establishing the fact of damages and proving their amount. Injuries of all the three kinds constitute but one cause of action.[9]

18. *Order of proof.*]—The order of proof is, as usual, in the discretion of the judge.[10]

19. *Relation of plaintiff to the drunkard.*]—The modes of

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[1] State v. Wentworth, 65 Me. 234.

[2] Tiffany v. Driggs, 13 Johns. 253. But the place may be essential. Andrews v. Harrington, 19 Barb. 343, 346.

[3] Commonw. v. Stoehr, 109 Mass. 365.

[4] *Connecticut*, Genl. Stats. Rev. 1875, p. 269, § 9; *Illinois*, Rev. Stats. 1874, p. 439, §§ 8, 9; *Indiana*, Laws 1875, ch. 264, § 20; *Iowa*, Code 1873, p. 289, § 1557; *Kansas*, Comp. Laws 1879 (Dassler's ed.), p. 388, § 2159; *Maine*, Rev. Stats. 1861, p. 304, ch. 27, § 32, amended in Laws 1872, ch. 63, § 4; *Massachusetts*, Laws 1879, ch. 297; *Michigan*, Laws 1875, p. 283, ch. 231, § 3, amended in Laws 1877, p. 212, ch. 193; *Montana*, Laws 1873, p. 69; *Nebraska*, Genl. Stats. 1873, p. 853, ch. 58, §§ 576–9; *New Hampshire*, Genl. Laws 1878, p. 270, ch. 109, § 28; *New York*, Laws 1873, p. 1016, ch. 646; *North Carolina*, Laws 1873–4, p. 94, ch. 68; *Ohio*, Laws 1875, p. 35, amending Act May 1, 1854, as amended April 18, 1870; *Pennsylvania*, Laws 1875, p. 41, ch. 47, § 7; *Rhode Island*, Genl. Stats. Supt. A. (1876), p. 268, ch. 508, §§ 32, 34; *South Carolina*, Laws 1873–4, p. 799, ch. 646, § 7; *Vermont*, Laws 1874, p. 52, ch. 27, amending Laws 1869, p. 9, ch. 4; *West Virginia*, Laws 1877, p. 144, ch. 107, § 16; *Wisconsin*, Rev. Stats. p. 470, ch. 66, § 1560.

[5] Compare Hoard v. Peck, 56 Barb. 202.

[6] Brannan v. Adams, 76 Ill. 321.

[7] Hall v. Barnes, 82 Ill. 228; Mead v. Stratton, 8 Hun, 148; and see Bodge v. Hughes, 53 N. H. 614.

In Ohio it has been held that the sale, being there a criminal offense, must be proved beyond a reasonable doubt. Mason v. Shay, 3 Am. L. Rec. 435, aff'g 1 Id. 553. Compare p. 495 of this vol.

[8] Volans v. Owen, 74 N. Y. 526, 529; Mulford v. Clewell, 21 Ohio St. 191; s. p. Emory v. Addis, 71 Ill. 273; Hackett v. Smelsley, 77 Id. 109. *Contra*, Jackson v. Brookins, 5 Hun, 530.

[9] Schneider v. Hosier, 21 Ohio St. 98.

[10] See Woolheather v. Risley, 38 Iowa, 486; Hall v. Barnes, 82 Ill. 228.

proving marriage,[1] or the right to service of children,[2] have already been stated. An employer need not prove a permanent relation, such as apprenticeship. Intoxication of ordinary hired laborers, with damage by the stoppage of their work, is enough.[3]

20. *Sale or gift of liquor.*]—Where the statute applies to sales and gifts, either a sale or a gift may be proved under an allegation that defendant sold and gave.[4] Under a statute which refers only to sales, proof of a gift will not sustain the action.[5] But the allegation of a sale in such case may be proven by evidence of a sale on credit,[6] or in exchange for services,[7] or furnishing as stakes of a game with the seller.[8] So giving away to promote custom,[9] or selling a cigar and throwing in a drink,[10] may be found by the jury to amount to a sale. But proof that the drinker wrongfully took the liquor, and the defendant, on discovering the tort, compelled him to pay for it, does not establish a sale.[11] The fact that the liquor was paid for by another person than the one to whom it was furnished, and who became intoxicated, is not material.[12] Proof that defendant refused to sell to the drinker on one occasion, is not evidence that he did not sell at another.[13]

21. *Liability of salesman.*]—The mere salesman is liable, without proof that he had any interest in the liquor or the business.[14]

22. *Liability of principal.*]—Under an allegation that the

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[1] P. 79 of this vol. Defendant may disprove the marriage by evidence of the existence of a prior husband or wife (Emerson v. Shaw, 56 N. H. 418, s. c. 1 Law & Eq. R. 635), and in such case the plaintiff can only recover for such injury to person or property as a stranger could, and not for loss of means of support. Kearney v. Fitzgerald, 43 Iowa, 580, s. c. 10 West. Jur. 553.

[2] P. 382 of this vol.

[3] Duroy v. Blinn, 11 Ohio St. 331.

[4] See State v. Brown, 36 Vt. 560; State v. Irvine, 3 Heisk. (Tenn.) 155; State v. Finan, 10 Iowa, 19. The terms of the act, it was noticed in Dubois v. Miller, 5 Hun, 335, apply as well to him who sells a barrel as to him who sells a glass. But query? unless known to be bought for consumption of buyer. See paragraphs 25 and 27 below.

[5] Brannan v. Adams, 76 Ill. 331. But where the statute refers to "furnishing," proof of a gift is enough. State v. Freeman, 27 Vt. 520. The defendant's declaration, a day or two after the drinking, that he had not charged and would not take pay, is not competent. State v. Greenleaf, 31 Me. 517.

[6] See Horn v. Smith, 77 Ill. 381; Riley v. State, 43 Miss. 397; Emerson v. Noble, 32 Me. 380.

[7] See Horn v. Smith (above); State v. Bescher, 32 Ind. 480.

[8] Commonw. v. Hogan, 97 Mass. 120.

[9] Kober v. State, 10 Ohio St. 444.

[10] State v. Decker, 10 West. L. J. 328. The administering of spirits by a physician to a patient is not a sale. Shaffner v. State, 8 Ohio St. 642.

[11] Kreiter v. Nichols, 28 Mich. 496.

[12] Volans v. Owen, 9 Hun, 558; Commonw. v. Very, 12 Gray, 124; and see State v. Munson, 25 Ohio St. 381; but compare Boyd v. Watt, 27 Ohio St. 259.

[13] Commonw. v. Barlow, 97 Mass. 597.

[14] Worley v. Spurgeon, 38 Iowa, 465; Barnaby v. Wood, 50 Ind. 405; s. p. in penal action, Roberts v. O'Conor, 33 Me. 496; and in criminal prosecutions, State v. Finan, 10 Iowa, 19; and see 4 Allen (Mass.), 587. As to liquor furnished at a club, see Marmont v. State, 48 Ind. 21, and cas. cit.; State v. Mercer, 32 Iowa, 405.

defendant sold, &c., it is competent to prove a sale by his subordinate;[1] and if there be evidence that the subordinate acted by his authority, defendant is liable;[2] and his liability in actual damages is not removed by evidence that the sale in this case was without his knowledge and contrary to his express instructions.[3] Evidence that the salesman was in the place and garb of a clerk or servant,[4] or was the son, or husband, or wife of the defendant, is competent, but not alone sufficient,[5] to show his agency.

23. *Connecting defendant with salesman.*]—The fact that the salesman was defendant's authorized subordinate, may be proved, like any other agency, or by proving other sales of liquor made by him or her, to other persons, in the presence of defendant,[6] or of defendant's partner or authorized agent in the business.

24. *Connecting defendant with business.*]—On the question whether defendant had any interest in the business, it is competent to prove circumstances shown or presumable to be within his knowledge, indicating the manner in which the business was conducted, and under what name and style.[7] Upon this principle, the inscription of defendant's name on a sign-board on or in the bar room,[8] may be proved by a witness; and the license or the application for it, and the labels bearing defendant's name on the jugs, &c., in the place,[9] are competent.

25. *Connecting sale with intoxication.*]—It must appear that the defendant's furnishing of liquor was to the person thereby intoxicated.[10] Evidence that he entered the saloon sober, and was found there, or came out, intoxicated, would be competent, at least in the absence of direct testimony, but not alone sufficient proof of the furnishing of liquor causing intoxication.[11] An alle-

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[1] See Parker v. State, 4 Ohio St. 563; State v. Stewart, 31 Me. 515; State v. Brown, Id. 520.

[2] Peterson v. Knoble, 35 Wis. 80; s. p. Comm'rs of Excise v. Dougherty, 55 Barb. 332. Permitting, not enough. Ditton v. Morgan, 56 Ind. 60.

[3] Kreiter v. Nichols, 28 Mich. 498; Smith v. Reynolds, 8 Hun, 128; Keedy v. Howe, 72 Ill. 133.

[4] See 50 N. Y. 214; 66 Barb. 338; 36 Super. Ct. (4 J. & S.) 222.

[5] The contrary has been held even in a criminal prosecution. State v. Brown, 31 Me. 520. I consider the rule in Parker v. State, 4 Ohio St. 565, sound. That the fact that the salesman was the defendant's son, is not enough without evidence of authority. But where the sale was by defendant's wife, the fact that they lived together, the place being his, and there being no evidence that she carried on a separate trade, was held sufficient evidence of her agency to sustain a verdict against him. Commonwealth v. Coughlin, 14 Gray (Mass.), 389. Such evidence, conversely, might not prove the husband to be the agent of his wife. Mead v. Stratton, 8 Hun, 148.

[6] Hall v. McKecknie, 22 Barb. 244; s. p. State v. Roberts, 55 N. H. 483, 485, and cas. cit.

[7] Redfield, J., Blanchard v. Manahan, 44 Vt. 251.

[8] State v. Wilson, 5 R. I. 291.

[9] Commonwealth v. Dearborn, 109 Mass. 368, and see p. 591 of this vol. The sign-board or jugs need not be produced. P. 774.

[10] Bush v. Murray, 66 Me. 472.

[11] Kearney v. Fitzgerald, 43 Iowa, 580, s. c. 10 West. Jur. 555; Commonw. v. Ken-

gation of causing intoxication, admits evidence of causing it in part.[1]

If the drinker or any other witness testifies to a sale at defendant's saloon, it is competent to prove by cross-examination or otherwise that the witness previously drank elsewhere, not for the purpose of contradicting him,[2] nor, if his own intoxication did the injury, to reduce the damages; but to impair his credit.

26. *Character of liquor.*]—A witness may testify directly to the intoxicating quality of a beverage,[3] or the court may take judicial notice of it;[4] and where they do not do so, there must be some evidence on the point,[5] and the question is for the jury.

27. *Knowledge and intent of seller.*]—It is not necessary to prove that the seller had in fact any mischievous intent, or anticipated causing intoxication,[6] or even that he knew the liquor to be intoxicating,[7] unless the act makes knowledge material.

If the act requires proof of known intemperate habits, evidence of general reputation is not enough,[8] at least without such circumstances of proximity,[9] or of long continued sales by defendant,[10] as to raise a presumption that he had notice of the habit. Intemperate habit is a question of fact, and a witness may be allowed to state that the drinker was of such habit,[11] subject, of course, to cross-examination as to the grounds of this statement.[12]

Where the liability sought to be enforced is affixed by the act to a sale to a minor, and the act makes knowledge of minority material, evidence of the fact of minority, and of circumstances sufficient to put the seller on inquiry, is *prima facie* sufficient; and it is not a sufficient answer to show merely that the buyer had a beard, and represented that he was of age.[13]

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nedy, 97 Mass. 224. Declarations of intent to go to defendant's saloon, may be competent. Rafferty v. Buckman, 46 Iowa, 195.

[1] Roth v. Eppy, 80 Ill. 283.

[2] Commonwealth v. Fitzgerald, 2 Allen, 297.

[3] Page 774 of this vol.

[4] So held of gin. Commonw. v. Peckham, 2 Gray, 514. So held of whiskey. Carman v. State, 18 Ind. 450. As to beer, see Markle v. Akron, 14 Ohio, 586; Klare v. State, 43 Ind. 483. As to wine, see Worley v. Spurgeon, 38 Iowa, 465. The court will not take judicial notice, whether one would recover from intoxication in five or six hours. Brannan v. Adams, 76 Ill. 331.

[5] See Schlosser v. The State, 55 Ind. 82.

[6] Barnaby v. Wood, 50 Ind. 405.

[7] The contrary was held in a criminal prosecution in State v. Chambers, 4 West. L. Monthly, 275; but see paragraphs 13 (above) and 37 (below).

[8] Stanley v. State, 26 Ala. 26, GOLDTHWAITE, J.

[9] Adams v. State, 25 Ohio St. 586, and see Smith v. State, 19 Conn. 493.

[10] Wickwire v. State, 19 Conn. 477.

[11] Stanley v. State (above).

[12] See Chapter V.

[13] Goetz v. State, 41 Ind. 162. There is difference of opinion whether knowledge of the minority or the habit is material unless made so by the act. In Jamison v. Burton, 43 Iowa, 282, s. c. 10 West. Jur. 505, it was held not material, and this is the better opinion. In Massachusetts it is not material, even in a criminal prosecution.

28. *Fact of Intoxication.*]—Any witness, though he be not an expert, who saw the alleged drinker, may be asked whether or not he was, in the witness' judgment, intoxicated; or drunk; or under the influence of liquor. It does not render the evidence incompetent that the witness is unable to state all the constituent facts which amount to drunkenness.[1]

29. *Liability of owner and lessor.*]—Proof of a lease of the premises made by a person sought to be charged as owner, raises a presumption of ownership.[2] Knowledge of the use of the premises for sale of liquor is not necessarily inferred, even from joint occupation.[3] Without some evidence tending to show knowledge, the owner cannot be held merely as owner.[4] Evidence of common notoriety is not alone competent evidence of his knowledge.[5]

30. *Contributory negligence.*]—It has been held that if the intoxication was produced in part by plaintiff's procurement,[6] or would have been wholly prevented by reasonable care which plaintiff might have exerted without danger,[7] there can be no recovery; but, on the other hand, if plaintiff was in nowise chargeable with responsibility for the intoxication, he is not precluded from recovery by reason of having intrusted the property, in respect to which he sues, to one known to him to be in the habit of getting intoxicated.[8] On neither point is plaintiff usually required, in the first instance, to prove his own freedom from negligence, until there is something in evidence to suggest such negligence.[9]

31. *Damages.*]—It is essential to prove actual damage of a kind mentioned in the statute.[10] All three kinds of injury, viz.:

See paragraph 37 (below). In Indiana it is material, but is presumed, and may be rebutted by satisfactory proof of reasonable belief, entertained in good faith, that the buyer was a minor, &c. Farrell v. State, 45 Ind. 371, and cas. cit. See, on the general principle that ignorance of a constituent fact does not necessarily take away criminality, Halstead v. State, 10 Cent. L. J. 290; and p. 772 of this vol; Reg. v. Prince, L. R. 2 C. Cas. R. 154, s. c. 13 Eng. R. 385.

[1] People v. Eastwood, 14 N. Y. 562, aff'g, 3 Park Cr. 25; s. p. McKee v. Nelson, 4 Cow. 355. "State whether or not your husband was intoxicated," &c, held not improper as leading. Woolheather v. Risley, 38 Iowa, 486. On the question whether one was intoxicated several hours after drinking, evidence as to how long it usually takes for a person to get sober, was held competent in Brannon v. Adams, 76 Ill. 331.

[2] See pp. 591 and 641 of this vol.

[3] Mead v. Stratton, 8 Hun, 148; Cobleigh v. McBride, 45 Iowa, 116.

[4] Barnaby v. Wood, 50 Ind. 405. Letting after the statute took effect, with knowledge of the lessee's purpose, is evidence of permission. See Granger v. Knipper, 2 Cinn. 480, and see State v. Shanahan, 54 N. H. 437; State v. Ballingall, 42 Iowa, 87, s. c. 10 West. Jur. 24.

[5] Cobleigh v. McBride (above); and see paragraph 27. Compare Adams v. The State, 25 Ohio St. 586.

[6] See Jewett v. Wanshura, 43 Iowa, 574, s. c. 10 West. Jur. 559; Engleken v. Hilger, 43 Iowa, 563. s. c. 10 West. Jur. 553.

[7] Reget v. Bell, 77 Ill. 593.

[8] Bertholf v. O'Reilly, 8 Hun, 16.

[9] See, also, p. 597 of this vol.

[10] Schneider v. Hosier, 21 Ohio St. 98; Freese v. Tripp, 70 Ill. 496; Graham v. Fulford, 73 Ill. 596.

to person, to property, and to means of support, pertain to but one cause of action, but the evidence may be restricted to those kinds which the complaint indicates had been sustained.[1]

32. — *to the person.*]—Mental suffering and indignity, are not alone sufficient to sustain the action.[2] But if evidence is given of physical injury and suffering—such as that caused by an assault, or by any act which would, if committed by a stranger, be a trespass, for instance, turning out of the house—then the injury to feelings and the indignity, become part of the actual damages.[3]

33. — *to property.*]—In general, the same rules apply to proof of injuries to property in these actions, as would be applied in actions against the intoxicated person. Thus, in a wife's action, she need not give such evidence of her title to the property injured or taken, as might be necessary as against her husband's creditors. It is enough if she proves that she always claimed and treated it as hers, and that her husband conceded it to be hers.[4] Under this or the following head of damage, plaintiff may also recover the expenses necessarily imposed on him or her, by the sickness of the intoxicated person, such as medical attendance, nursing, &c.[5]

34. — *to means of support.*]—To establish this ground of recovery, dependence for support, in some degree at least, must be shown.[6] To prove loss of support, plaintiff, having shown a legal right to support from a husband or parent, may show that the ability of the latter, for supporting, were impaired by the intoxication, or by consequent sickness or other incapacity;[7] that the intoxication prevented his obtaining employment,[8] or that his death was caused either by his intoxication or by another intoxicated person whose intoxication was caused by defendant.[9] "Means of

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[1] See Mulford v. Clewell, 21 Ohio. St. 191; Hackett v. Smelsley, 77 Ill. 109; Mason v. Shay, 1 Am. L. Rec. 553, affi'd in 3 Id. 435.

[2] Peterson v. Knoble, 35 Wis. 80, DIXON, C. J.; and see Wightman v. Devere, 33 Id. 570; s. p. in libel, 6 Hun, 5. And it seems that a wife's loss of the society of her husband is not enough. Dunlavey v. Watson, 38 Iowa, 398. Compare 56 Barb. 204. As to loss of services, see Hunt v. Town of Winfield, 36 Wis. 154, and cases cited.

[3] DIXON, C. J., Peterson v. Knoble (above). *Contra*, McCann v. Roach, 81 Ill. 213; and see, against damages for mental distress, Brantigam v. White, 73 Ill. 561. Calloway v. Layton, 47 Iowa, 456, s. c. 17 Alb. L. J. 314. It may depend on the language of the act. See Friend v. Dunks, 37 Mich. 25.

[4] Woolheather v. Risley, 38 Iowa, 486. Nor is it necessary for her to show that she pursued an independent remedy against a third person to whom the intoxicated husband transferred the property. Mulford v. Clewell, 21 Ohio St. 191.

[5] Wightman v. Devere, 33 Wis. 570.

[6] Volans v. Owen, 74 N. Y. 526, rev'g 9 Hun, 558.

[7] Mulford v. Clewell (above). According to the Illinois cases the effect must have been to substantially impair necessary and proper support. 73 Ill. 187, 561; 81 Id. 213.

[8] Roth v. Eppy, 80 Ill. 283.

[9] Jackson v. Brookins, 5 Hun, 530; Smith v. Reynolds, 8 Id. 128; Quain v. Russell, Id. 319; Emory v. Addis, 71 Ill. 273; Hackett v. Smelsley, 77 Id. 109. *Contra* Hayes v. Phelan, 4 Hun, 733; 6 Id. 335, note; Collier v. Early, 54 Ind. 559; Davis v. Justice, 31 Ohio St. 359.

support" in the statute includes the wages or produce of labor, and, hence, the husband's capacity for labor,[1] as well as moneys and goods in his hands for that support, and which were necessary and proper for it, with due regard to the circumstances and condition in life[2] of the couple. Upon this point the plaintiff may give evidence of the age, condition and circumstances of the husband or parent, and his habits of sobriety and industry, and capacity to earn or produce.[3] The evidence need not be clear, positive and specific as to the time, place, manner, and each item of loss. The injury may be proved like any other fact, by circumstances.[4] It is not necessary to show that plaintiff was exclusively dependent on such means;[5] nor is the recovery confined to past and present losses; but may include the loss of future means.[6] It is enough to show that the means of support have been diminished below what is reasonable and competent for the plaintiff's station in life, and below what they would otherwise have been.[7] If, however, others, also dependent, were also injured in means of support, the plaintiff's recovery should be limited to a proper share.[8]

35. *Exemplary damages.*]—To recover exemplary damages, (which may be had against the owner as well as the seller[9]) there must be evidence not only of actual damage,[10] but of conduct willful, wanton, reckless, or otherwise deserving of condemnation beyond the mere actual damage.[11] Evidence that the sale was made against the plaintiff's remonstrance,[12] or, after her notice not to sell, or was an attempt to hinder the reform of the drinker, is enough.[13]

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[1] Schneider v. Hosier, 21 Ohio St. 98; Wightman v. Devere, 33 Wis. 570.
[2] Hackett v. Smelsley, 77 Ill. 109.
[3] Dunlavey v. Watson, 38 Iowa, 398.
[4] Horne v. Smith, 77 Ill. 381.
[5] Hackett v. Smelsley (above).
[6] Mulford v. Clewell, 21 Ohio St. 191; Mason v. Shay, 3 West. L. Rec. 453, aff'g 1 Id. 553.
[7] Id.
[8] Franklin v. Schermerhorn, 8 Hun, 112.
[9] Hackett v. Smelsley, 77 Ill. 109.
[10] Ganssly v. Perkins, 30 Mich. 492.
[11] Cooley, J., Kreiter v. Nichols, 28 Mich. 500; s. p. Bates v. Davis, 76 Ill. 222; Franklin v. Schermerhorn, 8 Hun, 112. But a breach of the peace is not essential. Goodenough v. McGrew, 44 Iowa, 670. According to Ganssly v. Perkins (above), the willfulness must be one which contemplated injuring the plaintiff specially. According to Mason v. Shay, 1 Am. L. Rec. 553; affi'd in 3 Id. 435, exemplary damages are allowable wherever the sale was criminal. s. p. Schneider v. Hosier, 21 Ohio St. 98. Whether acts which are punishable criminally, are ground of exemplary damages, see, in the *affirmative*, Brannon v. Silvernail, 81 Ill. 434; in the *negative*, Koerner v. Oberly, 56 Ind. 284.
[12] Ganssly v. Perkins (above).
[13] Hackett v. Smelsley, 77 Ill. 109; Meidel v. Anthis, 71 Id. 241. So, perhaps, of clandestine sales. Heard v. Peck, 56 Barb. 202. And of sales under sham pretext of a medical prescription. People v. Safford, 5 Den. 112. Previous habits of intoxication are not matter of aggravation, unless shown to have been known to defendant. Goodenough v. McGrew (above).

36. Defenses;—*Limitations.*]—The limitation applicable to a tort or injury to the person, applies, as of the time of the sale, not the time of damage sustained.[1]

37 — *sale as medicine.*]—According to some authorities, general provisions of statute in restraint of sales of liquor, with no reference to sales for medical use, are to be construed with an implied exception of sales, made in good faith, of medicines, bitters and tinctures,[2] as well as of liquors sold on a physician's prescription.[3] Assuming this to be the rule applicable under this act, the question whether the sale was such, or was only a disguise for a sale of a beverage, is one of fact for the jury; and it is competent to prove the circumstances, such as the composition and character of the alleged medicine or bitters, the proportion of alcohol in it, and whether it does readily or with difficulty produce intoxication, whether it is agreeable or nauseous to the taste, whether it is useful or not as a medicine, and whether it is frequently resorted to and used as a beverage.[4] But mere ignorance of the intoxicating character of a beverage, is not competent,[5] except on the question of exemplary damages.

38. — *other sellers contributing to injury.*]—Evidence that sales by persons not parties to the action, contributed to cause the intoxication, is not competent, even in mitigation, for the statute imposes liability in respect of sales causing intoxication in whole or in part.[6] But evidence that previous intoxication, caused by others' sales, impaired the means of support, is competent in mitigation.[7]

39. —*plaintiff's connivance or negligence.*]—Evidence that plaintiff requested the sale,[8] or purchased liquor, as such, for her husband,[9] is competent in bar; but in the former case she may prove in rebuttal that defendant knew she made the request by her husband's constraint. Evidence that he drank with her consent is not competent in bar, but is in mitigation,[10] and so evi-

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[1] Emmert v. Gill, 39 Iowa, 692; but see paragraph 19.

[2] Russell v. Sloan, 33 Vt. 656. *Contra*, Commonw. v. Hallett, 103 Mass. 452. Compare Kearney v. Fitzgerald, 43 Iowa, 580, s. c. 10 West. Jur. 555; State v. Wall, 34 Me. 165.

[3] Ball v. State, 50 Ind. 595; State v. Larremore, 19 Mo. 391; and see Williams v. State, 48 Ind. 306, 309; People v. Safford, 5 Den. 112; Shaffner v. State, 8 Ohio St. 642.

[4] Russell v. Sloan (above).

[5] Commonw. v. Boynton, 2 Allen, 160. See, also, paragraphs 13, 27 (above). Hoar, J., says that a man is held to know the law, and the hardship is no greater to ascertain the fact. s. p. 103 Mass. 452. As to ignorance as to the person by whom the liquor was sent for, see Bates v. Davis, 76 Ill. 222; Miller v. State, 5 Ohio St. 275.

[6] Fountain v. Draper, 49 Ind. 441, 445; Hackett v. Smelsley, 77 Ill. 109; Emory v. Addis, 71 Id. 273; s. p. Woolheather v. Risley, 88 Iowa, 486.

[7] Woolheather v. Risley (above). See, also, Gansely v. Perkins, 30 Mich. 492; s. p. Cleveland, &c. R. R. Co. v. Sutherland, 19 Ohio St. 151.

[8] Jewett v. Wanshura, 43 Iowa, 574, s. c. 10 West. Jur. 559.

[9] Kearney v. Fitzgerald, 43 Iowa, 580, s. c. 10 West. Jur. 555; Engelken v. Hilger, 43 Iowa, 563, s. c. 10 West. Jur. 553.

[10] Roth v. Eppy, 80 Ill. 283.

dence that she accompanied him and consorted with him in the defendant's saloon, when he drank there, is competent in mitigation; but she may prove in rebuttal that she did not do so freely, but was compelled by him.[1] So evidence that they habitually drank together is competent in mitigation.[2] On the other hand, it has been held that where she might, without danger, have prevented his drinking on the only occasion proven, and did not do so, she could not recover.[3]

40. —*former adjudication; satisfaction.*]—The fact that defendant has suffered a criminal conviction for the same sale, is not material;[4] nor is it a bar that plaintiff has settled a claim against another seller,[5] if the intoxications were separate and distinct.[6]

V. Proceedings in rem for forfeiture.

41. *Burden of proof.*]—Under the statutes, proof of probable cause for seizure and prosecution may throw on the claimant the burden of proving innocence.[7] Defendant's refusal to produce his books and papers, raises a presumption that if produced, they would give a complexion to the case, at least unfavorable, if not directly adverse, to the interest of the party.[8]

42. *Knowledge and notice.*]—Defendant is bound by knowledge or notice which had at any time been communicated to him personally.[9] Also by that of which his agent was cognizant at the time of the transaction of the agent, not only if the knowledge was derived in the particular transaction, but equally if it was previously acquired, within a limit reasonable to presume recollection, and was such that the agent was at liberty to communicate it to his principal.[10]

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[1] Hackett v. Smelsley, 77 Ill. 109.
[2] Id. Compare Engelken v. Hilger, 43 Iowa, 563, s. c. 10 West. Jur. 553.
[3] Regel v. Bell, 77 Ill. 593.
[4] Bedore v. Newton, 54 N. H. 117; Cook v. Ellis, 6 Hill, 466.
[5] Jewett v. Wanshura, 43 Iowa, 574, s. c. 10 West. Jur. 559.
[6] Miller v. Patterson, 31 Ohio St. 419.
[7] Wood v. United States, 16 Pet. 342; Taylor v. United States, 3 How. U. S. 197; The Short Staple, 1 Gall. 103. And see Lilienthal's Tobacco v. U. S. 97 U. S. (7 Otto), 237. As to evidence of *fraudulent intent*, see Buckley v. U. S. 4 How. U. S. 251; Taylor v. U. S. 3 Id. 197; Alfonso v. U. S. 2 Story C. Ct. 421; Wood v. U. S. 16 Pet. 342; Bottomley v. U. S. 1 Story C. Ct. 135. As to competent evidence of *value* or *cost*, see Wood v. U. S. 16 Pet. 342; Buckley v. U. S. 4 How. U. S. 251; Alfonso v. U. S. 2 Story C. Ct. 421; Taylor v. U. S. 3 How. U. S. 197; and pages 306–11 of this vol.
[8] Clifton v. U. S. 4 How. U. S. 242, 247; The Luminary, 8 Wheat. 407. Compare Chaffee v. U. S. 18 Wall. 545.
[9] The Distilled Spirits, 11 Wall. 356, 366.
[10] Id. This is the English rule (17 C. B. N. S. 466), adopted in the U. S. Sup. Ct.; and see 33 Vt. 252.

43. *Admissions and declarations.*]—Where, as in the case of proceedings to enforce forfeiture of a ship,[1] or against a distillery,[2] the forfeiture and the proceedings are *in rem*, and the knowledge of the owner is not material, the admissions and declarations of the master or lessee, made during his holding that character, are competent.[3] So are memoranda and books containing relevant entries, found upon the premises.[4]

44. *Cogency of proof.*]—A proceeding *in rem* for forfeiture, is a civil and not a criminal proceeding within the rule as to proof beyond reasonable doubt.[5] But the jurors ought to be clearly satisfied.[6]

VI. Actions on recognizances.

45. *Mode of proof.*]—The authority of the magistrate who took the recognizance may be shown by parol evidence of his acts in that capacity, without producing his commission.[7] If the record to be proved is that of the court trying the case, the regular course is to produce and inspect the record.[8] Evidence is not admissible to contradict the record.[9]

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[1] U. S. v. Little Charles, 1 Brock. Marsh. 347.
[2] Dobbin's Distillery v. U. S. 96 U. S. (6 Otto), 395, 399.
[3] Id. 403.
[4] Id.
[5] Lilienthal's Tobacco v. U. S. 97 U. S. (7 Otto), 237, 267, 271; The Robert Edwards, 6 Wheat. 187.
[6] Lilienthal's Tobacco v. U. S. (above).
[7] Webster v. Davis, 5 Allen, 393, 396.
[8] Longley v. Vose, 27 Me. 179, 184.
[9] Id.; People v. Hurlbutt, 44 Barb. 126.

CHAPTER LVII.

PROCEEDINGS IN ADMIRALTY.

1. Mode of proof.

1. *Mode of proof.*]—The strict rules of the common law in respect to the admission of evidence, are not fully applied.[1] The mode of proof is subject to rules prescribed by the Supreme Court.[2] The competency of witnesses depends on the laws of the State in which the court is held.[3] The proofs must substantially conform to and sustain the pleadings; and although the strict rules of the common law in respect to variance are not followed, yet, in general, the court will not permit a party to be surprised by the exhibition of proof materially variant from the case stated in the pleadings. But, unless the variance is calculated to mislead, the court may proceed to a decree.[4]

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[1] Elwell v. Martin, Ware, 53; The J. F. Spencer, 3 Ben. 337. In admiralty, the admissions of the master, though made subsequently to the disaster, are competent against the owner, on the ground that when the transaction occurred, the master represented the owner, and was his agent in navigating the vessel. This sort of evidence is confined to the confessions of the master, and cannot be extended to any other person in the employment of the boat, for in no proper sense has the owner intrusted his authority to any one but the master. The Potomac, 8 Wall. 590.

[2] U. S. R. S. § 862; Blease v. Garlington, 92 U. S. (2 Otto), 1. Regulations as to proof in particular classes of actions, will be found in U. S. Rev. Stat.

[3] U. S. R. S. § 858. Except that there can be no exclusion for color, and that the incompetency to testify against executors, &c., is specially regulated by the statute quoted at p. 70 of this vol.

[4] 2 Abb. U. S. Pr. 80; Rules for Court of Admiralty, No. 24, 51.

PART III.

EVIDENCE AFFECTING PARTICULAR DEFENSES.

CHAPTER LVIII.

DEFENSES IN ABATEMENT.

1. Parties. 2. Another action pending.

1. *Parties.*]—The mode of proving the facts necessary to establish the incapacity of a party, or the interest of a person not made a party, has already been discussed in the chapters on actions by and against particular classes of persons. The sworn schedules in bankruptcy or insolvency made by plaintiff, and containing no mention of the claim he sues on, are competent,[1] but not conclusive,[2] against him. The like schedules of the third person, alleged to be the real party in interest, are not competent,[3] without evidence to connect plaintiff with them. Correspondence between the plaintiff and the third person is competent, if part of the *res gestæ*.[4]

2. *Another action pending.*[5]]—The pendency of another action, to be admissible, must be pleaded,[6] unless it appears on the face of the complaint.[7] Under an allegation of another action pending, a judgment recovered since commencement of the present action is evidence unless offered as a bar.[8] The record, or at least the docket entry, is the primary evidence.[9] Oral evidence of the pendency of the action is secondary.[10] Oral evidence as to the questions involved is admissible, within the limits stated in respect to former adjudications.[11] Proof of the pendency of the former action within reasonable limits of time, raises a presumption of its continued pendency, which throws on plaintiff the burden of showing the contrary.[12]

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[1] Springer v. Drosch, 32 Ind. 486, s. c. 2 Am. R. 356.

[2] See Cram v. Union Bank, 1 Abb. Ct. App. Dec. 461, affi'g 44 Barb. 426. A sworn statement in a pleading is not a conclusive admission.

[3] Turner v. See, 57 N. Y. 667.

[4] May v. Brownell, 3 Vt. 463.

[5] For the facts to be established, see Watson v. Jones, 13 Wall. 679.

[6] White v. Talmage, 35 Super. Ct. (J. & S.) 223; Estes v. Farnham, 11 Minn. 423.

[7] Moak's Van Santv. Pl. 744. But see N. Y. Code Civ. Pro. § 499.

[8] Krekeler v. Ritter, 62 N. Y. 372. There should be a supplemental answer, to make such judgment conclusive.

[9] Philadelphia, &c. R. R. Co. v. Howard, 13 How. U. S. 307.

[10] Wright v. Maseras, 56 Barb. 521.

[11] See Chapter LXI; s. p. Nichols v. Smith, 42 Barb. 381.

[12] Fowler v. Byrd, Hempst. 213.

CHAPTER LIX.

DEFENSES DENYING OR IMPEACHING THE CONTRACT SUED ON.

I. Denial of assent.
1. Fraud or deceit.
2. Mistake.
3. Duress.
4. Want of consideration.
5. Statute of frauds.
6. Forgery.
7. Alterations.

II. Illegality of contract.
8. General rules.
9. Compounding felony.
10. Sunday laws.
11. Usury: pleading; burden of proof.

II. Illegality of contract—*continued.*
12. — estoppel by certificate.
13. — oral evidence.
14. — variance.
15. — intent.
16. — covers for usury.
17. — act of agent or co-trustee.
18. — inception.
19. — declarations and admissions.

III. Incapacity of contracting party.
20. Infancy.
21. — new promise: admissions and declarations.
22. Insanity.

I. Denial of assent.

1. *Fraud or deceit.*]—Fraud by defendant,[1] or his agent,[2] in procuring the execution of even a sealed instrument sued on, may always be proved, if alleged.[3] The burden is on the party who relies on it to allege and prove it.[4] A mere allegation of false representation does not admit evidence of intent to deceive.[5] An allegation of fraud does not admit of evidence of rescission,[6] nor of an omission not shown to be fraudulent.[7]

Inadequacy of consideration may be so gross as to be competent under an issue of fraud.[8] Evidence having a tendency to establish fraud is not incompetent, by reason of the tendency being slight.[9] So of evidence slightly tending to show good faith.[10] Evidence of the general habits of the party alleged to be de-

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[1] Otherwise of that of a principal debtor in inducing sureties to sign, unless there is evidence that the creditor was privy to it. Coleman v. Bean, 1 Abb. Ct. App. Dec. 394.

[2] The representations of the agent being shown to have been made as part of the *res gestæ*. Sandford v. Handy, 23 Wend. 260.

[3] At common law as well as in equity. Hartshorn v. Day, 19 How. U. S. 211, 222.

[4] Beatty v. Fishel, 100 Mass. 448; Vint v. King, 2 Am. Law Reg. 712. For a summary of the material facts, under the new procedure, see Frenzel v. Miller, 37 Ind. 1, s. c. 10 Am. R. 62, and 17 Alb. L. J. 507.

[5] Lefler v. Field, 52 N. Y. 621; Dubois v. Hermance, 56 N. Y. 673, affi'g 1 Supreme Ct. (T. & C.) 293.

[6] Fox v. Griffin, 2 Allen, 1, 7.

[7] Dudley v. Scranton, 57 N. Y. 424.

[8] Eyre v. Potter, 15 How. U. S. 42; Vint v. King (above).

[9] Hubbard v. Briggs, 31 N. Y. 518.

[10] See Gray v. Lessington, 2 Bosw. 257.

frauded, showing him peculiarly susceptible to be imposed on, is competent.[1] The neglect to produce evidence in the power of the party charged with fraud is especially significant on this issue.[2]

Preponderance of evidence is enough.[3]

The fact of having restored, or offered to restore, must be alleged, to be admissible.[4]

2. *Mistake.*]—The presumption is that a grantor, who was of competent capacity to do business, knew the contents of a deed signed and delivered by him.[5] His mistake must be clearly and strongly proved before the court can relieve against it.[6] Evidence of mental reservations, or of subsequent oral declarations, is not enough, even where the deed remained in his possession.[7]

3. *Duress.*]—Actual violence need not be proved.[8] The act must be shown to have been induced by the coercion; this is not necessarily presumed.[9]

4. *Want of consideration.*]—Original want of consideration may be proved, when consideration is in issue.[10] Inadequacy of consideration is not a defense;[11] unless so gross as to sustain an inference of fraud.[12] Subsequent failure of consideration, to be admissible,—even where it consists in the fact that the contract was made in consideration of an executory agreement, which was afterward broken,[13]—must be pleaded.

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[1] Kauffman v. Swar, 5 Penn. St. (5 Barr.) 230.

[2] Cheney v. Gleason, 117 Mass. 557.

[3] Jones v. Greaves, 26 Ohio St. 2, s. c. 20 Am. R. 752. Compare p. 495 of this vol.

[4] Devendorf v. Beardsley, 23 Barb. 656. An offer to allow judgment may be enough. Harris v. Equit. L. Ass. Soc. 64 N. Y. 196.

[5] Souverbye v. Arden, 1 Johns. Ch. 240. As to who has the burden of proof if the signer is shown to have been illiterate, compare Add. on Contr. 7 ed. 226; King v. Langnor, 1 Nev. & M. 576; School Com. v. Kesler, 67 N. C. 443; Selden v. Myers, 20 How. U. S. 506; Stacy v. Ross, 27 Tex. 3; Sims v. Bice, 67 Ill. 88; Doraheimer v. Rorbach, 8 C. E. Green (N. J.), 46.

[6] Id. [7] Id.

[8] See United States v. Huckabee, 16 Wall. 414, and p. 270 of this vol. For conflicting definitions of duress, see 7 Wall. 214; 14 Id. 332; 49 Ind. 573, s. c. 19 Am. R. 695; 70 N. Y. 497, and cases cited.

[9] Feller v. Green, 26 Mich. 70. But compare Tilley v. Damon, 11 Cush. 247.

[10] Payment of consideration expressed, though acknowledged under seal, may be disproved, if material. Baker v. Cornell, 1 Daly, 469 (and see pp. 697, 738, 741, of this vol.). But disproving it does not make the contract void as against the contractor for want of consideration. Id.

[11] Earle v. Peck, 64 N. Y. 596, and cases cited.

[12] Greer v. Tweed, 13 Abb. Pr. N. S. 427. Or except where, as in contracts in restraint of trade, or between parties in a fiduciary relation (and, to some extent, in specific performance), the court refuse to enforce without adequate consideration.

[13] Batterman v. Pierce, 3 Hill, 171; Wilson v. Wilson, 37 Md. 1, s. c. 11 Am. R. 518. But compare Walker v. Millard, 29 N. Y. 375. To illustrate the distinction in another way,—if a note is given in consideration of the assignment of a patent, the invalidity of the patent is an original want of consideration; but if the patent be valid, its worthlessness is only a failure of consideration; and even this is not conceded to be a defense, for the court may decline to inquire into the adequacy of the consideration where there was no fraud or mistake. Miller v. Finley, 26 Mich. 249, s. c. 12 Am. R. 306; Eldridge v. Mather, 2 N. Y. 157; Nash v. Lull, 102 Mass. 60, s. c. 3 Am. R. 435, and cases cited. Compare Clough v. Patrick, 37 Vt. 421.

5. *Statute of frauds.*]—The rule of pleading,[1] and the principal rules as to the mode of proof,[2] have been already stated.

The burden is on defendant to show affirmatively that the value was in excess of the statute limit,[3] or that the stipulation precluded performance within one year, &c.[4] The statute of another State, if relied on, should be proved as a fact.[5]

6. *Forgery.*]—The mode of proving handwriting has been stated.[6] It is not competent to show that the person suspected of the forgery has forged the defendant's name in other instances,[7] nor that he has been already convicted of forging the paper in suit.[8] Proof beyond reasonable doubt is not required.[9]

In rebuttal of the defense of forgery of defendant's name to an ordinary obligation to pay money, plaintiff may show that, at about its date, defendant was trying to borrow.[10]

7. *Alterations.*]—The rule has already been stated.[11]

II. Illegality of contract.

8. *General rules.*]—Illegality must be pleaded, to be admissible;[12] and if the special ground is stated, other grounds not stated are inadmissible.[13] It cannot be presumed except upon clear evidence.[14] To bring a case within a statutory prohibition, defendant should produce satisfactory evidence that the facts are such as to make the statute applicable, and not leave to mere inference what should be established by proof.[15]

The usual test whether a demand connected with an illegal

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[1] Pp. 374, 471, 522, 725 of this vol.

[2] Requisite memorandum, pp. 292, 363; Auction sales, p. 327; Extension or modification, pp. 314, 370; Requisite delivery, p. 318; Part payment, p. 319; Part performance, p. 731; Guaranty, p. 471

[3] Crookshank v. Burrell, 18 Johns. 58.

[4] Walker v. Johnson, 96 U. S. (6 Otto), 424.

[5] Wilcox Silver Plate Co. v. Green, 9 Hun, 347, affd 72 N. Y. 17; Ellis v. Maxson, 19 Mich. 186, s. c. 2 Am. R. 81.

[6] Pp. 391–6 of this vol.

[7] Rosc. N. P. 93, citing Balcetti v. Serani, Peake Cas. 142; Griffiths v. Payne, A. & E. 131. But compare Corser v. Paul, 41 N. H. 24; Stratton v. Farwell, 10 Allen, 31, n.

[8] Castrique v. Imrie, L. R. 4 H. L. 414, 434, *per* Blackburn, J.

[9] Page 495 of this vol.; N. Y. Indemnity Co. v. Gleason, 7 Abb. New Cas. 334; Blaeser v. Milwaukee, &c. Ins. Co. 37 Wis. 31, s. c. 19 Am. R. 747.

[10] Stevenson v. Stewart, 11 Penn. St. 307. Compare p. 248 of this vol.

[11] Pages 397, 406, 695 and 696 of this vol.

[12] Goss v. Austin, 11 Allen, 525; Rosc. N. P. 346. Otherwise if it appear by plaintiff's case. Russell v. Barton, 66 Barb. 539.

[13] Dingeldein v. Third Avenue R. R. Co. 9 Bosw. 79, rev'd, on another ground, in 37 N. Y. 575. This rule does not bind the court to enforce an unlawful contract.

[14] Nelson v. Eaton, 26 N. Y. 410, s. c. 16 Abb. Pr. 113, rev'g 7 Abb. Pr. 305, and affi'g 15 How. Pr. 305. If the contract could be legally performed, an intention to do that which is a violation of the law must be shown. Waugh v. Morris, L. R. 8 Q. B. 202, s. c. 5 Moak's Eng. 197.

[15] Miller v. Roessler, 4 E. D. Smith, 234.

transaction is capable of being enforced by law is, whether the plaintiff requires the aid of the illegal transaction to establish his case.[1]

Mere knowledge of the other party's illegal intent is not usually enough,[2] but knowledge and giving aid is.[3] Common report is not usually competent to charge plaintiff with knowledge.[4]

Oral evidence is admissible to show an illegal intent, though it contradict the terms of a written instrument;[5] but not necessarily to show innocent intent contrary to a writing expressing illegal intent.[6] The acts and declarations of each party, both before and after, as well as at the time of making the contract, are competent against himself on the question of intent,[7] and they may be examined as witnesses,[8] within limits already stated.[9]

The presumption that the law is known extends even to foreigners, making abroad a contract to be performed within this State;[10] but not to persons, not citizens of this State, and making, without the State, a contract to be performed without it.[11] Foreign law is matter of fact to be alleged and proved.[12]

9. *Compounding felony.*]—It should appear, 1. That there was an agreement to compound a felony; 2. That the contract was the result of that agreement; and, 3. That the plaintiff knew of the illegal consideration at the time of making the contract.[13] The opinion of the public prosecutor, that all the evidence which the government could produce would not be sufficient to sustain the charge, is not relevant.[14]

10. *Sunday laws.*]—It is not enough to prove that the negotiation of the contract was made, and its terms agreed on, on Sunday, if the contract was completed and perfected on a secular day; nor even that the instrument was executed on Sunday if it

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[1] Holt v. Green, 73 Penn. St. 198, s. c. 13 Am. R. 737, and cases cited; Gregory v. Wilson, 36 N. J. (7 Vroom), 315, s. c. 13 Am. R. 448; Alvord v. Latham, 31 Barb. 294. Compare Howe, J., Perenilhet v. Hautho, 23 La. Ann. 294, s. c. 8 Am. R. 595.

[2] Tracy v. Talmage, 14 N. Y. 162; Michael v. Bacon, 49 Mo. 474, s. c. 8 Am. R. 138; Taliaferro, J., Hubbard v. Moore, 24 La. Ann. 591, s. c. 13 Am. R. 128; Mahood v. Tealza, 26 La. Ann. 108, s. c. 21 Am. R. 546.

[3] Hull v. Ruggles, 56 N. Y. 424, affi'g 1 Supm. Ct. (T. & C.) 18, s. c. 65 Barb. 432.

[4] Hedges v. Wallace, 2 Bush (Ky.), 442. Knowledge of agent held not imputable to principal. Stanley v. Chamberlain, 39 N. J. L. 565. Compare p. 783 of this vol.

[5] Cassard v. Hinman, 1 Bosw. 207, affi'g 14 How. Pr. 84; again, 6 Bosw. 8; Sherman v. Wilder, 106 Mass. 537.

[6] Porter v. Havens, 37 Barb. 343. Compare paragraph 13.

[7] Brown v. Brown, 34 Barb. 533; Sherman v. Wilder (above).

[8] See pp. 336, 620 and 793 of this vol.

[9] Pp. 620 and 793 of this vol.

[10] Dewitt v. Brisbane, 16 N. Y. 508. Compare Smeltzer v. White, 92 U. S. (2 Otto), 390, 393.

[11] Merchants' Bank v. Spalding, 9 N. Y. 53, 62, affi'g 12 Barb. 302.

[12] See Thatcher v. Morris, 11 N. Y. 437.

[13] Earl v. Clute, 2 Abb. Ct. App. Dec. 1.

[14] Bigelow v. Woodward, 15 Gray, 560; and see Davies v. London, &c. Marine Ins. Co. 38 L. T. R. N. S. 478. Record of acquittal not conclusive of innocence. People v. Buckland, 13 Wend. 592; see, also, pp. 655 and 671 of this vol.

was delivered on a secular day.[1] A subsequent ratification on a secular day may be proved, even by acts, without express promise.[2] To prove a work of "necessity or charity," honest belief that a case of necessity, &c., existed, is not alone sufficient;[3] but the object of the act done being proved, belief is relevant, and may go to the jury even though the ground of belief or means of knowledge have not been shown.[4]

11. *Usury: Pleading; and Burden of Proof.*]—To be admissible, usury must be pleaded;[5] and a general allegation, without stating the facts relied on as constituting usury, is not enough to admit evidence of essential facts not alleged.[6] The facts alleged for this purpose must be proved as laid, or the defense fails.[7]

If foreign law is relied on, both the law[8] and the facts necessary to bring the contract under foreign law[9] must be alleged, and proved. There is no presumption that the usury laws of this State prevail in another State or country.[10] An obligation made without the State, and not designating a place of payment, is not presumed usurious, though the rate exceeds our limit.[11] On a contract made here between persons resident here, and which would be usurious by our law, but which is to be performed in a State where it would not be usurious, intent to evade may be presumed in the absence of explanation.[12]

The affirmative of the issue is upon the defendant[13] to prove not merely an usurious intent, but facts from which usurious intent is to be deduced.[14] Evidence supporting allegations that the

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[1] Lovejoy v. Whipple, 18 Vt. 379; Sumner v. Jones, 24 Id. 317, 321. So of sales and services on a secular day pursuant to a contract on Sunday. Cranson v. Goss, 107 Mass. 439, s. c. 9 Am. R. 45.

[2] Sumner v. Jones (above).

[3] Johnson v. Town of Irasburgh, 47 Vt. 28, s. c. 19 Am. R. 111.

[4] Doyle v. Lynn & Boston R. R. Co. 118 Mass. 195, s. c. 19 Am. R. 431.

[5] Fay v. Grimsteed, 10 Barb. 321; Mechanics' Bank of Williamsburgh v. Foster, 44 Barb. 87, s. c. 19 Abb. Pr. 47, 29 How. Pr. 408; Frank v. Morris, 57 Ill. 138, s. c. 11 Am. R. 4.

[6] Watson v. Bailey, 2 Duer, 509; Fay v. Grimsteed (above); Smalley v. Doughty, 6 Bosw. 66; Manning v. Tyler, 21 N. Y. 567. Compare Dagal v. Simmons, 23 Id. 491.

[7] Griggs v. Howe, 2 Abb. Ct. App. Dec. 291, affi'g 31 Barb. 100.

[8] Cutler v. Wright, 22 N. Y. 472.

[9] Dolman v. Cook, 14 N. J. Eq. 56; and see pp. 229, 335 of this vol. For a convenient clue to the conflicting authorities on the law of place, see Dickinson v. Edwards, 7 Abb. New Cas. 65, and cas. cit., and p. 411 of this vol.; Merchants' Bk. of Canada v. Griswold, 72 N. Y. 472, affi'g 9 Hun, 561; Cope v. Wheeler, 41 N. Y. 303, affi'g Cope v. Alden, 53 Barb. 350, s. c. 37 How. Pr. 181. The apparent conflict in the cases is reduced when it is considered that the courts lean toward sustaining a contract made without corrupt intent, if it can be sustained by the law of either place. General expressions in the opinions as to what law applies, often mean what law the court may apply in support of the contract, not what law it must apply in prohibition of it.

[10] Davis v. Garr, 6 N. Y. 124; Cutler v. Wright, 22 N. Y. 472.

[11] Davis v. Garr (above).

[12] Berrien v. Wright, 26 Barb. 208.

[13] Haughwout v. Garrison, 69 N. Y. 339, affi'g 40 Super. Ct. (J. & S.) 550.

[14] Valentine v. Conner, 40 N. Y. 248; Eldridge v. Reed, 2 Sweeny, 155.

security sued on was given in substitution for a prior security of the same or less amount, and that the prior security was usurious, throws on plaintiff the burden of giving evidence to purge the new security of the presumption of usury.[1]

12. — *estoppel by certificate, &c.*]—Plaintiff may exclude evidence of usury by proving that, without any notice of the facts constituting usury, he took the securities and advanced the money on the faith of defendant's affidavit or certificate that there was no defense, and that he would not have taken them had he had any notice of usury.[2] It is essential to show that the purchase was in reliance[3] on a certificate or affidavit which had already been made.[4] A certificate may be rebutted by evidence that it was fraudulently obtained; but not by evidence of negligently signing while ignorant.[5] Oral representations are equally competent.[6] Representations by the maker do not estop the payee.[7] Representations by the payee do not estop the maker.[8] A guaranty of payment does not estop;[9] nor does accepting a conveyance of the equity of redemption;[10] but assuming payment on receiving a conveyance does.[11]

13. — *oral evidence.*]—The fact that the contract is in writing does not exclude oral evidence to show that though apparently innocent it was usurious;[12] or, though apparently usurious, it was innocent.[13]

14. — *variance.*]—A substantial variance as to the rate exacted,[14] or as to the ground or pretext on which it was exacted,[15] is material and fatal, if plaintiff was misled to his prejudice; otherwise not.[16]

15. — *intent.*]—The intent which is essential, is not intent to

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[1] Stanley v. Whitney, 47 Barb. 586.

[2] Mason v. Anthony, 3 Abb. Ct. App. Dec. 207; Smith v. Lombardo, 15 Hun, 415, 417; Dinkelspiel v. Franklin, 7 Hun, 389, 340.

[3] Wilcox v. Howell, 44 N. Y. 398, affi'g 44 Barb. 396.

[4] Payne v. Burnham, 62 N. Y. 69, rev'g 2 Hun, 143, s. c. 4 Supm. Ct. (T. & C.) 678.

[5] Dinkelspiel v. Franklin, 7 Hun, 389, affi'g 72 N. Y. 108; see, also, p. 443 of this vol. and cases cited.

[6] Am. L. Ins. & Trust Co. v. Bayard, 5 N. Y. Leg. Obs. 13; Ferguson v. Hamilton, 35 Barb. 427; and see Ahern v. Goodspeed, 9 Hun, 263; Benedict v. Caffe, 5 Duer, 226; Robbins v. Richardson, 2 Bosw. 248; Adams v. Blancan, 6 Robt. 334.

[7] Hackley v. Sprague, 10 Wend. 114.

[8] Dowe v. Schutt, 2 Den. 621.

[9] Tiedemann v. Ackerman, 16 Hun, 307.

[10] Brooks v. Avery, 4 N. Y. 225.

[11] Murray v. Barney, 34 Barb. 336. Compare Berdan v. Sedgwick, 44 N. Y. 626, affi'g 40 Barb. 359.

[12] Rohan v. Hanson, 11 Cush. 44.

[13] Hollenbeck v. Shutts, 1 Gray, 431; 2 Whart. Ev. § 1044; Shoop v. Clark, 4 Abb. Ct. App. Dec. 235.

[14] Griggs v. Howe, 2 Abb. Ct. App. Dec. 291, affi'g 31 Barb. 100; Frank v. Morris, 57 Ill. 138, s. c. 11 Am. R. 4.

[15] Gasper v. Adams, 28 Barb. 441; Brown v. Champlin, 66 N. Y. 214, 219.

[16] Catlin v. Gunter, 11 N. Y. 368, s. c. 10 How. Pr. 315, rev'g 1 Duer, 253; Duel v. Spence, 1 Abb. Ct. App. Dec. 559.

violate the statute,[1] but intent to take more than the rate fixed, and this is to be deduced from the facts.[2] The evidence must sustain an inference that both parties were cognizant of the facts essential to usury,[3] and that there was intent, both on the part of the lender[4] and of the borrower.[5] But it need not be shown that the intent was communicated.[6] Each party may be compelled to testify to his intent,[7] except in those jurisdictions where, as in New York, usury is indictable, and there the privilege[8] is a protection, not only to a party[9] but to an agent[10] in the usurious transaction.

Where the facts are such that the question of legality depends upon intent, a party may be allowed to testify, even in his own favor, whether he intended to take or pay usury,[11] but not whether it was his understanding that the other intended to take usury, for this is only an inference.[12] If the facts proved constitute usury, testimony to innocent intent cannot sustain a finding that there was no usury;[13] and if the facts do not constitute usury, intent is not material.[14]

Reservation of interest in excess of the legal limit is presumptive, but not conclusive,[15] evidence of usury. Slight excess may be explained by evidence of mistake or inadvertence.[16] The mere fact that the lender reserved part of the consideration,[17] or that the security reserved interest for a term anterior to its date,[18] are not sufficient to establish usury.

A subsequent payment of a bonus, in addition to legal interest, will, without direct evidence of agreement, sustain a finding of original agreement to pay it.[19]

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[1] And ignorance of the statute is not material. Bank of Salina v. Alvord, 31 N. Y. 473.

[2] Fiedler v. Darrin, 50 N. Y. 437, rev'g 59 Barb. 651; and see 58 N. Y. 308.

[3] Powell v. Jones, 44 Barb. 521.

[4] Woodruff v. Hurson, 32 Barb. 557.

[5] Keyes v. Moultrie, 3 Bosw. 1.

[6] Ayrault v. Chamberlain, 33 Barb. 229.

[7] See, as to proving intent, pp. 336, 618, 620, of this vol.

[8] For the rule as to privilege, see p. 620 of this vol.

[9] Fellows v. Wilson, 31 Barb. 162. But the court may require a party sworn in his own behalf on an issue of usury, to answer whether he is not under indictment for usury. Southworth v. Bennett, 58 N. Y. 659.

[10] Curtis v. Knox, 2 Den. 341; Henry v. Salina Bank, 1 N. Y. 83, affi'g 2 Den. 155; Vilas v. Jones, 1 N. Y. 274.

[11] Black v. Ryder, 5 Daly, 304.

[12] Central Bank v. St. John, 17 Wis. 157; Hogg v. Ruffner, 1 Black, 115. Compare Burt v. Gwinn, 4 Har. & J. (Md.) 507, 517.

[13] Austin v. Walker, 45 Iowa, 527.

[14] Smith v. Paton, 31 N. Y. 66, affi'g 6 Bosw. 145.

[15] Archibald v. Thomas, 3 Cow. 284.

[16] Marvine v. Hymers, 12 N. Y. 223. Compare Utica Ins. Co. v. Tilman, 1 Wend. 555.

[17] Booth v. Swezey, 8 N. Y. 276. The fact that the borrower gave temporary credit without interest, for part of the loan, does not necessarily prove usury, but may be explained. Brown v. Champlin, 66 N. Y. 214, 219.

[18] Marvin v. Feeter, 8 Wend. 532. Unless it is shown affirmatively that the lender did not provide the money on the day of date, and hold it in readiness. Dowdall v. Lenox, 2 Edw. 267.

[19] Catlin v. Gunter, 11 N. Y. 368, s. c. 10 How. Pr. 315, rev'g 1 Duer, 253.

Evidence of usury in former dealings of the parties is not enough;[1] but a general arrangement for usurious accommodations, under which the loan in question was made, is;[2] and a series of loans, each followed by the voluntary payment of a usurious bonus, is competent on the question of intent.[3]

16. — *covers for usury.*]—If a contract is not necessarily usurious the burden is on defendant to prove the guilty intent, and that the contract was a cover for usury and for the loan of money upon usury,[4] and that the parties had knowledge of the facts constituting the usury.[5] On these questions circumstantial evidence is freely received.[6]

Evidence of usage cannot be received to justify a transaction otherwise usurious.[7] Profitableness of selling exchange cannot be assumed without proof;[8] but if profitableness is shown, evidence that buying exchange was exacted as a condition of the loan, proves usury.[9] If the bank was entitled to reserve for exchange, defendant must prove the current rate of exchange in order to show the excess of legal interest.[10]

To show that commissions charged for advances in the course of business were usury, the burden is on defendant to give some evidence showing them to be unusually high.[11] The court cannot take judicial notice of the usual rate, nor determine it by reference to adjudications in reported cases between strangers.[12] Where the lender made a charge for expenses, the facts of necessary labor and inconvenience, and the state of health affected thereby, and the fact that the money was previously safely invested, if shown to have been communicated to the borrower as the lender's reasons for the charge, are competent in the lender's behalf; and so is the testimony of the lender that the reservation was intended as compensation for trouble and expense, and not for the loan.[13]

17. — *act of agent or co-trustee.*]—If the principal did not take usury nor know of its being taken, evidence that his agent, without sanction from him, exacted a bonus upon the pretense

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[1] Brinckerhoof v. Foote, Hoffm. 291; Ross v. Ackerman, 46 N. Y. 210; Jackson v. Smith, 7 Cow. 717.

[2] Keutgen v. Parks, 2 Sandf. 60.

[3] Storer v. Coe, 2 Bosw. 661.

[4] Matthews v. Coe, 70 N. Y. 239, 242.

[5] Thomas v. Murray, 32 N. Y. 605, rev'g 34 Barb. 157; Valentine v. Conner, 40 N. Y. 248.

[6] See Quackenbos v. Sayer, 62 N. Y. 344, aff'g 4 Supm. Ct. (T. & C.) 424, s. c. 2 Hun, 157; Knick. L. Ins. Co. v. Nelson, 7 Abb. New Cas. 170, aff'g 13 Hun, 321.

[7] Dunham v. Gould, 16 Johns. 367, aff'g, as Dunham v. Dey, 13 Id. 40; Bank of Utica v. Wager, 2 Cow. 712; Pratt v. Adams, 7 Paige, 615.

[8] Murray v. Barney, 34 Barb. 336.

[9] Marvine v. Hymers, 12 N. Y. 223; Internat. Bk. v. Bradley, 19 N. Y. 245.

[10] Wheeler v. National Bank, 96 U. S. (6 Otto), 268.

[11] Seymour v. Marvin, 11 Barb. 80, 87.

[12] Id.

[13] Thurston v. Cornell, 38 N. Y. 281, s. c. 7 Transc. App. 258.

that it was for the principal, does not prove usury,[1] even though the borrower believed the agent was dealing with him as a principal.[2] The burden is upon defendant to establish that the creditor was a party to the agreement for the bonus, or accepted the benefit of it.[3] If he accepted it, direct evidence that he knew that it came from the borrower is not essential.[4]

Where one of several trustees is shown to have exacted a bonus, the burden is on defendant to show sanction by the others.[5]

Election to ratify usury will not generally be presumed without evidence.[6]

18. — *inception.*]—Where original want of consideration and usurious transfer in inception is alleged, the question whether the obligation had inception before its transfer depends on whether the transferor could have sued on it.[7] Evidence that there had been no intent to deliver and no delivery in fact, is enough on this point.[8] One who takes a note at its inception at a greater discount than the legal rate, must be conclusively presumed to have intended to loan, as the transaction can have no other character. His want of knowledge that the note takes its inception in his hands, is immaterial.[9]

19. — *declarations and admissions.*]—Oral evidence is admissible to show that one security was given and accepted in payment of or substitution for another,[10] and for this purpose it is not essential to produce the other,[11] unless some question arises on its contents. Declarations and admissions of the party are admissible in favor of the declarant or his principal, if part of the *res gestæ*.[12] The rules as to accounts, memoranda and entries in the course of business, have been already stated.[13]

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[1] Esteves v. Purdy, 66 N. Y. 446, rev'g 6 Hun, 46. See conflicting cases in 29 Am. R. 70, note.

[2] Lee v. Chadsey, 3 Abb. Ct. App. Dec. 43.

[3] Guardian Mut. L. Ins. Co. v. Kashaw, 66 N. Y. 544, 547, rev'g 3 Hun, 616.

[4] Earle v. Hammond, 2 Abb. N. C. 368.

[5] Van Wyck v. Walters, 16 Hun, 209; Stout v. Rider, 12 Hun, 574.

[6] Brackett v. Barney, 28 N. Y. 333.

[7] Eastman v. Shaw, 65 N. Y. 522, 527.

[8] Id. 529.

[9] Id. 530.

[10] Gilbert v. Duncan, 29 N. J. L. (5 Dutch.) 133; Duncan v. Gilbert, Id. 521.

[11] Id.

[12] Ripley v. Mason, Hill & D. Supp. 66. Declarations to a stranger after the bargain was concluded, and on the evening of the same day, no part of the *res gesta*. Smith v. Webb, 1 Barb. 230.

[13] P. 319, &c. of this vol. For instances of their application, see Bank of Utica v. Hillard, 5 Cow. 153; see, also, Id. 419; Churchman v. Lewis, 34 N. Y. 444; East River Bank v. Hoyt, 32 N. Y. 119, rev'g 41 Barb. 441; Bank of Monroe v. Culver, 2 Hill, 531.

III. Incapacity of contracting party.

20. *Infancy.*]—Infancy, to be admissible, must be pleaded.[1] It may be proved in the modes stated in Chapter V. A complaint on contract does not admit a recovery for damages on evidence of defendant's fraud in falsely representing that he was of age.[2] The burden is on a defendant pleading infancy by a foreign law, to allege and prove the foreign law;[3] but the court may presume that the law of a sister State is the same as the common law.[4]

21. — *new promise: Admissions and declarations.*]—A new promise is admissible in rebuttal, though not alleged.[5] Otherwise of a promise to pay something else by way of compromise.[6] If the issue is upon a new promise after defendant came of age, an express promise must be established, unless the demand is for necessaries.[7] An explicit acknowledgment may be such as to sustain a finding of an express promise.[8] The ratification should be a promise to a party in interest or his agent, or an explicit admission of an existing liability from which a promise may be implied. It must be equivalent to a new contract;[9] and it will sustain the action, although the original demand has been barred by the statute.[10] In the absence of evidence to the contrary, an adult,[11] making such a promise, may be presumed to have known the law and the facts necessary to establish his exemption from legal liability.[12]

If the demand is for necessaries,[13] the burden is on the defendant to show that during minority he was properly supplied by parent or guardian, if he rely on that.[14]

For the purpose of showing what the original transaction was,

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[1] Moak's Van Santv. Pl. 368. *Contra*, at common law. Wailing v. Toll, 9 Johns. 141. Infancy at time of suit, as ground of abatement, is not matter for evidence at the trial. The remedy is by preliminary motion. Treadwell v. Bruder, 3 E. D. Smith, 596.

[2] Studwell v. Shapter, 54 N. Y. 249. Nor does an allegation of the false representation in the reply. Brown v. McCune, 5 Sandf. 224.

[3] Thompson v. Ketcham, 8 Johns. 189.

[4] Holmes v. Mallett, 1 Morris, 82.

[5] Esselstyn v. Weeks, 12 N. Y. 635; Dusenbury v. Hoyt, 53 Id. 521.

[6] Bliss v. Perryman, 2 Ill. (1 Scam.) 484.

[7] Gay v. Ballou, 4 Wend. 403; Millard v. Hewlett, 19 Wend. 301.

[8] Bank of Silver Creek v. Browning, 16 Abb. Pr. 272.

[9] Goodsell v. Myers, 3 Wend. 479.

[10] Halsey v. Reid, 4 Hun, 777.

[11] When to a plea of infancy plaintiff replied and proved a new promise; *Held*, that the burden was on the defendant to prove he was still an infant, when he made it. Bigelow v. Grannis, 4 Hill, 206; Bay v. Gunn, 1 Den. 108; and see Hartley v. Wharton, 11 Adol & E. 934.

[12] Taft v. Sergeant, 18 Barb. 320. *Contra*, Ewell's Cas. 29. See, also, Rawley v. Rawley, 17 Moak's Eng. 121, n.; Ring v. Jamison, 2 Mo. App. 584.

[13] See page 178 of this vol.

[14] Parsons v. Keys, 43 Tex. 557.

the acts, declarations, and admissions of defendant, though made before he came of age, are competent against him.[1] Those of his parent or guardian, as to his liability, are not.[2]

22. *Insanity.*]—A denial of the making or delivering of the contract does not admit evidence of defendant's unsoundness of mind in making and delivering.[3] An allegation of unsoundness, coupled with a denial of having authorized any person to make the contract, and of the making of such a contract, only puts sanity in issue.[4] The burden to establish insanity is on the defendant. The presumptions and modes of proof are the same as in an action to rescind.[5]

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[1] Haile v. Lillie, 3 Hill, 149; Ackerman v. Runyon, 3 Abb. Pr. 111, s. c. 1 Hilt. 169.

[2] Whart. Ev. § 1208.

[3] Dearmond v. Dearmond, 12 Ind. 455.

[4] Byrd v. Nunn, 26 Weekly R.

[5] See page 733 of this vol. For the mode of proving what are necessaries, see page 178 of this vol.

CHAPTER LX.

PAYMENT OR OTHER DISCHARGE.

I. Payment.
1. Pleading; and burden of proof.
2. Oral evidence; *res gestæ*.
3. Authority to pay.
4. Agent's authority to receive.
5. — presumed from agency in sale.
6. — from possession of security, &c.
7. Payment to assignor.
8. — to executors, trustees, &c.
9. — to sheriff.
10. Payment by mail.
11. — by check or draft.
12. — by note, &c., of debtor or third person.
13. — by obligation of joint debtor, &c.
14. — by delivery of property.
15. Payment of collateral.
16. Receipts.
17. Part payment, in full.
18. Admissions; entries and memoranda.
19. Possession of instrument; indorsements.
20. Presumption of payment from subsequent transactions.
21. Circumstantial and corroborative evidence.
22. Application by the debtor.
23. — by the creditor.
24. — by the court.

I. Payment—*continued*.
25. Presumption of payment from lapse of time.

II. Accord and satisfaction.
26. Mode of proof, and effect.

III. Account stated.
27. Mode of proof, and effect.

IV. Compromise and Composition.
28. Mode of proof, and effect.

V. Tender.
29. Necessity, and mode of proof.

VI. Release.
30. Mode of proof, and effect.
31. Oral evidence.
32. Impeaching.

VII. Suretyship and modification of contract.
33. Defendant a surety.
34. Modification.

VIII. Discharge.
35. In bankruptcy.
36. — impeaching.
37. In insolvency.
38. New promise.

I. Payment.

Pleading; and burden of proof.]—Payment[1] is not admissible in evidence unless pleaded.[2] A defendant pleading payment, or tender and readiness to pay, has the burden of proof.[3] And if

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[1] Even though after the commencement of the action. Hawes v. Woolcock, 30 Wis. 213.

[2] Greenl. Ev. 473, § 516; Baker v. Kistler, 13 Ind. 63. Except, perhaps, where the complaint is a mere general allegation of indebtedness. Marley v. Smith, 4 Kans. 183. Even part payment is not admissible in mitigation, unless pleaded (McKyring v. Bull, 16 N. Y. 297), and may not be available though proved by plaintiff (Seward v. Torrence, 5 Supm. Ct. [T. & C.] 323), unless the existence of some payment is conceded by the complaint. Quin v. Lloyd, 41 N. Y. 349, rev'g 1 Sweeny, 253. But a specific denial of a specific allegation of non-payment, may be equivalent to an allegation of payment. Van Giesen v. Van Giesen, 10 N. Y. 316, aff'g 12 Barb. 520.

[3] North Pennsylvania R. R. Co. v. Adams, 54 Penn. St. 94; Gernon v. McCan, 23 La. Ann. 84.

the payments pleaded are specified, evidence of other payments is not admissible[1] without amendment.

A general allegation of payment admits evidence of payment in cash or in any other mode,[2] and by any agency,[3] which in law amounts to satisfaction by the transfer of an equivalent; but not other modes of avoidance,[4] such as taking other security and releasing it again, to defendant's prejudice;[5] nor a set-off.[6]

Under an allegation of payment a guarantor or surety may show any specific payment or even an appropriation by the principal of property accepted in payment by the creditor, but not a set-off or counter-claim in favor of the principal, except under circumstances appealing to the equitable consideration of the court.[7]

2. *Oral evidence; Res gestæ.*]—Payment[8] in money may be proved by an eye-witness, without producing or accounting for a receipt passed,[9] but the receipt is then competent as part of the *res gestæ*.[10] A receipt for other property in payment, if such as to embody a contract, should be produced or accounted for.[11] Delivery of money, without more, is presumed to be in payment of some debt. The rule as to declarations and admissions of agents has been already stated.[12]

In applying the rule of the *res gestæ*,[13] declarations and entries made at the time and place of paying and before the transaction is fully closed and other scenes intervene—as, for instance, a request for and refusal of a receipt with the reason given,[14] are competent; but previous declarations to a third person, of intent to obtain money for the purpose of paying,[15] or declarations to a third person after sending money, of having sent a certain

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[1] Hoddy v. Osborn, 9 Iowa, 517.

[2] Farmers' & Citizens' Bank v. Sherman, 33 N. Y. 69, affi'g 6 Bosw. 181; Moorehouse v. Northrop, 33 Conn. 380.

[3] Wolcott v. Smith, 15 Gray, 537. Thus the fact of the delivery of property on an agreement to sell and apply the proceeds to payment, &c. is admissible. Ruggles v. Gatton, 50 Ill. 412. So is an account stated between plaintiff and defendant and payment of the balance. Rosc. N. P. 655, citing Callander v. Howard, 10 C. B. 290; L. J. 19 C. P. 312.

[4] Walters v. Washington Ins. Co. 1 Iowa, 404, 409.

[5] Harley v. Kirlin, 45 Penn. St. 49, 58.

[6] Green v. Storm, 3 Sand. Ch. 305.

[7] Coe v. Cassidy, 6 Daly, 242, and cases cited.

[8] Even of a judgment (Vidiclir v. Cousin, 6 La. Ann. 489), or a mortgage (Mauzey v. Bowen, 8 Ind. 193).

[9] Keene v. Meade, 3 Pet. 1, 7, affi'g Meade v. Keane, 3 Cranch C. Ct. 51. Except, perhaps, in the case of payments to public officers required by law to give receipts. See pp. 260, 261 of this vol.

[10] Van Keuren v. Corkins, 66 N. Y. 77.

[11] See Townsend v. Atwater; 5 Day, 298.

[12] Pages 44, 241, 276 and 480 of this vol. Jenks v. Burr, 56 Ill. 450.

[13] See pp. 44, 245, 264 of this vol. and Strange v. Donohue, 4 Ind. 327.

[14] Fifield v. Richardson, 34 Vt. 410, 418.

[15] Crounse v. Fitch, 1 Abb. Ct. App. Dec. 475, and see Wilson v. Pope, 37 Barb. 321.

amount,[1] are not. The rule of the *res gestæ* admits declarations and entries not brought to the knowledge of the party against whom they are offered, if offered, not to show the fact of payment, but the party's intention or application of a payment, the fact of payment and mutuality of intent being otherwise proved.[2]

3. *Authority to pay.*]—Authority of the person paying need not be proved.[3]

4. *Agent's authority to receive.*[4]]—In respect to a debt, due in the ordinary course of business, evidence of payment made during business hours to one found in plaintiff's counting-room, apparently intrusted with the conduct of business there, is sufficient,[5] and is ordinarily conclusive.[6]

An agent's authority to receive, even payments expressly stipulated to be paid to the principal, may be shown by evidence of recognition by the principal.[7] But special authority in each case is not evidence of general authority.[8] Evidence of the principal's admission that the money was properly paid to the alleged agent is primary and sufficient evidence of the agent's authority.[9] Recognition of the payment by receiving the money from one assuming to be an agent without authority, is not recognition of his authority to give a receipt in full, or an admission that no more was due than was paid.[10] In an action against an individual, evidence that he had a partner interested in the contract sued on, lets in a receipt proven to have been signed by the partner in the firm name.[11] Payment to one of several joint creditors may be proved if he was the agent of the others.[12] Offsetting the debt against an agent's indebtedness is not payment,[13] even though good faith appear.[14]

5. —*presumed from agency in sale.*]—An agent selling for an unknown principal is presumed to have authority to receive payment of the price.[15]

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[1] Young v. Commonwealth, 28 Penn. St. 501, 504.

[2] This I deem the sound rule, though some authorities seem adverse. See pp. 245, n. 4, and 264, n. 2, of this vol.

[3] Sanford v. McLean, 3 Paige, 117; and see Tacey v. Irwin, 18 Wall. 549, 551; 9 Id. 826; Gernon v. McCan, 23 La. Ann. 84. Otherwise, if he did not pay in satisfaction, or the payment was revoked. Rosc. N. P. 658, 659.

[4] For other rules as to evidence of authority to receive payment, see pages 241, 252, 275, 279, 480, &c. of this vol.

[5] Barrett v. Deere, M. & M. 200, Ld. Tenterden, C. J.

[6] Barrett v. Deere (above); Rosc. N. P. 657.

[7] Bronson's Exr. v. Chappell, 12 Wall. 681, 688.

[8] Smith v. Kidd, 68 N. Y. 130, 138.

[9] Doyle v. St. James Church, 7 Wend. 178.

[10] Sewanee Mining Co. v. Best, 3 Head (Tenn.), 701.

[11] Shepard v. Ward, 8 Wend. 542.

[12] Wright v. Ware, 58 Geo. 150; and see pp. 188, &c. of this vol. and as to partners, 218–22, and Homer v. Wood, 11 Cush. 62.

[13] Henry v. Marvin, 3 E. D. Smith 71; Pearson v. Scott, 38 L. T. R. N. S. 747.

[14] Underwood v. Nicholls, 17 C. B. 239.

[15] Henry v. Marvin (above).

One selling for a known principal is not presumed, from that fact alone, to have authority to receive payment[1] unless he is permitted and able to deliver the thing sold, in which case his authority must be presumed, in the absence of evidence to the contrary.[2] Such authority cannot be presumed for the purpose of a payment before due.[3] A local usage, allowing mere selling brokers to receive payment, is not admissible for the purpose of showing authority in the broker to receive such payment.[4]

6. —*from possession of security, &c.*]—Possession of a negotiable security drawn or indorsed so as to be in effect payable to bearer is presumptive evidence of authority to receive payment. Mere possession of a negotiable security so expressed or indorsed as to be payable to another than the possessor,[5] or of a non-negotiable security, such as a bond and mortgage,[6] is not alone sufficient to authorize an inference of authority. Possession, together with the fact that the one in possession originally took the security for the owner, or negotiated and made the loan for which the security was taken, and was thereafter intrusted by the owner with its possession, is sufficient.[7] In such cases it is incumbent upon the debtor who makes payments to the agent, to show that the securities were in his possession on each occasion when the payments relied on were made.[8]

The presumption of authority terminates upon the principal's death.[9] Without the custody of the obligation, neither the fact that the assumed agent was the one through whom the loan was made or the security taken, nor the fact that he had usually been employed in the receipt of money for the creditor, is sufficient evidence of authority.[10] Possession, with authority to receive interest, does not imply authority to receive principal.[11] Authority to receive payment does not authorize the agent to receive it before it is due.[12] Authority to examine title does not imply authority to receive money to pay off liens.[13] Authority to foreclose does not imply authority to receive part payment nor to receive and collect notes on time.[14]

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[1] Higgins v. Moore, 34 N. Y. 417, rev'g 6 Bosw. 344.
[2] Whiton v. Spring, 74 N. Y. 169.
[3] Id. *Contra*, Rosc. N. P. 657.
[4] Higgins v. Moore (above); Pearson v. Scott, 38 L. T. R. N. S. 747.
[5] Doubleday v. Kress, 50 N. Y. 410, rev'g 60 Barb. 181. *Contra*, see 2 Greenl. Ev. (13th ed.) 52.
[6] Id; Smith v. Kidd, 68 N. Y. 130, 137.
[7] Doubleday v. Kress (above).
[8] Smith v. Kidd, 68 N. Y. 130, 137.
[9] Megary v. Funtis, 5 Sandf. 376.
[10] Id. 139; Rosc. N. P. 657.
[11] Doubleday v. Kress, 50 N. Y. 410, rev'g 60 Barb. 181.
[12] Smith v. Kidd, 68 N. Y. 130. 141.
[13] Josephthal v. Heyman, 2 Abb. N. C. 22.
[14] Heyman v. Beringer, 1 Abb. N. C. 315. According to some authorities the implied powers of an attorney for a non-resident and absent creditor, are more ex-

7. *Payment to assignor.*]—If an assignment of a mortgage remain unrecorded, a payment on account meanwhile to the assignor may be proved; and the fact that the payment was in advance, or that the debtor did not call for production of the securities, is not evidence of bad faith.[1] In case of a final satisfaction, the omission to call for the securities is a suspicious circumstance which requires evidence that the payment was made under misrepresentation, or other evidence of good faith.[2]

8. — *to executors, trustees, &c.*]—Evidence of a payment to one of several co-executors or co-administrators, and a release, receipt, satisfaction piece or the like executed by one, are competent against the estate.[3] Otherwise of co-trustees.[4]

In case of payment to an executor, administrator or other trustee, evidence that it was made actually and in good faith, and that the trustee was authorized to receive it, is sufficient without evidence as to the application of the moneys.[5] In case of payment on a written security, it is not necessary to show that the trustee indorsed the payment on the bond, or paid the money to the *cestui que trust.*[6]

9. — *to sheriff.*]—A debtor who has paid the debt to the sheriff, upon an execution against his creditor, cannot, when the creditor sues him, prove the payment merely by the sheriff's receipt and the execution. He must prove the judgment by the record; the transcript from the office of the clerk of a county in which the judgment-roll was not filed, is not sufficient.[7] The mere issue and delivery of an execution, is not, *prima facie*, evidence of the payment of the judgment on which it is issued.[8] A levy on land raises no presumption of satisfaction of the judgment. A levy on chattels, is presumptive evidence of satisfaction only when the execution has been so used as to change the title of the goods, or in some way to deprive the debtor of his property.[9] The seizure by the sheriff, upon attachment, of goods sufficient to pay the judgment is not, alone, presumed to be satisfaction. The burden is on the debtor to show the application of the goods to the judgment.[10]

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tensive than those implied in other cases. See Glass v. Thompson, 9 B. Monr. (Ky.) 235; Hopkins v. Willard, 14 Vt. 474; Kimball v. Perry, 15 Id. 414; Heyman v. Beringer, 1 Abb. N. C. 315, 316, note.

[1] Van Keuren v. Corkins, 66 N. Y. 77.

[2] Brown v. Blydenburgh, 7 N. Y. 141, and see Purdy v. Huntington, 42 Id. 334; Foster v. Beals, 21 Id. 247; Kellogg v. Smith, 26 Id. 18, and page 11 of this vol.

[3] 3 Abb. N. Y. Dig. new ed. 345.

[4] As to payments to and receipts by other trustees, see pp. 235, 817 of this vol.

[5] 1 N. Y. R. S. 730 (2 Id. 6th ed. 1, 110), § 66; Champlin v. Haight, 10 Paige, 274.

[6] Hadley v. Chapin, 11 Paige, 245.

[7] Handly v. Greene, 15 Barb. 601. Compare Code Pro. § 293. As to payment on attachment at suit of a third person, compare Ross v. Pitts, 39 Ala. N. S. 606, and Flanagan v. Mechanics' Bank, 54 Penn. St. 398.

[8] Runyan v. Weir, 8 N. J. L. (3 Hals.) 286.

[9] United States v. Dashiel, 3 Wall. 688, and cas. cit.

[10] Maxwell v. Stewart, 22 Wall. 77.

10. *Payment by mail.*]—The burden of proof of payment of a debt, is not sustained by proof that a letter, even though registered,[1] containing the requisite amount, directed to the creditor, was duly deposited in the post office.[2] The debtor must also either show that the creditor authorized this mode of remittance, by express assent or direction, or a usage and course of dealing from which such assent or direction may be fairly inferred—in which case due mailing is conclusive[3]—or he must give evidence of circumstances tending to show receipt by the creditor, in which case the question may go to the jury.[4] Evidence that in a previous instance money was sent by mail without objection, is not enough to show authority, nor is a mere letter by mail requesting a remittance.[5] The post master's entries are competent as tending to show the receipt of a registered letter,[6] but are not conclusive,[7] even as to date.[8]

11. —*by check or draft.*]—A check or draft drawn by defendant,[9] payable to the order of the plaintiff, and shown to have been paid by the bank or drawee to the plaintiff; or indorsed by him and shown to have been paid, without other evidence that it was paid to him; is presumptive evidence of payment of the amount by defendant to plaintiff, without evidence that plaintiff received the paper from defendant.[10] If the paper was payable to bearer, it must be shown that it was delivered to plaintiff, or that he received the money or value on it.[11] Payment of money being thus shown, it is presumed to have been in satisfaction of an existing debt;[12] and in the absence of other proof may be presumed to apply to a debt of the same amount, in suit.[13]

Mere delivery of a check,[14] does not operate as payment of a previous debt, and a receipt given on such delivery, acknowledg-

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[1] First Nat. Bank of Bellefonte v. McManigle, 69 Penn. St. 156. s. c. 8 Am. R. 236.

[2] Gurney v. Howe, 9 Gray, 404, 407; Crane v. Pratt, 12 Gray (Mass.), 348.

[3] Gurney v. Howe (above).

[4] First Nat. Bank of Bellefonte v. McManigle, 69 Penn. St. 156, s. c. 8 Am. R. 236; Waydell v. Velie, 1 Bradf. 277.

[5] Burr v. Sickles, 17 Ark. 428; Morton v. Morris, 31 Geo. 378. But see Townsend v. Henry, 9 Rich. (S. C.) 318.

[6] Gurney v. Howe (above).

[7] Dunlop v. Munroe, 7 Cranch, 242, 270, aff'g 1 Cranch C. Ct. 536.

[8] Gurney v. Howe (above).

[9] So of a check made by his wife and indorsed by him. Murphy v. Brick, 33 Penn. St. 235.

[10] Mountford v. Harper, 16 M. & W. 825; Egg v. Barnett, 3 Esp. 196. *Contra*, Bunting v. Allen, 18 N. J. L. 299, unsound because payment without more is presumed to be in satisfaction of debt.

[11] Lowe v. McClery, 3 Cranch C. Ct. 254; p. 245 of this vol.

[12] Masser v. Bowen, 29 Penn. St. 128.

[13] Murphy v. Brick, 33 Id. 235.

[14] Unless drawn upon the creditors themselves. Pratt v. Foote, 9 N. Y. 463; Comm'l Bk. of Penna. v. Union Bk. of N. Y. 11 N. Y. 203.

ing the receipt of money, if given by mere agents for collection, adds nothing to the effect of such delivery, and is open to parol evidence as to its real import.[1] If defendant relies upon laches of his creditor in demanding payment or giving notice of dishonor of a check given by the debtor in payment, the burden of proof is on the defendant to show such laches.[2] In the absence of express agreement, a check though drawn by the debtor in lieu of money at the request of the creditor and delivered in exchange for a receipt of payment, does not amount to payment, unless the check is actually paid or clearly would have been paid if duly presented. If remaining unpaid it is not enough for the debtor to show that it might probably have been collected.[3] If the draft or check of the debtor, drawn on a third person, is expressly received in full payment, the burden is on the plaintiff to show diligence in obtaining payment, and if not paid, notice of non-payment; or he must excuse the non-presentment and produce the bill on the trial to be cancelled.[4]

Other rules as to proving payment of negotiable paper,[5] or by the delivery and acceptance of negotiable paper,[6] have been already stated.

12. — *by note, &c., of debtor, or third person.*]—Defendant, in proving the debt to have been paid by the transfer of securities need not produce the securities,[7] unless he desires to show their contents or tenor.

Negotiable paper of the debtor,[8] or of his agent,[9] or of either of several joint-debtors,[10] or the negotiable paper of any other person,[11] or a draft or order of the debtor on a third person,[12] taken for an antecedent debt,[13] is presumed not to have been accepted in payment, but only as conditional payment, suspending the right of action.

The burden is on defendant to show that it was given and re-

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[1] Bradford v. Fox, 38 N. Y. 289, rev'g 16 Abb. Pr. 51, s. c. 39 Barb. 203; s. p. Taylor v. Wilson, 11 Metc. (Mass.) 44.

[2] Id.

[3] Syracuse, &c. R. R. Co. v. Collins, 1 Abb. New Cas. 47.

[4] Dayton v. Trull, 23 Wend. 345.

[5] Page 446 of this vol.

[6] Page 331 of this vol.

[7] Daniel v. Johnson, 29 Geo. 207: Morrison v. Myers, 11 Iowa, 538.

[8] The Kimball, 3 Wall. 37. Acceptance of the debtor's non-negotiable promise does not even suspend the remedy unless it is founded upon a new consideration. Geller v. Seixas, 4 Abb. Pr. 108.

[9] P. 331, note 11.

[10] Nightingale v. Chafee, 11 R. I. 609, s. c. 23 Am. R. 531.

[11] Vail v. Foster, 4 N. Y. 312.

[12] Haines v. Pearce, 41 Md. 221, 231.

[13] Gibson v. Tobey, 46 N. Y. 637. For the rule as to presumption on taking note of a debtor for price of goods sold, see p. 331. In those jurisdictions where the presumption is the other way, the presumption is not conclusive, and may be repelled by the circumstances of the transaction, even without extrinsic evidence. 3 Wall. 37, 46, citing Butts v. Dean, 2 Metc. (Mass.) 76.

ceived as payment,[1] though it is otherwise of an obligation of a third person transferred at the time of the creation of the debt.[2] Even when an express agreement is proved, if the paper be that of the debtor, it does not merge or extinguish the demand.[3] Acceptance of the negotiable promise of a third person,[4] or of the debtor and a third person jointly[5] on an agreement that it is to be satisfaction, extinguishes the original debt.[6] On the question whether a security transferred was accepted as absolute payment or only as a security, the value of the security compared with the debt is relevant.[7]

Securities shown to have been received in either way must be produced, or accounted for by plaintiff, in order to enable him to recover. The presumption is that they were duly paid, or would have been by use of due diligence.[8] In case of the note of the debtor, or such of several notes as remain unpaid,[9] it is enough to produce them at the trial for cancellation.[10] Where negotiable paper does not amount to payment within these rules, it may be shown to be at least conditional payment, by evidence that the creditor transferred it and that it is outstanding in the hands of others.[11]

Bank notes or other negotiable paper although paid in good faith, supposing them to be genuine,[12] or supposing the maker to have been solvent, may be shown to have been worthless or uncurrent, if the receiver was ignorant of the fact at the time of taking them,[13] and has not been guilty of laches in returning them.[14] The creditor cannot avoid the effect of payment by new security, by evidence that the security was illegal by reason of usury taken by him, although he might take advantage of usury proved by the debtor.[15]

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[1] Nightingale v. Chafee, 11 R. I. 609, s. c. 23 Am. R. 531; Noel v. Murray, 13 N. Y. 167; Smith v. Applegate, 1 Daly, 91; Crane v. McDonald, 45 Barb. 354.

[2] Youngs v. Stahelin, 34 N. Y. 258.

[3] Cole v. Sackett, 1 Hill, 516; 1843, Waydell v. Luer, 5 Id. 448; and see Hill v. Beebe, 13 N. Y. 556.

[4] Booth v. Smith, 3 Wend. 66; Kellogg v. Richards, 14 Wend. 116.

[5] N. Y. State Bank v. Fletcher, 5 Wend. 85.

[6] But evidence of canceling the new security, is competent to show revivor of the original debt. Westcott v. Keeler, 4 Bosw. 564.

[7] Wallis v. Randall, 16 Hun, 33.

[8] Dayton v. Trull. 23 Wend. 345.

[9] Lyman v. Bank of United States, 12 How. U. S. 225, affi'g 1 Blatchf. 297; 20 Vt. 666.

[10] Armstrong v. Cushney, 43 Barb. 340; Central City Bank v. Dana, 32 Barb. 296; Armstrong v. Tuffts, 6 Barb. 432; Johnston v. Jones, 4 Barb. 369. Otherwise, where a transferee has recovered judgment on the note. Teaz v. Chrystie, 2 E. D. Smith, 621, s. c. 2 Abb. Pr. 109. Whether, in case of a note of a third person, it is necessary to prove an offer to return made before action, compare with these cases, Hoopes v. Strasburger, 37 Md. 390, s. c. 11 Am. R. 538.

[11] See Battle v. Coit, 26 N. Y. 404, 406, and cas. cit.

[12] Markle v. Hatfield, 2 Johns. 455.

[13] Ontario Bank v. Lightbody, 13 Wend. 101.

[14] Kenny v. First Nat. Bk. of Albany, 50 Barb. 112.

[15] La Farge v. Herter, 9 N. Y. 241.

13. — *by obligation of joint debtor, &c.*]—The individual note of one of two joint debtors or partners will not operate as payment of the joint debt, unless expressly received as such.[1] Evidence that it was receipted for as cash,[2] or that it was accompanied by a sealed security,[3] or that judgment was subsequently recovered on it,[4] is not enough. Evidence that a security given by one partner or joint debtor, was expressly accepted as payment, is competent to show exoneration of the others.[5]

14. — *by delivery of property.*]—The delivery of property, other than money, by the debtor to the creditor, is not presumed as payment rather than as security.[6]

15. *Payment of collateral.*]—Payment of a collateral is presumptive evidence of a payment on the principal.[7]

Payment of the principal security is presumptive evidence of the release of the collateral, unless equity requires its survival.[8]

Evidence that plaintiff transferred collaterals held by him, without evidence of the terms of transfer, raises a legal presumption in the debtor's favor that he transferred them absolutely and without recourse, and received the full amount due on their face, or elected to take them at that sum in satisfaction.[9]

16. *Receipts.*]—If the contents or mode of signature of a receipt are to be proved, it must be produced or accounted for, so as to let in secondary evidence.[10] A receipt remaining in the creditor's possession (if separate from the instrument) is not, without explanation, evidence that the payment acknowledged in it was made.[11] The suppression of some of a series of receipts admitted to be in possession of the party who produces the others, is evidence that the receipts withheld afford inferences unfavorable to that party who withholds them.[12] Neither a simple unsealed re-

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[1] Claflin v. Ostrom, 54 N. Y. 581; King v. Lowry, 20 Barb. 532. Even though the note was that of the continuing parties given on the retiring of the defendant, who relies on it as payment. Nightingale v. Chafee, 11 R. I. 609, s. c. 23 Am. R. 531. Evidence that it was taken in payment with knowledge of an agreement between the partners that the maker assumed the debt, discharges the others. Millerd v. Thorn, 15 Abb. Pr. N. S. 371, s. c. 56 N. Y. 402.

[2] Muldon v. Whitlock, 1 Cow. 290, 306; Vernam v. Harris, 1 Hun, 451, s. c. 3 Supm. Ct. (T. & C.) 483. *Contra*, Palmer v. Priest, 1 Sprague, 512. A higher security taken from one partner individually, is presumed taken as collateral. Nicholson v. Leavitt, 4 Sandf. 252. Compare Hoskinson v. Elliot, 52 Penn. St. 393.

[3] Rose. N. P. 390, cit. Ansell v. Baker, 15 Q. B. 20.

[4] Claflin v. Ostrom (above). Compare paragraph.

[5] Macklin v. Crutchen, 6 Bush, 401.

[6] Perit v. Pittfield, 5 Rawle, 166, and see Dudgeon v. Haggart, 17 Mich. 273.

[7] Prouty v. Eaton, 41 Barb. 409; Hunt v. Nevers, 15 Pick. 500, 504.

[8] McGiven v. Wheelock, 7 Barb. 22.

[9] Hawks v. Hinchcliff, 17 Barb. 492.

[10] Romayne v. Duane, 3 Wash. C. Ct. 246.

[11] Nelson v. Boland, 37 Mo. 432.

[12] James v. Biou, 2 Sim & Stu. 600, 607. Or, perhaps more strictly, should be said to support the most unfavorable construction that other evidence, actually adduced, will properly bear.

ceipt,[1] even though official,[2] nor the usual receipt for payment of purchase money contained in a sealed conveyance,[3] is conclusive evidence of the payment acknowledged in it. And it may be impeached or avoided, although plaintiff has not alleged the facts he offers in evidence for the purpose.[4] Where a contract is embodied with the receipt, in one paper, the part constituting the receipt is open to explanation.[5]

The language of the instrument, so far as it relates to the fact of delivery, the thing delivered,[6] and the question whether the words "received payment," or their equivalent, represented an agreement to accept in satisfaction, may be contradicted or varied by parol. But the contradiction to which a receipt is subject is of some fact which is stated in it.[8]

Words in the receipt stating that the payment, or a security transferred, was received "as a compromise"[9] or "without recourse,"[10] constitute a contract within the rule excluding oral evidence to vary the terms of the instrument; and to avoid the effect of a receipt of money in full of an unliquidated claim, oral evidence is not admissible to show that it was given upon a condition not expressed in it.[11]

He who seeks to recover, notwithstanding his receipt, must prove his case clearly and show how he came to give such a receipt.[12]

But a receipt, unexplained or uncontradicted, is conclusive.[13] A letter which accompanied the receipt is, if relevant, competent as part of the *res gestæ*.[14]

17. *Part payment, in full.*]—Part payment accepted in full, may be proved as a bar, either by a sealed release;[15] or on proof that it was made by way of compromise, and accepted on release of the balance;[16] or, if the claim paid arose on a written obli-

[1] Battle v. Rochester City Bank, 3 N. Y. 88; Wadsworth v. Allcott, 6 N. Y. 64.
[2] Johnson v. United States, 5 Mas. 425.
[3] Brown v. Cabalin, 3 Oreg. 45, and see pp. 697, 698 of this vol.
[4] Van Nest v. Talmage, 17 Abb. (N. Y.) Pr. 99, 105.
[5] Smith v. Holland, 61 N. Y. 635.
[6] Tobey v. Barber, 5 Johns. 68.
[7] Buswell v. Pioneer, 87 N. Y. 312, s. c. 4 Abb. Pr. N. S. 244, 35 How. Pr. 447; Richard v. Wellington, 66 N. Y. 308. Otherwise where the note was stated to be received in "full payment." Howard v. Norton, 65 Barb. 161. A receipt for a note with a stipulation that, if discounted, a certain sum is to be applied to a specific indebtedness, held not capable of being varied as to the stipulation by parol. Stapleton v. King, 33 Iowa, 28, s. c. 11 Am. R. 109, and cas. cit.
[8] Green v. Rochester, &c. Co. 1 Supm. Ct. (T. & C.) 5.
[9] Kellogg v. Richards, 14 Wend. 116, Nelson, J
[10] Graves v. Friend, 5 Sandf. 568.
[11] Coon v. Knap, 8 N. Y. 402.
[12] Chapman v. Railroad Co. 7 Phil. (Penn.) 204.
[13] Lambert v. Seely, 17 How. Pr. 432. For the rule as to explaining alterations, see pp. 406, 696 of this volume, applied to a receipt in Printup v. Mitchell, 17 Geo. 558. Compare Thrasher v. Anderson, 45 Geo. 539.
[14] Foster v. Newbrough, 66 Barb. 645, rev'd in 58 N. Y. 481, for lack of foundation for secondary evidence.
[15] See paragraphs 30–2.
[16] Blair v. Wait, 69 N. Y. 113, affi'g 6 Hun, 477. Where a claim for an un-

gation, by evidence that the obligation was surrendered to be canceled, on payment of the part with an agreement to accept it in full.[1]

In other cases, payment and acceptance of a sum of money (as distinguished from merchandise or other property in gross), less than a liquidated debt, is only payment *pro tanto*. Payment of a less sum, or a promise to pay it, though reinforced by additional security of the debtor's own means, is not satisfaction; but an acceptance of an obligation or collateral security of a third person on his property, is.[2]

A receipt for payment in full may be rebutted,[3] except so far as it is conclusive under the preceding rules. Evidence of declarations of the creditor, made at the time of the payment, to the effect that more was due him, is competent in his own favor.[4]

A receipt expressed to be in full of all accounts, will sustain a finding of a settlement of accounts on both sides.[5]

A receipt in full of all demands against one person is not, alone, evidence of payment of a joint demand against him and another.[6]

18. *Admissions; Entries and memoranda.*]—Evidence of an admission by the creditor, or by his agent, made within the scope of his authority,[7] that he had received payment,[8] is competent; but is not conclusive,[9] unless acted on so as to raise an estoppel. An admission of payment in full, is competent, although the specific

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certain amount is made, and the auditing officers of the government state it at a reduced sum, the creditor's acceptance of a draft for the amount and collection of it without objection, is an acceptance in full satisfaction of the claim. Baird v. United States, 96 U. S. (6 Otto), 430. Where, on a loss of several things insured, the value of one, as to which there is no dispute, is paid on condition that the insured waives his claim as to the others, this is no consideration, and without a technical release such other claims are not discharged. Redfield v. Holland Purchase Ins. Co. 56 N. Y. 354.

[1] Ellsworth v. Fogg & Harvey, 35 Vt. 355; Draper v. Hilt, 43 Vt. 439, s. c. 5 Am. R. 292; McKenty v. Universal Life Ins. Co. 3 Dill. C. Ct. 448. To establish the settlement of a large and unquestionable claim, by payment of a small sum, the evidence should be clear and satisfactory. Home Ins. Co. v. Western Transp. Co. 51 N. Y. 93, affi'g 4 Rob. 257, s. c. 33 How. Pr. 102. Whether the solvency or insolvency of the debtor is competent, as tending to show whether acceptance of part in full was probable or improbable, compare Keeler v. Salisbury, 33 N. Y. 656; Molyneaux v. Collier, 18 Geo. 406

[2] Keeler v. Salisbury, 33 N. Y. 648, 653, affi'g 27 Barb. 485.

[3] For instance, by evidence of compulsion. Thomas v. McDaniel, 14 Johns. 185; Rourke v. Story, 4 E. D. Smith, 54. So, evidence that there was another account between the parties, and that the partner who gave the receipt was not accustomed or able to attend to the business, is sufficient to go to the jury. Lynch ads. Welch, 5 N. Y. Leg. Obs. 20. Compare Berrian v. Mayor, &c. of N. Y. 4 Rob. 538.

[4] Dillard v. Scraggs, 36 Ala. 670.

[5] Alvord v. Baker, 9 Wend. 323.

[6] Walker v. Leighton, 11 Mass. 140.

[7] McRea v. Insurance Bank of Columbus, 16 Ala. 755.

[8] Otherwise, of an admission of having settled, which may merely mean adjustment. Fort v. Gooding, 9 Barb. 371. Otherwise, also, of mere declarations of intent never to collect. McGuire v. Adams, 8 Penn. St. 286.

[9] Ray v. Bell, 24 Ill. 444.

payments of which there is other evidence, are less than the amount of the whole debt.[1]

The payer's entry in his account is not evidence in his own favor,[2] of the fact of payment, unless shown to have been brought to the knowledge of the creditor,[3] or unless the entry is admissible on some ground applicable to other memoranda.[4]

19. *Possession of instrument; Indorsements.*]—In a conflict of evidence on a question of payment of a written security, possession of the security by the creditor will usually sustain a finding of non-payment.[5] Possession by the debtor, or obligor, even though only a surety, raises a presumption of payment,[6] but is not conclusive.[7]

A notice to produce an instrument, for any purpose, is sufficient to admit parol proof of indorsements upon it, of payments.[8]

20. *Presumption of payment from subsequent transactions.*]—Defendant may show that after the time when the debt sued for is alleged to have become due and payable, plaintiff gave him a promissory note,[9] or other obligation,[10] or security,[11] for the payment of money; and, in the absence of anything to show what was the consideration of the later obligation, there is a legal presumption that no previous indebtedness from defendant to plaintiff existed.[12] Defendant may prove the later obligation by parol, without producing or accounting for the writing.[13] This throws the burden on plaintiff to show that the demand in suit was not settled; but slight evidence may be sufficient for this purpose.[14]

Evidence of the payment of one instalment of rent, in the absence of other evidence, raises a legal presumption that prior instalments were paid;[15] and, upon the same principle, evidence of the payment of one of a series of instalments accruing under any contract, or one of a series of obligations taken upon the same transaction, is competent as tending to show payment of those preceding.[16]

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[1] Henderson v. Moore, 5 Cranch, 11.

[2] Brannin v. Foree, 12 B. Mon. (Ky.) 506; Whitehouse v. Bank of Cooperstown, 48 N. Y. 239.

[3] Meyer v. Reichardt, 112 Mass. 108.

[4] The Queen v. Exeter, L. R. 4 Q. B. 341; pp. 319–26 of this vol.

[5] Brembridge v. Osborne, 1 Stark. 374.

[6] Carroll v. Bowie, 7 Gill (Md.), 33, 41. So, also, of possession of a mortgage and the bond, by a grantee of the land. Braman v. Bingham, 26 N. Y. 483.

[7] Graves v. Wood, 3 B. Mon. (Ky.) 34.

[8] Howell v. Huyck, 2 Abb. Ct. App. Dec. 423.

[9] De Freest v. Bloomingdale, 5 Den. 304; Duguid v. Ogilvie, 3 E. D. Smith, 527, s. c. 1 Abb. Pr. 145.

[10] Callaway v. Hearn, 1 Houst. (Del.) 607.

[11] Chewning v. Proctor, 2 M'Cord, 11, 15.

[12] De Freest v. Bloomingdale (above); Duguid v. Ogilvie (above).

[13] Mead v. Brooks, 8 Ala. 840.

[14] Chewning v. Proctor (above).

[15] Patterson v. O'Hara, 2 E. D. Smith, 58; Decker v. Livingston, 15 Johns. 479.

[16] But the value of such evidence in cases other than those of rent, where dispos-

Where by the contract,[1] or the law,[2] payment was a condition precedent to the performance of another act, evidence that such act was performed, is competent to sustain an inference that payment had been made.

21. *Circumstantial and corroborative evidence.*]—On the mere question of payment it is not competent to show, for the purpose of raising a presumption of payment that it was the debtor's habit to pay his debts promptly;[3] nor that in enumerating them he made no mention of the debt in suit;[4] nor that he was responsible and at hand, and that the creditor was pressed for money, yet made no claim.[5] But such evidence may be competent on the question whether the debt ever existed, especially where it is a stale claim.[6] The solvency or wealth of the defendant at the time of the alleged payment is not competent;[7] nor is the fact that he borrowed money ostensibly for the purpose of paying.[8]

Evidence that a person authorized to receive, but who is since deceased, went to defendants' place of business for the purpose of settling with them, and that he had no money before he went in, and that within he saw defendants, and that he was seen to come out with money which he said he got of defendants, is sufficient to sustain a finding of payment.[9] Evidence that a witness showed the money directly after the interview in which he testifies it was paid to him, is competent as having a tendency to confirm his testimony.[10]

22. *Application by the debtor.*]—If a payment is voluntarily made by the debtor, its application by him to one of several debts or accounts may be inferred from his conduct,[11] or even from circumstances alone,[12] or from his interest, under circumstances not

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session so commonly follows default, depends upon the circumstances of the case. Compare Matthews v. Light, 40 Me. 394; Bougher v. Kimball, 30 Mo. 193; Sennett v. Johnson, 9 Penn. St. 335.

[1] Reynolds v. Richards, 14 Penn. St. 205.

[2] Terry v. N. Y. Central R. R. Co. 22 Barb. 574.

[3] Abercrombie v. Sheldon, 8 Allen (Mass.), 532. *Contra*, Orr v. Jackson, 1 Ill. App. 439.

[4] Id.

[5] Beach v. Allen, 7 Hun, 441. *Contra*, Orr v. Jackson (above).

[6] Church v. Fagan, 43 Mo. 123; Fisher v. Plimpton, 97 Mass. 441; Marshall v. Marshall's Admr. 12 B. Mon. (Ky.) 459; Nicholls v. Van Valkenburgh, 15 Hun, 230; Thorp v. Goewey, 5 Rep 619; and see pp. 247, 282 of this vol.

[7] Veazie v. Hosmer, 11 Gray, 396: Church v. Fagin, 43 Mo. 123; 1 Dan. Neg. I, § 1229. It may have been the motive for plaintiff's confidence in not collecting. Hilton v. Scarborough, 5 Gray, 422.

[8] Reed v. Pearson, 3 N. J. L. (2 Penn.) 681. Compare Burlew v. Hubbell, 1 Supm. Ct. (T. & C.) 235.

[9] Whisler v. Drake, 35 Iowa, 103. Whether evidence of simultaneous payment of other like claim,—such as laborers on a pay-roll,—is competent, compare Filer v. Peebles, 8 N. H. 226, and p. 375 of this vol.

[10] Chester v. Dickerson, 54 N. Y. 1, affi'g 52 Barb. 349.

[11] Peters v. Anderson, 5 Taunt. 596; and see 22 Wend. 554.

[12] Stone v. Seymour, 15 Wend. 19, 24; Howland v. Rench, 7 Blackf. (Ind.) 236.

manifesting any other intention.[1] But for this purpose a declaration, or circumstances not known to the creditor at the time, are not competent to defeat an exercise of the right of application by the creditor.[2] To show the debtor's application, his letter, or that of his general agent, to the creditor, at the time,[3] or the declarations of the bearer of the money, made at the time of delivering it to the creditor,[4] are competent in the debtor's favor. Where there is such evidence, the creditor's prior letter of demand is not competent to show a different application.[5] In the absence of other evidence, application expressed in a receipt will control;[6] but application wrongfully made, although indicated by a receipt sent to the payer, does not bind him. If he had previously communicated his dissent to such application, his silence on receiving the receipt will not conclude him.[7] Evidence of a request from the debtors to the creditor, to pay himself out of their property in his hands, is not evidence of payment without something to indicate compliance with the request,[8]

23. — *by the creditor.*]—In the absence of evidence of an application by the debtor, an application by the creditor may be proved. If the creditor claims application to a debt other than that in suit, it is for him to prove the existence of the obligation,[9] and, if written, he must produce it or account for it, before giving oral evidence of it.[10] For the purpose of proving the application, the like indirect evidence of intention is competent, as in case of application by the debtor;[11] and moreover the entries made by the creditor in his own books of account at the time of the payment, are competent evidence in his behalf,[12] but are not conclusive. Crediting on an open account implies intent to apply to the earlier items, notwithstanding the creditor holds security for those only.[13] But crediting on a private account is not conclusive, unless communicated to the debtor.[14]

24. — *by the court.*]—When application devolves upon the

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[1] Such as the fact that the payment was precisely the amount of one debt and not that of another. Robert v. Garnie, 3 Cai. 14; Seymour v. Van Slyck, 8 Wend. 403; Davis v. Fargo, Clarke, 470.

[2] Munger on Ap. 28.

[3] Mitchell v. Dall, 2 Har. & G. (Md.) 159.

[4] Gay v. Gay, 5 Allen (Mass.), 157.

[5] Mitchell v. Dall (above).

[6] Stewart v. Keith, 12 Penn. St. 238.

[7] *Per* Bronson, J., Starkweather v. Kittle, 17 Wend. 20.

[8] King v. Bush, 36 Ill. 142.

[9] Mann v. Major, 6 Rob. (La.) 475.

[10] Trundle v. Williams, 4 Gill (Md.), 313.

[11] Truscott v. King, 6 N. Y. 147.

[12] Van Rensselaer v. Roberts, 5 Den. 470.

[13] Id. s. p. Crampton v. Pratt, 105 Mass. 255. So, also, notwithstanding those items had been barred. Hill v. Robbins, 22 Mich. 475. Compare Mills v. Fowkes, 5 Bing. N. C. 455.

[14] Allen v. Culver, 3 Den. 284; Seymour v. Marvin, 11 Barb. 80. Nor even then always conclusive evidence of intention. Dulles v. De Forest, 19 Conn. 190.

court because of no application by the parties being shown, evidence of the existence of the other debts is admissible.[1]

25. *Presumption of payment from lapse of time.*]—Under an allegation of payment, the legal presumption of payment is available[2] which arises from the mere lapse of twenty years from the time a payment is due. This presumption is usually defined with important qualifications in the statutes; which should be consulted. At common law, and in equity,[3] great lapse of time without part payment or other recognition, is a circumstance which, with others, may tend to show payment;[4] and if extending for twenty years[5] from the time the obligation was due and payable,[6] and before the commencement of the proceeding on it,[7] raises (except against the government)[8] a legal, but not conclusive[9] presumption that payment has been made, which throws on the creditor the burden of proving non-payment.[10]

The presumption applies to any obligation that can be extinguished by an act of payment, such as a judgment,[11] or a sealed obligation,[12] or an assessment,[13]—as distinguished from a covenant which must be released by deed.[14] This presumption is not, like the statute of limitations, a mere bar to the remedy; but is a

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[1] Robinson v. Allison, 36 Ala. 525, 531.

[2] New York Life Ins. & Trust Co. v. Covert, 3 Abb. Ct. App. Dec. 350; 29 Barb. 435, 441; Malloy v. Vanderbilt, 4 Abb. New Cas. 127, 132; and see Livingston v. Livingston, 4 Johns Ch. 287.

[3] Giles v. Baremore, 5 Johns. Ch. 545.

[4] Where the time is less than the statute period, any accompanying circumstances tending to explain or repel the presumption, are evidence for the jury. Jackson v. Sackett, 7 Wend. 94. The facts that defendant had been solvent and accessible (Husky v. Maples, 2 Coldw. [Tenn.] 25), and that plaintiff had been pressed for money (Levers v. Van Buskirk, 4 Penn. St. 309, 314), have been received in aid of the presumption. *Contra*, Daby v. Ericsson, 45 N. Y. 786, and see paragraph 21.

[5] Exclusive of disabilities. Dunlop v. Ball, 2 Cranch, 180; Higginson v. Mein, 4 Id. 415.

[6] Thus in case of rent, or a bond payable by instalments, the presumption arises as to each instalment, at the expiration of the period from the time it became due. Lyon v. Odell, 65 N. Y. 28; Slate v. Lobb, 3 Harr. (Del.) 421, 423.

[7] Driggs v. Williams, 15 Abb. Pr. 477.

[8] United States v. Williams, 4 McLean, 567; 5 Id. 133.

[9] Arden v. Arden, 1 Johns. Ch. 313; Bailey v. Jackson, 16 Johns. 210; Jackson v. Hotchkiss, 6 Cow. 401; McLellan v. Crofton, 6 Greenl. 307, 334; Farmers' Bank v. Leonard, 4 Harr. (Del.) 536. *Contra*, Dedlake v. Robb, 1 Woods, 680.

[10] 2 Whart. Ev. § 1360. Whether the presumption could always be rebutted by evidence of non-payment, see Giles v. Baremore, 5 Johns. Ch. 545; Fox v. Phelps, 20 Wend. 437, affi'g 17 Id. 393.

[11] Boardman v. De Forrest, 5 Conn. 1; Miller v. Smith, 16 Wend. 425, rev'g 14 Id. 188. And a justice's judgment, before the short limitation of the present statute. Fairbanks v. Wood, 17 Wend. 329; Johnson v. Burrell, 2 Hill, 238.

[12] For instance, a bond. Higginson v. Mein, 4 Cranch, 415. But not administration bonds. 2 Whart. Ev. § 1360. A mortgage. Jackson v. Pierce, 10 Johns. 414. A sealed award. Smith v. Lockwood, 7 Wend. 241. Rent accrued on a covenant, but not the covenant itself. Central Bank v. Heydon, 48 N. Y. 260.

[13] Mayor, &c. of N. Y. v. Colgate, 12 N. Y. 140.

[14] Lyon v. Adde, 63 Barb. 89; Central Bank v. Heydon, 48 N. Y. 260.

prima facie extinguishment of the debt;[1] not however available to support an allegation of payment as a ground of affirmative relief.[2]

The statute[3] declaring that the presumption arises from the lapse of twenty years, by implication forbids a presumption of payment from mere lapse of time, short of twenty years.[4] But it may be presumed from other circumstances in connexion with the lapse of less time.[5] The statute presumption is not that payment was made at the expiration of the limit, but at some prior indefinite time, or when the obligation became due.[6]

The common law presumption may be *repelled*, not only by evidence of acknowledgment or part payment, but by other circumstances—for instance, proceedings of enforcement, such as a statute foreclosure of a mortgage;[7] or, in case of a judgment,[8] return of an execution unsatisfied within the twenty years; or by evidence of the debtor's insolvency,[9] for which purpose other judgments, recovered by third persons, within the limit, and remaining unsatisfied, may be put in evidence.[10] And in aid of evidence of insolvency, evidence of absence,[11] or distant residence,[12] is competent. The statute, on the other hand, excludes every species of evidence to rebut the presumption, except that of part payment or a written acknowledgment.[13] Proof of actual non-payment is not available.[14]

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[1] Reed v. Reed, 46 Penn. St. 239. The fact that a note is statute barred, is not conclusive evidence that it has been paid. Pratt v. Huggins, 29 Barb. 277.

[2] Lawrence v. Ball, 14 N. Y. 477; Brady v. Begun, 36 Barb. 533.

[3] For the successive N. Y. statutes which leave the rule a very complex one, compare 2 R. S. 301 (3 Id. 6th ed. 570), §§ 46–48; Code Pro. § 90 (3 R. S. 6th ed. 477); Code Civ. Pro. §§ 376 (as am'd 1877), 381, 395. But by N. Y. Code Civ. Pro. the presumption avails under an allegation that the action was not commenced, or the proceeding not taken, within the time limited by the statute (§ 378).

[4] Ingraham v. Baldwin, 9 N. Y. 45; and see Daby v. Ericsson, 45 N. Y. 786.

[5] Flagg v. Ruden, 1 Bradf. 192; Bander v. Snyder, 5 Barb. 63.

[6] Martin v. Gage, 9 N. Y. 398.

[7] Jackson v. Slater, 5 Wend. 295; and see Levers v. Van Buskirk, 7 Watts & S. 70.

[8] Henderson v. Cairns, 14 Barb. 15; compare Code Civ. Pro. § 377.

[9] Waddell v. Elmendorf, 10 N. Y. 170, affi'g 12 Barb. 585; Farmers' Bank v. Leonard, 4 Harr. (Del.) 536.

[10] Waddell v. Elmendorf (above). And even judgments which have been satisfied may be competent for the consideration of the jury. Levers v. Van Buskirk, 4 Penn. St. 309, 314.

[11] Boardman v. De Forrest, 5 Conn. 1.

[12] M'Kender v. Littlejohn, 4 Ired. N. C. L. 198. Whether absence and insolvency are alone sufficient to rebut the presumption, compare Kline v. Kline, 20 Penn. St. 503, 508; Roberts v. Judd, 5 Vt. 236; and McLellen v. Crofton, 6 Greenl. 307, 334.

[13] Morey v. Farmers' Loan & Trust Co. 14 N. Y. 302; Malloy v. Vanderbilt, 4 Abb. New Cas. 127, 132.

[14] Fisher v. The Mayor, &c. 67 N. Y. 73, 80, reversing 6 Hun, 64; 3 Id. 648.

II. Accord and satisfaction.

26. *Mode of proof, and effect.*]—This defense ought to be pleaded; but may be inserted by amendment, at the trial.[1] Under this answer, evidence of payment may avail if plaintiff is not misled.[2] The burden is on the defendant to show that the accord and satisfaction was accepted by the plaintiff. An accord, executory, with tender of performance, is not a bar.[3] Tender is not enough, even as to costs.[4]

In respect to a liquidated and undisputed debt, payment of part in full is not enough,[5] even if the less sum came from a third person;[6] but evidence that it was loaned by him in good faith for the purpose of obtaining the satisfaction agreed on is enough to establish satisfaction.[7] The payment of a less sum if accompanied with anything given by the debtor to the creditor which the law can consider a benefit—such as a release of cross demands—and accepted as a satisfaction of the whole, is a good accord and satisfaction.[8]

In respect to a debt uncertain in amount,[9] or the existence of which is disputed,[10] a less sum accepted in full constitutes an accord and satisfaction.

Acceptance in satisfaction having been shown, the relative value of the thing accepted and the debt is immaterial.[11] Upon showing that the creditor received an obligation of a third person, to be satisfaction if paid at maturity, the burden is on defendant to show that it was so paid.[12]

A substituted executory agreement is not an accord and satisfaction unless it gives a cause of action.[13]

The plaintiff cannot rebut the evidence of an accord and satisfaction by showing a new promise,[14] or that the security he accepted was void for his own usury.[15]

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[1] Brett v. First Univ. Soc. 63 Barb. 610, 613.

[2] Prouty v. Eaton, 41 Barb. 409. It is not the appropriate allegation to admit evidence of compromise. Williams v. Irving, 47 How. Pr. 440, 442.

[3] 1 Abb. N. Y. Dig. 15; Kromer v. Heim, 44 Super. Ct. (J. & S.) 237, 246.

[4] Noe v. Christie, 51 N. Y. 270, 273.

[5] Ryan v. Ward, 48 N. Y. 204.

[6] Bunge v. Koop, 48 N. Y. 225.

[7] Grocers' Bank v. Fitch, 1 Supm. Ct. (T. & C.) 651, affi'd in 58 N. Y. 623.

[8] Pardee v. Wood, 8 Hun, 584.

[9] Brett v. First Univ. Soc. of Brooklyn, 63 Barb. 610, 617.

[10] Howard v. Norton, 65 Barb. 161. As to "jump settlements," see Calkins v. Griswold, 11 Hun, 208; Hamilton, &c. Co. v. Goodrich, 6 Allen, 191, 199.

[11] Grocers' Bank of N. Y. v. Fitch, 1 Supm. Ct. (T. & C.) 651, affi'd on Genl. Term opinion, 58 N. Y. 623.

[12] Dolsen v. Arnold, 10 How. Pr. 528.

[13] Kromer v. Heim, 44 Super. Ct. (J. & S.) 237, 246; Billings v. Vanderbeck, 23 Barb. 546.

[14] Stafford v. Bacon, 1 Hill, 532.

[15] La Farge v. Herter, 9 N. Y. 241, affi'g 11 Barb. 159; 4 Id. 346.

III. Account stated.

27. *Mode of proof, and effect.*]—This defense ought to be pleaded.[1] The statement may be proved by evidence of the reading over of the items (even though they were all on one side), and agreeing upon the balance or amount due.[2] An account stated is presumed to include all previous transactions[3] prior to the day on which it was had, including previous accounts stated.[4]

Where a statement of account is alleged by defendant as a defense, not as a counterclaim, the new procedure does not require plaintiff to controvert it in pleading, unless a reply be ordered by the court.[5]

The statement of the account having been proved, between parties who stood on equal terms, the burden is on plaintiff to show the fraud, concealment or mistake on which he relies as ground for opening it.[6] It is a general rule, applicable with due regard to the circumstances of each case, that where the accounts have been shown to be erroneous to a considerable extent, both in amount and in the number of the items, or where fiduciary relations exist, and a less considerable number of errors are shown, or where fiduciary relations exist and one or more fraudulent omissions or insertions in the account are shown, the court opens the account, and does not merely surcharge and falsify.[7]

An account expressly stated by both parties, being shown, and unimpeached, plaintiff cannot recover on the original cause of action;[8] but if there is a failure to prove the stating of the account, defendant may fall back on the accounts and prove that there is, in fact, a balance due him, unless his pleading is so framed as to show that he relies solely on the account stated.[9]

IV. Compromise and composition.

28. *Mode of proof, and effect.*]—It is enough to prove that a substantial controversy upon a claim made or resisted, in good faith, by the defendant, and a compromise made by him on the

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[1] Kock v. Bonitz, 4 Daly, 117, 120.

[2] Id. Or in other modes stated at p. 459 of this vol. An account is not usually conclusive on the party by whom it is rendered. Schettler v. Smith, 34 Super. Ct. (J. & S.) 17.

[3] Dutcher v. Porter, 63 Barb. 15.

[4] Dorsey v. Kollock, 1 N. J. L. 35.

[5] Welsh v. German American Bank, 42 Super. Ct. (J. & S.) 462, affi'd in 73 N. Y. 424; Code Civ. Pro. §§ 514, 516. In an action to recover a single item alleged to have been fraudulently omitted, a reopening of the account generally would be a departure from the pleadings. McMichael v. Kilmer, 76 N. Y. 36, rev'g 12 Hun, 336.

[6] Brown v. Van Dyke, 8 N. J. Eq. (4 Halst.) 795, 803.

[7] Williamson v. Barbour, L. R. 9 Ch. Div. 529, s. c. 37 L. T. R. N. S. 698, 699.

[8] Milward v. Ingram, 2 Mod. 43.

[9] Goings v. Patten, 1 Daly, 168, s. c. 17 Abb. Pr. 339.

settlement of it.[1] In the absence of evidence of fraud, misrepresentation or undue advantage taken, the non-beneficial character of the compromise is not relevant.[2] A compromise having been shown, mistake of law is immaterial unless caused by the advice of the other party.[3] Evidence of fraud or oppression may be met by showing ratification after knowledge of it.[4]

A *composition* with creditors, including plaintiff, must be alleged (under the new procedure), in order to be admissible as a bar.[5] The facts necessary to make it binding should be proved,[6] including delivery of the new notes or other securities, or at least, tender of them, made and kept good (and in that case the securities must be brought into court for delivery), unless there is evidence that plaintiff waived or dispensed with tender. To avoid the composition the debtor's fraud on the creditor by giving others a secret advantage may be proved.[7]

V. Tender.

29. *Necessity, and mode of proof.*]—Tender cannot be proved, where keeping the tender good and paying into court are necessary, unless those acts are also alleged.[8] Where the party making tender omits to produce the money in consequence of the other party's refusal to act, it is not enough to prove his declaration that he had the money ready, but he must at least give sufficient evidence that at the time of demand of performance he had such means of procuring the money as to entitle him to go to the jury on the question of his being then able to make the payment.[9] A tender of the check of the party for money, if not objected to, is sufficient.[10] In case of the tender of a written instrument, an absolute refusal to accept any such instrument excuses the omission actually to execute it before tender.[11] Where goods to be tendered are ponderous and bulky, it is enough if they are placed in the power of the party to whom they are tendered.[12] If warehouse receipts are tendered, with an

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[1] See 3 Abb. N. Y. Dig. new ed. 83, 178; Dixon v. Evans, L. R. 5 H. L. 606.
[2] Id.
[3] Taplin v. Wilson, 4 Hun, 244.
[4] Stebbins v. Niles, 25 Miss. 267; Adams v. Sage, 28 N. Y. 103.
[5] Smith v. Owens, 21 Cal. 11.
[6] Warburg v. Wilcox, 7 Abb. Pr. 336, and cas. cit.; Bump on Composition, 72.
[7] Beach v. Ollendorf, 1 Hilt. 41.
[8] Becker v. Boon, 61 N. Y. 317 (Dwight C. dissented); Kortright v. Cady, 5 Abb. Pr. 358, s. c. less fully, 23 Barb. 490; but see reversal, 21 N. Y. 343.
[9] Goodrich v. Sweeny, 36 Super. Ct. (J. & S.) 320, 325.
[10] Mitchell v. Vermont Copper Mining Co. 67 N. Y. 280, affi'g 40 Super. Ct. (J. & S.) 406; 47 How. Pr. 218.
[11] Blewett v. Baker, 58 N. Y. 611, affi'g 37 N. Y. Super. Ct. (J. & S.) 23; and see Rinaldo v. Housmann, 1 Abb. New Cas. 312.
[12] Hayden v. Demets, 53 N. Y. 426, affi'g 34 Super Ct. (J. & S.) 344. A seller's tender of goods, to which he has not good title, is not enough. Croninger v. Crocker, 62 N. Y. 151, 157.

order for payment of the charges and delivery of the goods themselves if required, a refusal on account of inability to pay, with no objection as to the sufficiency of the tender, is a waiver of any objection to it.[1] But a tender of bulky articles must be seasonably made, to give opportunity for examination before the close of the day.[2] An anticipatory declaration of refusal to perform, without withdrawing the declaration before the time of performance arrives, excuses the party to whom it is made from performing or offering to perform.[3] Where the party's absence from the State, or being beyond reach, or intentional evasion, is relied on, evidence that he was temporarily absent from his residence is not sufficient.[4]

The authority of the person making the tender may be inferred from slight evidence.[5]

VI. Release.

30. *Mode of proof, and effect.*]—A release under seal is conclusive evidence of its own consideration. To make it admissible in evidence with this effect, it should be pleaded.[6] An allegation of a release will admit evidence of an unsealed instrument purporting to release, together with acts creating an equitable estoppel to the same ffeect.[7] A release given by one of two joint creditors may be proved in the same cases as where his admissions and declarations might be.[8] A release by one of two co-trustees may be aided by evidence of conduct of the other implying recognition and ratification.[9] Delivery may be presumed of a partial release, indorsed on the original obligation continuing in the possession of the obligee.[10] A trustee who sets up a release from a *cestui que trust*, must either show actual and adequate consideration, or that it was based upon a settlement at arms length, or that he gave the *cestui que trust* full information and a fair statement of the trust.[11]

An unqualified sealed release of one of several joint wrongdoers,[12] or joint, or joint and several debtors,[13] at common law re-

[1] Hayden v. Demets, 53 N. Y. 426, affi'g 34 Super. Ct. (J & S.) 344.
[2] Croninger v. Crocker, 62 N. Y. 151, 158.
[3] Shaw v. Republic Life Ins. Co. 69 N. Y. 286, modifying 67 Barb. 586. Where the party absolutely refuses to perform, the law does not require the useless act of a tender of performance as a condition precedent. Pettitt v. Turner, 2 Supm. Ct. (T. & C.) 608.
[4] Hoag v. Parr, 13 Hun, 95.
[5] Tacey v. Irwin, 18 Wall. 549, 551.
[6] Rosc. N. P. 663; Hitchcock v. Carpenter, 9 Johns. 344.
[7] Cornell v. Masten, 35 Barb. 157.
[8] Page 188 of this vol.
[9] Van Rensselaer v. Akin, 22 Wend. 549.
[10] Fitch v. Forman, 14 Johns. 172.
[11] Bolton v. Gardner, 3 Paige, 273. Compare p. 735 of this vol.
[12] Gunther v. Lee, 45 Md. 60.
[13] Nicholson v. Revill, 4 Ad. & E. 675.

leases all; but an unsealed release does not.[1] By the statute, a note or memorandum in writing given by a creditor to a partner after dissolution,[2] or to one of several joint debtors,[3] may be given in evidence in bar of the creditor's action against the releasee, but without prejudice to his right to recover against the other debtors, and to their right of set-off.[4] A release of one of several joint debtors, if not produced, will not be presumed to have been absolute, without proof.[5]

31. *Oral evidence.*]—Oral evidence is competent for the purpose of showing the obligations to which it applies;[6] but not to contradict its terms by excluding one to which they apparently apply.[7] An unsealed release may be supported by evidence that it was given on a sufficient consideration; and this may be shown by parol, though the writing be silent[8] or express a nominal or different consideration.[9] Parol evidence that plaintiff signed on conditions not expressed, is not competent for the purpose of exonerating him from its effect.[10]

32. *Impeaching.*]—A sealed release[11] cannot be impeached for want of consideration.[12] The burden of proving fraud or mistake is on plaintiff if he rely on it to avoid his release.[13] A promise to pay the debt, in consideration of the release, cannot be proved.[14]

VII. Suretyship and modification of contract.

33. *Defendant a surety.*]—Under the new procedure (as formerly in equity, and in some courts of law), oral evidence that defendant was a surety is admissible, in an action between the obligors in a written instrument, and equally against other parties

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[1] Irvine v. Millbank, 15 Abb. Pr. N. S. 378, affi'g 14 Id. 408, s. c. 36 Super. Ct. (J. & S.) 264; Morgan v. Smith, 70 N. Y. 537, 543.

[2] L. 1838, p. 242, c. 257, § 2, as am'd by L. 1845, p. 410, c. 348 (same stat. 2 R. S. 6 ed. 1157, § 27).

[3] Id. § 5.

[4] Id. §§ 2, 3.

[5] Boland v. Crosby, 49 N. Y. 183. The burden seems to be put by the statute on the debtors, to show that the release was intended to discharge all. § 3, last clause.

[6] Rowe v. Thompson, 15 Abb. Pr. 377; Strong v. Dean, 55 Barb. 337; Howlett v. Howlett, 56 Barb. 467.

[7] For instance, to show that a release of "all demands" was not intended to release a particular debt. Pierson v. Hooker, 3 Johns. 68.

[8] Frink v. Green, 5 Barb. 455.

[9] See pp. 738, 741 of this vol.

[10] Van Bokkelen v. Taylor, 62 N. Y. 105, rev'g 2 Hun, 138, s. c. 4 Supm. Ct. (T. & C.) 422; Acker v. Phœnix, 4 Paige, 305; and see p. 507 of this vol.

[11] As distinguished from a composition deed. Russell v. Rogers, 15 Wend. 351.

[12] Gray v. Barton, 55 N. Y. 68; Torry v. Black, 58 Id. 185.

[13] Crossley v. The St. Louis, 4 Ben. 510; Schmidt v. Herforth, 5 Robt. 124.

[14] Stearnes v. Tappin, 5 Duer, 294. As to new promise compare p. 821 of this vol., and Stearns v. Tappin (above).

to or holders of it, if they dealt with it with actual notice of the fact of suretyship.[1] Actual notice to the creditor, of the fact of suretyship, at or before the time of the act complained of, must be shown; but for this purpose it is enough if the fact appear on the face of the security.[2]

34. *Modification.*]—An extension or modification of the contract may be proved by evidence which would be competent in favor of the principal.

VIII. Discharge.

35. *In bankruptcy.*]—A discharge, even though granted pending the action,[3] is not admissible in evidence unless pleaded.[4] In case of a discharge under the Bankrupt Act of 1867, or the United States Revised Statutes, a general allegation that on a day named it was duly granted to the bankrupt (setting forth a copy) is enough to admit the evidence.[5] Defendant has the burden of proving his discharge.[6] The certificate is admissible without the record of proceedings;[7] and is conclusive evidence of the fact and regularity of the discharge.[8]

Plaintiff has the burden of proving that his demand is one of a class excepted by the statute from the operation of the discharge, for example, that it is for money received in a fiduciary capacity.[9]

In case of a *foreign* bankruptcy, the burden is on defendant to show affirmatively that the contract or the parties to it were

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[1] Hubbard v. Gurney, 64 N. Y. 457; and cas. cit. in 11 Moak's Eng. R. 41, n. 183; 17 Id. 183; Artcher v. Douglass, 5 Den. 509; Garrett v. Ferguson, 9 Mo. 125; s. p. 1 Greenl. Ev. § 281, n. 2, and cas. cit.; Horne v. Bodwell, 5 Gray, 457.

[2] Gahn v. Niemcewicz, 11 Wend. 312, affi'g 3 Paige, 614.

[3] Rudge v. Rundle, 1 Supm. Ct. (T. & C.) 649; Bump on Bkcy. (7 ed.) 748.

[4] Horner v. Spelman, 78 Ill. 206; Bump on Bkcy. 748.

[5] U. S. R. S. § 5119; Hays v. Ford, 55 Ind. 52; N. Y. Code Civ. Pro. § 532.

[6] Cooper v. Cooper, 9 N. J. Eq. (1 Stockt.) 566, 569.

[7] Morse v. Cloyes, 11 Barb. 100, 104, rev'd on other grounds in Seld. Notes, No. 5, p. 12; Bump on Bkcy. 752.

[8] U. S. R. S. § 5120; Dusenbury v. Hoyt, 14 Abb. Pr. N. S. 132, s. c. 36 N. Y. Super. Ct. (J. & S.) 98, rev'd on another ground in 53 N. Y. 521; Stern v. Nussbaum, 5 Daly, 382, s. c. 47 How. Pr. 489. The presumption that the necessary final oath was taken is not overcome by the mere fact that it is not found on file. Young v. Ridenbaugh, 3 Dill. C. Ct. 239. The rules of pleading and evidence as to discharges under prior acts are more strict. See Morse v. Cloyes, 11 Barb. 100, rev'd on other grounds in Seld. Notes, No. 5, p. 12; and cases cited in Bump on Bkcy. 749; and cases below cited; Schermerhorn v. Talman, 14 N. Y. 93; Sherwood v. Mitchell, 4 Den. 435.

But even in respect to those discharges, there is a legal presumption in favor of the regularity of the proceedings. McCormick v. Pickering, 4 N. Y. 276.

[9] Sherwood v. Mitchell, 4 Den. 435; Harrison v. Lourie, 49 How. Pr. 124, 127. *Contra*, Clement v. Hayden, 4 Penn. St. 138.

such that the foreign law could discharge the liability,[1] and that the requirements of the law were complied with.[2]

36. — *impeaching.*]—Unless a reply was required, the facts relied on to avoid a discharge may be proved in rebuttal, though not alleged.[3]

A discharge of the United States, under the act of 1867 or the Revised Statutes, cannot be impeached in a State court for any cause which would have prevented the granting of the discharge under the bankrupt act, or which would have been sufficient ground for annulling the discharge in the United States court under the act,[4] nor even on the ground that it was fraudulently obtained.[5] It is impeachable for entire want of jurisdiction.

37. *Insolvency.*]—The discharge, even though granted pending the action, is not admissible unless pleaded.[6] A general allegation that it was duly given or made will admit it;[7] but if the allegation is put in issue, defendant must show jurisdiction.[8] The certificate of discharge, if it recite the jurisdictional facts, is admissible in evidence without the record of the proceedings;[9] and is *prima facie* sufficient[10] (though not conclusive[11]) evidence of jurisdictional facts. Its recitals are conclusive evidence of the existence and regularity of the non-jurisdictional matters recited.[12] Extrinsic evidence of regularity is competent.[13] Defendant is bound to show that the contract or parties to it were such that the State discharge could be operative upon it;[14] but it is for plaintiff to show that his debt was not provable.

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[1] Green v. Sarmiento, 3 Wash. C. Ct. 17, s. c. Pet. C. Ct. 74; and see Munroe v. Guillesaume, 3 Abb. Ct. App. Dec. 334.

[2] Fielmann v. Brunner, 2 Hun, 354, s. c. 4 Supm. Ct. (T. & C.) 556.

[3] Ruckman v. Cowell, 1 N. Y. 505, s. c. 7 N. Y. Leg. Obs. 7.

[4] Corey v. Ripley, 57 Maine, 69, s. c. 2 Am. R. 19.

[5] Ocean National Bank v. Olcott, 46 N. Y. 12; Poillon v. Lawrence, 43 Super. Ct. (J. & S.) 385. *Contra*, Batchelder v. Low, 43 Vt. 662, s. c. 5 Am. R. 311. Compare Payne v. Able, 7 Bush, 344, s. c. 3 Am. R. 316; Hennessee v. Mills, 57 Tenn. 38.

[6] Cornell v. Dakin, 38 N. Y. 253; Spencer v. Beebe, 17 Wend. 557.

[7] N. Y. Code Civ. Pro. § 532.

[8] Id.

[9] O'Connell v. Sutherland, 16 Abb. Pr. 460, note.

[10] Barber v. Winslow, 12 Wend. 103, and cas. cit.; Jay v. Slack, 4 N. J. L. (1 South.) 77.

[11] Morrow v. Freeman, 61 N. Y. 515.

[12] Stanton v. Ellis, 12 N. Y. 575. Or at least *prima facie*. Blanchard v. Young, 11 Cush. 341. As to effect if omission to file papers under the two-thirds act see Barnes v. Gill, 13 Abb. Pr. N. S. 169.

[13] Bullymore v. Cooper, 46 N. Y. 236, affi'g 2 Lans. 71. What presumptions arise from defects in the record, see Soule v. Chase, 1 Robt. 222, s. c. 1 Abb. Pr. N. S. 48, rev'd, on another point, in 39 N. Y. 342; People *ex rel.* Pacific Mutual Ins. Co. v. Machado, 16 Abb. Pr. 460; Salters v. Tobias, 3 Paige, 338; Ayres v. Scribner, 17 Wend. 407.

[14] Smith v. Bennett, 17 Wend. 479; s. p. Green v. Sarmiento, 3 Wash. C. Ct. 17, s. c. Pet. C. Ct. 74. For the mode of proving domicil and citizenship, see Chapter V. For the effect of a State insolvent discharge, in respect to citizens affected, see Baldwin v. Hale, 1 Wall. 223, and cases there cited; Matter of Coates, 3 Abb. Ct. App. Dec. 231.

38. *New promise.*]—Plaintiff may prove in rebuttal, a new promise[1] if made after discharge.[2] Acknowledgment or mere expression of intention is not enough.[3] The promise must be clear, distinct and unequivocal.[4] If conditional, the occurrence of the condition must be shown.[5]

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[1] Dusenbury v. Hoyt, 53 N. Y. 521, rev'g 36 Super. Ct. (J. & S.) 94; 14 Abb. Pr. N. S. 132.

[2] Promise before discharge is irrelevant. Reed v. Frederich, 8 Gray, 230. The date of a written promise may be supplied by oral evidence. See Lobb v. Stanley, 5 Q. B. 574.

[3] Allen & Co. v. Ferguson, 18 Wall. 1, citing Hill on Bkcy. 264–6, and cases there collected.

[4] Id.; Stern v. Nussbaum, 5 Daly, 382, s. c. 47 How. Pr. 489.

[5] Allen v. Ferguson (above); Scouton v. Eislord, 7 Johns. 36; Eklar v. Galbraith, 16 Am. L. Reg. N. S. 78.

CHAPTER LXI.

LIMITATIONS.

1. Pleading.
2. Burden of proof.
3. New promise.
4. Conditional new promise.
5. Acknowledgment.
6. Part payment.
7. Indorsement of payments.

1. *Pleading.*]—Even though plaintiff shows a case to which the statute appears to be a bar, the statute is not available to defendant unless he has pleaded the facts necessary to give it application.[1] If pleaded, the burden is on plaintiff to show any suspension of the statute on which he relies.[2]

2. *Burden of proof.*]—Under a plea of the statute, the burden is on plaintiff to show the commencement of action within the statute period.[3] Under the new procedure, service, or the time of delivery to the sheriff for the purpose of service, is usually the time.[4] At common law the date of the process is *prima facie* evidence of the time when it was sued out,[5] but does not exclude extrinsic evidence.[6] An indorsement by the deputy sheriff of its delivery at the office, is not evidence of the date of its delivery, for the statute does not require him to make such indorsement.[7] It is not necessary to show that the process was actually returned, nor (at common law[8]) even that it was actually delivered to the sheriff; but it must be proved that it was sent to him, or his deputy, with an absolute and unconditional intention to have it served.[9] Oral declarations of trust, though incompetent evidence to establish the trust, are competent to show that at the time they were made the alleged trustee

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[1] N. Y. Code Civ. Pro. § 413. The rule is satisfied by pleading the facts without mentioning the statute. Harpending v. Reformed Dutch Ch. 16 Pet. 455. This rule may be applied to special statutory limitations such as that of divorce. Kaiser v. Kaiser, 16 Hun, 602. Otherwise of delay, and staleness of claim in equity. Sullivan v. Portland, &c. R. R. Co. 94 U. S. (4 Otto), 806. Plaintiff may rely on the statute, though not pleaded, to bar any demand proved by defendant which did not call for a reply. Mann v. Palmer, 3 Abb. Ct. App. Dec. 162.

[2] Baldwin v. Martin, 14 Abb. Pr. N. S. 9, s. c. 35 Super. Ct. (J. & S.) 85, and cas. cit.; Graham v. Schmidt, 1 Sandf. 74.

[3] 2 Greenl. Ev. § 431; Taylor v. Spears, 1 Eng. (6 Ark.) 381.

[4] N. Y. Code Civ. Pro. § 399.

[5] 2 Greenl. Ev. § 431.

[6] Id.; Porter v. Kimball, 3 Lans. 330.

[7] Wardwell v. Patrick, 1 Bosw. 406. Compare N. Y. Code Civ. Pro. § 100.

[8] See N. Y. Code Civ. Pro. § 399.

[9] Burdick v. Green, 18 Johns. 14.

had not begun to claim adversely, and thus show that the statute had not then attached.[1]

The burden is on plaintiff to show the existence of facts which he relies on to create an exception from the general rule of the statute.[2] Where it is incumbent on plaintiff to prove that he was under a disability, he must show that it was a continuing disability from the first.[3] Where fraud is available to suspend the running of the statute the presumption is, that if the party affected might with ordinary care and attention have seasonably detected it, he seasonably had actual knowledge of it.[4] The burden is on the debtor, whose absence has been shown and who relies on his return to the State, to prove the facts requisite to render his return effectual as the origin of the statute bar.[5]

3. *New promise.*]—A new promise is admissible in rebuttal though not alleged.[6] Otherwise of a promise varying the contract.[7] The evidence must show an express promise to pay, absolute or conditional, or an acknowledgment of the debt as subsisting, made under such circumstances that such a promise may be implied.[8] The promise must be made to the creditor, or some one acting for him, or if made to a third person must be calculated and intended to influence the action of the creditor.[9] Under the present statute an acknowledgment or new promise, relied on to take the case out of the limitation, must be in writing, signed by the party sought to be charged.[10] This statute

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[1] Barker v. White, 58 N. Y. 204.

[2] Ford v. Babcock, 7 N. Y. Leg. Obs. 270, s. c. 2 Sandf. 518; Somerville v. Hamilton, 4 Wheat. 230, 234.

[3] Ang. on Lim. 204, § 196.

[4] Ang. on Lim. 193, § 187.

[5] Cole v. Jessup, 2 Barb. 309, 314; Ford v. Babcock, 7 N. Y. Leg. Obs. 270, 280, s. c. 2 Sandf. 518. If the contract was made without the State the burden is on defendant to show residence within it for the statute period. Mayer v. Friedman, 7 Hun, 218, affi'd 69 N. Y. 608.

[6] Esseltyn v. Weeks, 12 N. Y. 635, s. c. 2 Abb. Pr. 272; Dusenbury v. Hoyt, 53 Id. 521; Yaw v. Kerr, 47 Penn. St. 333.

[7] Lonsdale v. Brown, 3 Wash. 404.

[8] Wakeman v. Sherman, 9 N. Y. 85; Meyerhoff v. Froelich, 27 Weekly R. 258. If there was more than one debt, a general acknowledgment of indebtedness is not sufficient alone as evidence of a new promise to pay either one. Stafford v. Bryan, 3 Wend. 532, 536; and see 1 Pet. 351.

[9] Wakeman v. Sherman (above); Sibert v. Wilder, 16 Kan. 176, s. c. 22 Am. R. 280.

[10] N. Y. Code Civ. Pro. § 395; Esselstyn v. Weeks, 2 Abb. Pr. 272, s. c. 12 N. Y. 635; and see Adger v. Alston, 15 Wall. 555, 561. And an account stated, not signed, cannot be regarded as a new contract to sustain an action when action on the original indebtedness is barred by the statute. Chace v. Trafford, 116 Mass. 529, s. c. 17 Am. R. 171. The debtor's specifying the demand in an assignment for benefit of creditors, may be enough as a new promise (Pickett v. King, 34 Barb. 193), but a part payment by his assignee does not revive the debt again as of the date of the payment. Roosevelt v. Mark, 6 Johns. Ch. 266. As to promises of joint debtors, partners after dissolution, &c., see p. 184 of this vol. and Beardsley v. Hall, 36 Conn. 270, s. c. 4 Am. R. 74. In those jurisdictions where the statute does not require a new promise to be in writing, *the statute of frauds* does not require it, if the original contract was in writing. Brandt on Suretyship & G. 85, § 65.

does not alter the requisite acknowledgment or new promise, but only requires it to be in writing, signed;[1] and the date of the writing may be shown by oral evidence,[2] even for the purpose of correcting an erroneous date.[3] And oral evidence is competent to connect the new promise with the original debt.[4]

4. *Conditional new promise.*]—If the new promise was conditional, plaintiff must at least give evidence from which the jury may infer fulfillment of the condition, as expressed.[5] If the promise was to pay in specific articles, plaintiff must show that he was ready and offered to accept them. Promise to pay when able, is insufficient without evidence of the ability to pay.[6] Direct evidence of ability is not necessary; it may be inferred from circumstances.[7] To show continuing inability, defendant may prove his indebtedness to third persons without producing or accounting for written securities.[8]

5. *Acknowledgment.*]—Evidence of an acknowledgment is not enough unless it suffices to sustain an inference of promise;[9] but an acknowledgment without words importing intent to pay may suffice.[10] The production of the instrument sued on, with an indorsement in the handwriting of the debtor, of his name and the date of the indorsement, is a sufficient acknowledgment in a writing signed by the party chargeable, within the meaning of the statute.[11]

6. *Part payment.*]—The statute requiring a new promise to be in writing does not prescribe any new rule of evidence as to the fact or effect of payment; and part payment may be proved by oral admissions of the debtor.[12] Where a part payment relied on was made by an agent, the evidence must sustain an inference that the agent had authority to make a new promise, or to perform for the party the very act which is relied on as evidence of a new promise.[13] The authority of the agent may be proved by parol.[14] If defendant or his authorized agent made the payment, it is immaterial whose money was used.[15]

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[1] Kincaid v. Archibald, 73 N. Y. 189, 192, affi'g 10 Hun, 9.
[2] Edmonds v. Downs, 2 C. & M. 459.
[3] Kincaid v. Archibald, 73 N. Y. 189, 193, and cases cited.
[4] Ilsley v. Jewett, 2 Metc. 168, 173.
[5] Cartledge v. West, 2 Den. 377; Wakeman v. Sherman, 9 N. Y. 85; Bush v. Barnard, 8 Johns. 407.
[6] Id.; Tompkins v. Brown, 1 Den. 247; Chandler v. Glover, 32 Penn. St. 509.
[7] Thus the fact that he was in business and kept open store is enough to go to the jury. Lonsdale v. Brown, 4 Wash. C. Ct. 86. The mere fact of his having a sign of business over his door is not enough. Everson v. Carpenter, 17 Wend. 419, 422.
[8] Duffie v. Phillips, 31 Ala. 571.
[9] Van Keuren v. Parmelee, 2 N. Y. 523.
[10] Cowan v. Magauran, Wall., Jr. 66, and cas. cit.
[11] Bourdin v. Greenwood, L. R. 13 Eq. Cas. 281, s. c. 1 Moak's Eng. 677.
[12] First National Bank of Utica v. Ballou, 49 N. Y. 155; 2 Lans. 120.
[13] Smith v. Ryan, 66 N. Y. 352, 356, affi'g 39 Super. Ct. (J. & S.) 489.
[14] First Nat. Bank of Utica v. Ballou, 49 N. Y. 155.
[15] Id.

The part payment must be an actual transfer of something of value, not a mere indorsement or deduction;[1] and it must be shown to have been made under circumstances which will warrant a finding, as a question of fact, that the debtor intended to recognize the debt as subsisting, and that he was willing to pay it;[2] but its effect is not impaired by evidence that he supposed the part payment would extinguish the whole.[3]

Evidence of mere payment of money is not enough without something to connect it with the debt in suit.[4]

The effect of a part payment, as against the statute, may be repelled by evidence that the debtor, at the time of making it, expressly disputed the balance or the item now contested.[5]

7. *Indorsement of payment.*]—An indorsement on the instrument sued on, acknowledging a part payment, and dated, is competent, and sufficient to go to the jury, if in the handwriting of the defendant; or, when in the handwriting of the creditor who is shown to have since deceased,[6] if there is extrinsic evidence of the date.[7] In other cases an indorsement on the security, made by the creditor without the privity of the debtor, is not evidence of the payment for this purpose, unless it appear that it was made at a time when its operation would be against the interest of the person making it. With such evidence it is sufficient to go to the jury.[8]

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[1] Blanchard v. Blanchard, 122 Mass. 558, s. c. 23 Am. R. 397.

[2] Pickett v. King, 34 Barb. 193. Hence compulsory payment is not enough. Morgan v. Rowlands, L. R. 7 Q. B. 493, s. c. 2 Moak's Eng. 611, and cas. cit. In application of the same principle, the delivery of a bill or note of a third person as collateral security or as provisional or conditional part payment, is competent evidence within the rule allowing evidence of payment, and whether the security resulted in part payment or not is immaterial. Smith v. Ryan, 66 N. Y. 352, 355, aff'g 39 Super. Ct. (J. & S.) 489. But on the other hand, a part payment derived from a collateral security, without the assent of the debtor to it as a payment; is not alone sufficient as a new promise. Harper v. Fairley, 53 N. Y. 442.

[3] Carrington v. Crocker, 37 N. Y. 336, s. c. 4 Abb. Pr. N. S. 335.

[4] Livermore v. Rand, 26 N. H. (6 Fost.) 85.

[5] Peck v. N. Y. and Liverpool S. S. Co. 5 Bosw. 226, 237.

[6] Risley v. Wightman, 13 Hun, 163, 165; 1 Greenl. Ev. 13th ed. 155.

[7] Whether this is necessary compare Risley v. Wightman (above); Knight v. Clements (above); 1 Greenl. Ev. 154, §§ 121, 122; Miller v. Dawson, 26 Iowa, 186.

[8] Roseboom v. Billington, 17 Johns. 182.

CHAPTER LXII.

FORMER ADJUDICATION.

1. General Rules.
2. Former recovery as merging the cause of action.
3. Splitting cause of action.
4. Former adjudication as an estoppel.
5. What questions are concluded.
6. Construction of instrument.
7. Courts and tribunals.
8. Exclusive jurisdiction.
9. Parties.
10. Joint defendants.
11. Form of the adjudication.
12. Record to be produced.
13. What questions were determined by it.
14. Oral evidence to explain record.
15. Set-off.
16. *Rebuttal:* Want of Jurisdiction.
17. — fraud.
18. — appeal; reversal.
19. — new title.

1. *General Rules.*]—The general rules are: 1. The judgment of a court of concurrent jurisdiction directly upon the point is, as a plea, a bar, or, as evidence, conclusive between the same parties, on the same matter directly in question in another court; 2. The judgment of a court of exclusive jurisdiction directly upon the point is, in like manner, conclusive upon the same matter between the same parties, coming incidentally in question in another court for another purpose; 3. But neither the judgment of a concurrent or exclusive jurisdiction is evidence of any matter incidentally cognizable, nor of any matter to be inferred by argument from the judgment.[1]

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[1] Duchess of Kingston's Case, 20 How. St. Tr. 538, s. c. 2 Smith's L. Cas. 609; Caujolle v. Ferrie, 13 Wall. 465, 469. The conclusive effect is lost if opportunity to plead has been had and neglected. Page 828, n. 1. The reader will be assisted in harmonizing the otherwise irreconcilable conflict which apparently exists, even among well considered decisions, if he bears in mind the distinctions between the following important classes of cases, which are all comprehended under the general designation of "former adjudication." 1. Where, to prevent plaintiff from maintaining any action, defendant insists that he has already had his action on the same cause and it has been determined against him. Here the judgment is a bar. 2. Where defendant adduces a judgment between himself and plaintiff, as evidence of the truth of defendant's allegation of fact or denial. Here if the action was for the same cause, the judgment is conclusive on every question that might have been litigated; if on another claim or demand, it is conclusive as to those questions which actually were litigated and determined. 3. Where he adduces it as determining the construction of a contract between them, or of a statute on which their controversy turns. 4. Where, to prevent plaintiff from maintaining any action, defendant insists that he has already had his action and recovered judgment on facts now alleged. Here, although the judgment may be evidence of the truth of the allegations of the complaint, it merges the cause of action, and though the allegations be true the court will not give plaintiff a second judgment. See, for the limits of this rule, 4 Abb. N. Y. Dig. new ed. 86; 3 Id. 452–74; 1 Id. 268. 5. Where he alleges that plaintiff has sued for and recovered a part of an entire claim which cannot be split. Here the court, upon the same principle, will not entertain a second action, although it be clear that something remained due and unrecovered, which ought to have been recovered in the first action.

2. *Former recovery as merging the cause of action.*]—A former recovery in favor of plaintiff, relied on, not as furnishing evidence in support of defendant's present allegations, but as merging the cause of action and constituting a bar to a new action, is not admissible if not pleaded.[1]

3. *Splitting cause of action.*]—A judgment in a former action brought only for a part of the same cause of action, is admissible (if pleaded) to bar recovery for the residue; and all the items of a running account constitute a single cause of action within this rule,[2] and so do all sums due on a single covenant, at the time of commencement of action.[3]

4. *Former adjudication as an estoppel.*]—Where a former adjudication is pleaded as an estoppel, it is a conclusive bar. Where

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See 1 Id. 627; Jex v. Jacob, 7 Abb. New. Cns. 453; Perry v. Dickenson, Id. 466. 6. Where he alleges that in a former action by himself against the plaintiff, the latter ought to have set-off what he now alleges, and by failing to do so is concluded. See Blair v. Bartlett, 75 N. Y. 150.

Independent of the rules stated in the text, judicial proceedings may be given in evidence, like anything else, as circumstances from which to infer a given consequence, without that concurrence as to identity of parties and subject-matter which works a technical bar. Van Rensselaer v. Akin, 22 Wend. 549. The pleading of a party in a former proceeding, is competent against him (without reference to identity of subject or parties), if shown to have been made with his knowledge or sanction. Cook v. Barr, 44 N. Y. 156. But is not conclusive unless there is some ground for treating it as raising an estoppel. Id.

When used for other objects than as a bar or estoppel, as for instance in deraigning a title or to show a confession, or an act done, the reason of the rule restricting the evidence to a case between the same parties ceases. A mere stranger to a verdict and judgment, for instance, who claims land in virtue of a purchase upon execution, may give the record in evidence. A plea of guilty to an indictment for an assault and battery, may be received as evidence against the defendant in a civil action at the suit of the prosecutor; an answer in chancery in one suit, is admissible in another between different parties. Walsh v. Ostrander, 22 Wend. 177, COWEN, J; Barr v. Gratz, 4 Wheat. 213. And, where reputation is relevant, a judgment between different parties establishing the fact, is competent evidence of reputation. Reed v. Jackson, 1 East, 355. Where pleadings and a judgment or decree are put in evidence for such a purpose to prove a fact which appears on the face of those documents to have been in issue, the party producing them is not bound also to put in the depositions as part of his own case. Laybourn v. Crisp, 4 M. & W. 320; Rosc. N. P. 128.

[1] Norris v. Amos, 15 Ind. 365. Otherwise at common law. Mason v. Eldred, 6 Wall. 231, 234. Nor is it available when not pleaded by defendant, even if proved by plaintiff. Brazill v. Isham, 12 N. Y. 9, aff'g 1 E. D. Smith, 437. But admission without objection is not ground of reversal. N. Y. Cent. Ins. Co. v. Nat. Prot. Ins. Co. 14 N. Y. 85; Draper v. Stouvenel, 38 Id. 219, 222.

[2] Secor v. Sturgis, 16 N. Y. 548.

[3] Jex v. Jacob, 7 Abb. New Cas. 453. The true distinction seems to be that if the claims constituted a single cause of action, though arising on different transactions or periods,—as for instance, a running account, or successive instalments of rent actually accrued,—a judgment for part bars a new action for the rest; but if they are such that although they might have been joined, they must have been separately stated as separate causes of action even though they arose at the same time or on the same contract,—such as claims on distinct covenants, or claims on a principal and on a collateral security, etc.,—a judgment on one does not bar a new action on the other, unless by establishing some matter fatal to both. Compare Jex v. Jacob, 7 Abb. New Cas. 453; and Perry v. Dickenson, Id. 466, and cases cited, where conflicting cases are collected.

the party could and did not plead it, but denied the fact to conclude which it is offered, he consents to try the fact, and the adjudication is only *prima facie* evidence. Where from the form of the proceeding he could not plead it, it is admissible and conclusive.[1]

5. *What questions are concluded.*]—An adjudication when used as an estoppel in another action between the same parties upon the same claim or demand, is conclusive, not only as to every matter which was offered and received to sustain or defeat the claim or demand, but as to any other admissible matter which might have been offered for that purpose.[2] When used as an estoppel in an action on another claim or demand, it is conclusive on any material fact, common to both,[3] which was actually controverted, litigated and determined in the former action, and on those only.[4] In all cases therefore, where it is sought to apply the estoppel of a judgment rendered upon one cause of action to matters arising in a suit upon a different cause of action, the inquiry must always be as to the point or question actually litigated or determined in the original action, not what might have been thus litigated and determined.[5]

In cases of either class it is conclusive, although the facts necessary to show that the same question was determined are shown by parol,[6] under rules below stated.

One who pleads and proves a judgment as a former adjudication, in respects favorable to him, is concluded by it in respects in which it is unfavorable to him, although it might not otherwise be conclusive in such respects.[7]

6. *Construction of instrument.*]—The construction of a contract determined in an action between the parties, is conclusive on them in another action on subsequently accruing claims on the same clauses.[8] Where a former adjudication on the construction, even of a statute, is relied on, the party need not prove again the facts which led the court to give such construction to the statute.[9]

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[1] Wood v. Jackson, 8 Wend. 9, rev'g 3 Id. 27 (SEWARD); Lawrence v. Hunt, 10 Id. 81, 85 (s. p. NELSON, J.); Rosc. N. P. 205; modifying the rule of CH. J. DE GREY, in Duchess of Kingston's Case, 20 How. St. Tr. 538, s. c. 2 Sm. L. Cas. 609; Krekeler v. Ritter, 62 N. Y. 372; Wright v. Butler, 6 Wend. 284, 288; Jackson v. Lodge, 36 Cal. 28. *Contra*, Bigelow on Est. 520, who is of opinion that it ought to be conclusive whenever it is admissible. Reasonable certainty is all that is required in the allegation. Gould v. Evansville, &c. R. R. Co. 91 U. S. (1 Otto), 526, 531.

[2] Cromwell v. County of Sac, 94 U. S. (4 Otto), 351, 352.

[3] Thus, a judgment defeating an action on one of two instruments given as one transaction, upon the ground of want of authority, or of fraud, or discharge, common to both, is a bar to an action between the same parties, upon the other instrument. Aurora City v. West, 7 Wall. 82, 96; Bouchaud v. Dias, 3 Den. 243; Gardner v. Buckbee, 3 Cow. 120.

[4] Cromwell v. County of Sac, 94 U. S. (4 Otto), 351, 353; Davis v. Brown, Id. 423.

[5] Id.; Id.

[6] Walker v. Chase, 53 Me. 258. Compare Russell v. Place, 94 U. S. (4 Otto), 606.

[7] United Society of Shakers v. Underwood, 11 Bush. 265, s. c. 21 Am. R. 214, 219.

[8] Tioga R. R. Co. v. Blossburg, &c. R. R. Co. 20 Wall. 137, 143, and cases cited.

[9] Wood v. Mayor, &c. of N. Y. 73 N. Y. 556.

7. *Courts and tribunals.*]—The rule that a former adjudication is an estoppel, is applied not only to the adjudications of domestic courts, inferior[1] or superior, but, with due qualification as to jurisdictional questions, to the adjudications of competent tribunals in foreign countries, to sentences of courts of admiralty, to those of ecclesiastical tribunals, and, in short, of every court which has proper cognizance of the subject-matter,[2] if the adjudication is conclusive by the law of the foreign jurisdiction; and in a qualified degree, to decisions of other bodies than those which are strictly judicial.[3]

It is a general rule that where a particular authority is confided to a public officer to be exercised by him in his discretion, upon an examination of facts, of which he is made the appropriate judge, his decision upon these facts is, in the absence of any controlling provisions, absolutely conclusive as to the existence of those facts.[4]

An award is in the nature of a former adjudication under these rules.[5]

8. *Exclusive jurisdiction.*]—An adjudication by a court of exclusive jurisdiction is necessarily conclusive on all other courts, no matter in what controversy adduced,[6] subject however to impeachment for fraud or want of jurisdiction. When adduced in the same court, it only binds the subject-matter as between parties and privies.[7]

9. *Parties.*]—The term "parties," in these rules, includes not only the actual parties to the particular litigation but also all persons who claim under them as privies,[8] and all who have a direct

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[1] Routledge v. Hislop, 2 Ellis & E. 549.

[2] Hopkins v. Lee, 6 Wheat. 109; Smith v. Kernochan, 7 How. (U. S.) 198.

[3] See Big. on Est. 14. As to the conclusive effect of decisions of church judicatories, see Connitt v. Reformed Protestant Dutch Church of New Prospect, 54 N. Y. 551; 4 Lans. 339, and cas. cit.

[4] Allen v. Blunt, 3 Story, 745. For the discussion of this principle, and the distinction bteween revising the decision of the officer, and applying to equity for the benefit of it for another than the one in whose favor it was made, see Martin v. Mott, 12 Wheat. 19; Gould v. Hammond, 1 McAll. 235; Lindsey v. Hawes, 2 Black. 554, and cases cited; State of Minnesota v. Bachelder, 1 Wall. 109; Stark v. Starrs, 6 Id. 402; Silver v. Ladd, 7 Id. 219; U. S. v. Wright, 11 Id. 648; Johnson v. Towsley, 13 Id. 72.

[5] Brazill v. Isham, 12 N. Y. 9, affi'g 1 E. D. Smith, 437. See Chapter XXIV.

[6] Gelston v. Hoyt, 3 Wheat. 246; Case of Broderick's Will, 21 Wall. 503.

[7] The Mary, 9 Cranch, 126.

[8] Big. on Est. 75. For instance, a different person succeeding to the same trust. Verplanck v. Van Buren, 76 N. Y. 247, 256, rev'g 11 Hun, 328; but not the same person appearing individually in the earlier case, and as trustee in the later. Rathbone v. Hooney, 58 N. Y. 463; and see p. 159 of this vol. Assignor and assignee of a chose in action. Chew v. Brumagen, 13 Wall. 497. Compare p. 11, &c. of this vol. Persons purchasing *pendente lite.* Craig v. Warp, 1 Abb. Ct. App. Dec. 454. A corporation in which a previous corporation had become merged. Phila. &c. R. R. Co. v. Howard, 13 How. (U. S.) 307. Creditors may be concluded by a judgment, to which an assignee in trust for them was a party. Kerrison v. Stewart, 93 U. S. (3

interest in the subject-matter of the suit, or have a right to make a defense, or control the proceedings,[1] to adduce and cross-examine witnesses, and to appeal;[2] or who have assumed to do so.[3]

The rule does not make an adjudication evidence against a stranger,[4] nor against new parties not in privity, nor in favor of new parties not in privity, against whom the judgment had it been adverse would not have been available.[5]

If the parties are not nominally the same, extrinsic evidence is competent[6] and necessary[7] to show the identity.

The fact that there were other parties in the former suit who are also estopped, does not render the former decision any less conclusive against him who is a party to both.[8]

10. *Joint defendants.*]—Where the contract is joint and not joint and several, a judgment against one debtor merges the entire cause of action, even without proof of satisfaction, and bars an action.[9] Otherwise, under the special statutes as to joint debtors.[10] In actions for wrongs whether to person or property, a previous recovery against a joint wrong-doer, on account of the same wrong, is not a bar unless satisfaction is proved.[11]

11. *Form of the adjudication.*]—The rule is applicable to adjudications at law or in equity,[12] unless the adjudication was upon the ground that the party had mistaken his remedy. It extends not only to ordinary judgments at law, and decrees in equity,[13] but also to a judgment by default;[14] and to a judgment by confession,

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Otto), 155, 160. Persons not parties to proceedings in a court of equity for distribution of a common fund among the claimants, are not concluded by the decree (if notice was not given and they were not guilty of neglect), from proceeding on their own behalf, if they intervene before distribution. Matter of Howard, 9 Wall. 175, 186, and cas. cit. Compare Kerr v. Blodgett, 48 N. Y. 62; 16 Abb. Pr. 137, s. c. 25 How. Pr. 303.

[1] Bates v. Stanton, 1 Duer, 79.

[2] 1 Greenl. Ev. § 535.

[3] Big on Est. 47.

[4] Hurst v. McNeil, 1 Wash. C. Ct. 70; Matthews v. Menedger, 2 McLean, 145; Booth v. Powers, 56 N. Y. 22, rev'g Flint v. Craig, 59 Barb. 319. "In truth there is no possible ground on which a reported case can be made evidence of the facts stated therein, against a stranger." Gridley, J., Seymour v. Marvin, 11 Barb. 80, 86; but see page 827, note.

[5] Baring v. Fanning, 1 Paine, 549.

[6] Stevelie v. Read, 2 Wash. C. Ct. 274; Evans v. Patterson, 4 Wall. 224, 231.

[7] Greely v. Smith, 3 Woodb. & M. 236.

[8] Dows v. McMichael, 6 Paige, 139; Thompson v. Roberts, 24 How. (U. S.) 233.

[9] Mason v. Eldred, 6 Wall. 231, 238, reviewing cases.

[10] Id.

[11] Lovejoy v. Murray, 3 Wall. 1, citing the conflicting cases. The contrary is held in Virginia and Rhode Island.

[12] Bank of U. S. v. Beverly, 17 Pet. 127.

[13] Smith v. Kernochen, 7 How. (U. S.) 198. As to interlocutory decree, compare Rumford Chem. Works v. Hecker, 10 Pat. Off. Gaz. 289; Stovall v. Banks, 10 Wall. 583, 587.

[14] Dickson v. Wilkinson, 3 How. (U. S.) 57.

on facts appearing on the record,[1] and to adjudications on adverse rights as between co-defendants.[2]

A *nonsuit* at law,[3] or what is equivalent, a dismissal of complaint in an action of a legal nature under the new procedure, for reasons which would be cause of nonsuit at common law,[4] is not a bar, unless it affirmatively appears that it was granted upon a determination of the merits of the same controversy.[5] A *demurrer*, followed by judgment on the merits against the demurrant, is a bar;[6] but the bar rests rather on the judgment than on the demurrer. A *report* of a referee or similar finding in a court having power to arrest judgment and grant a new trial,[7] or a *verdict*, without judgment thereon,[8] or on which the judgment has been reversed,[9] is not an adjudication and is not admissible in a subsequent action.

An *order*, made on motion, is not conclusive in the same sense as a judgment; and to prove it the motion papers and evidence should be produced.[10] A *reversal*, remanding the cause for new trial, is not a bar unless it directly affirms or denies some point in issue.[11]

12. *Record to be produced.*]—The record, or a copy properly authenticated,[12] must be produced,[13] or accounted for, so as to let in secondary evidence. If the record be lost, the regularity of the proceedings and the sufficiency of the evidence given on the former trial are presumed.[14] Unless a foundation is laid for second-

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[1] Big. on Est. 18, 20.

[2] Corcoran v. Chesapeake, &c. Canal Co. 94 U. S. (4 Otto), 741; Craig v. Ward, 1 Abb. Ct. App. Dec. 454.

[3] Holton v. Gleason, 26 N. H. (6 Fost.) 501; Greely v. Smith, 1 Woodb. & M. 181; 3 Id. 236; Homer v. Brown, 16 How. (U. S.) 354; Mich. Ins. Bk. v. Eldred, 6 Biss. 370.

[4] Wheeler v. Ruckman, 51 N. Y. 391. And by N. Y. Code Civ. Pro. § 1209, a judgment of dismissal in any action thereafter commenced, does not bar a new action for the same cause of action, unless it expressly declares, or it appears by the judgment-roll, that it is rendered upon the merits. Whether an absolute dismissal of a bill in equity is a bar, compare Wheeler v. Ruckman (above); Durant v. Essex Co. 7 Wall. 107, 109; United States v. Lane, 8 Id. 185, 201; Allen v. Blunt, 5 Woodb. & M. 121; Lessee of Wright v. Deklyne, 1 Pet. C. Ct. 199.

[5] Smith v. Ferris, 1 Daly, 18. The general entry of the dismissal of a suit by agreement is evidence of an intention not to abandon the claim on which it is founded, but to preserve the right to bring a new suit thereon, if it becomes necessary. Haldeman v. United States, 91 U. S. (1 Otto), 584, 586.

[6] Aurora City v. West, 7 Wall. 82, 98; Clearwater v. Meredith, 1 Wall. 25, 43; Gould v. Evansville, &c. R. R. Co. 91 U. S. (1 Otto), 526, 533.

[7] Leonard v. Barker, 5 Den. 220.

[8] Reed v. Proprietors of Locks, 8 How. (U. S.) 274, 291; Allen v. Blunt, 3 Story C. Ct. 742, 746.

[9] Smith v. McCool, 16 Wall. 560.

[10] Alkus v. Rodh, 4 Daly, 397.

[11] Harvey v. Richards, 2 Gall. 216; Aurora City v. West, 7 Wall. 82, 106.

[12] See page 357 of this vol.

[13] Davisson v. Gardner, 10 N. J. L. (5 Halst. 289); Thelluson v. Sheldon, 2 New R. 228; Mackay v. Easton, 19 Wall. 619, 632. Failure to produce or account for it is a circumstance construed against the party. Clark v. Oakley, 4 Ark. 236.

[14] Trepagnier v. Butler, 12 Mart. (La.) 534. See the rules on this subject more fully stated in Chapter XIX.

ary evidence, oral evidence is not competent to show the contents of parts of the record not produced.[1] The reported decision of the court is not primary evidence of the adjudication, though it can be referred to as an exposition of the law.[2] The record, or a copy, is not rendered incompetent by the fact that the record was not made up until after the commencement of the present action.[3]

13. *What questions were determined by it.*]—The burden is on the party adducing the former adjudication, to show that the subject of the present suit was directly in issue in the former one,[4] and that the former decision necessarily involved a determination of the rights of the parties in respect to the question.[5] The fact that the writs or forms of action were different is not decisive, but the causes of action are regarded as the same, if the same evidence would support both.[6] Identity in the description of the cause of action stated in the two cases, with the fact that the names of parties and amount claimed are the same, is enough to throw on the other party the burden of showing that the causes of action were not the same.[7]

The presumption, in the absence of evidence to the contrary, is, that the decision was upon the merits.[8] If the record shows that the verdict or other adjudication could not have been had without deciding the particular matter now questioned, it will be considered as having finally determined it.[9] A record presenting fairly two points, on either of which the decision might turn, is conclusive on both, if the court fully considered and determined both, and the decision might as well have been put upon one as the other.[10] Where the parties and the cause of action are the same, the *prima facie* presumption is, that the questions presented for decision were the same, unless it appears that the merits of the controversy were not involved in the issue.[11] If the rec-

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[1] Lessee of James v. Stookey, 1 Wash. C. Ct. 330; Davisson v. Gardner, 10 N. J. L. (5 Halst.) 289. Where a bill, answer and decree are put in evidence to prove a fact which appears on the face of those documents to have been in issue, the party producing them is not bound also to put in the depositions as part of his own case. Rosc. N. P. 129, citing Laybourn v. Crisp, 4 M. & W. 320.

[2] Mackay v. Easton, 19 Wall. 619, 632.

[3] Krekeler v. Ritter, 62 N. Y. 372; Rinchey v. Striker, 28 Id. 45, s. c. 26 How. Pr. 83.

[4] Lonsdale v. Brown, 4 Wash. C. Ct. 86.

[5] Id.; Lawrence v. Hunt, 10 Wend. 81.

[6] Hitchin v. Campbell, 2 Blacks. 827; Kitchen v. Campbell, 3 Wils. 304.

[7] Lonsdale v. Brown (above); Agate v. Richards, 5 Bosw. 456.

[8] Stearns v. Stearns, 32 Vt. 678.

[9] Packet Co. v. Sickles, 5 Wall. 593.

[10] Hawes v. Contra Costa Water Co. 5 Sawy. 287. Where a bill *in equity* seeks to adjudicate the entire right of the parties before the court, the decree may be deemed conclusive, not only against grounds of claim which were set forth in the bill as false and pretended, but also against all other grounds. *In re* Chiles, 22 Wall. 157, 166; and see Aurora City v. West, 7 Id. 82.

[11] Gould v. Evansville, &c. R. R. Co. 91 U. S. (1 Otto), 526, 532.

ord produced does not disclose what was at issue and determined, extrinsic evidence is necessary.[1]

14. *Oral evidence to explain record.*]—For the purpose of showing what was determined, oral evidence that a question not involved in the pleadings was litigated, is not competent,[2] except in case of a justice's judgment.[3] Oral evidence, not inconsistent with the record, is admissible to show what was litigated and the ground of the decision,[4]—for instance, to show the precise day of adjudication;[5] that the present cause of action had not accrued when the former judgment was rendered;[6] to connect a bill of particulars with the record;[7] to show the evidence given on the issue;[8] that the party supported his allegation by estoppel;[9] and that the finding or verdict was upon one rather than another of several issues.[10] And evidence that the judgment was upon a written instrument may be given without producing the instrument.[11]

If the record is silent as to whether the causes of action are the same, extrinsic evidence as to the ground of the verdict is competent.[12] But the extrinsic evidence should be confined to the points in controversy on the former trial, to the testimony given by the parties, and to the questions submitted to the jury for their consideration; and then the record furnishes the only proper proof of the verdict.[13] Evidence of the secret deliberations of the jury, or the grounds of their proceedings in making up their verdict, is not competent.[14] The reasons given by the court upon the delivery of their judgment are competent to show the ground of it.[15] Oral evidence is not competent to contradict the record,[16] nor to show mistake in it.[17] Where the actual grounds of the

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[1] Davis v. Brown, 94 U. S. (4 Otto), 423.

[2] Campbell v. Butts, 3 N. Y. 173; Davis v. Tallcot, 12 N. Y. 184, rev'g 14 Barb. 611.

[3] Id.; Doty v. Brown, 4 N. Y. 71.

[4] Packet Co. v. Sickles, 5 Wall. 592; Miles v. Caldwell, 2 Id. 43; White v. Madison, 26 N. Y. 117, s. c. 26 How. Pr. 481; Kerr v. Hays, 35 N. Y. 331; Lawrence v. Cabot, 41 Super. Ct. (J. & S.) 122.

[5] Whitaker v. Wisbey, 12 C. B. 52; 12 L. J. C. P. 116. And a variance from the day stated in the record, if that be fixed by legal fiction, is not deemed a contradiction of the record. Id.

[6] Marcellus v. Countryman, 65 Barb. 201.

[7] Marsh v. Pier, 4 Rawle, 273.

[8] State v. Thompson, 19 Iowa, 299. And a juror's testimony is competent.

Whether the fact that the party offered no evidence at all, affects the conclusive character of the adjudication, compare Colwell v. Bleakley, 1 Abb. Ct. App. Dec. 400; Ramsey v. Herndon, 1 McLean, 450.

[9] Rider v. Union Ind. Rub. Co. 4 Bosw. 169.

[10] Rake v. Pope, 7 Ala. N. S. 161; Washington, &c. Steam P. Co. v. Sickles, 24 How. (U. S.) 333.

[11] Artcher v. McDuffie, 5 Barb. 147.

[12] Perkins v. Walker, 19 Vt. 144; Big. on Est. 84.

[13] Packet Co. v. Sickles, 5 Wall. 593, and cases cited (Nelson, J.).

[14] Id. Compare Marcellus v. Countryman, 65 Barb. 201.

[15] Birckhead v. Brown, 5 Sandf. 134.

[16] Brintnall v. Foster, 7 Wend. 103. Nor even a justice's docket. Id.

[17] McPherson v. Cunliff, 11 Serg. & R. 422; Reed v. Jackson, 1 East, 355.

judgment can be clearly discovered from the judgment itself, it is conclusive respecting the grounds, as well as respecting the actual matter decided.[1]

15. *Set-off.*]—A claim which might have been interposed as a set-off, but was not, is not barred,[2] unless it is so involved in the facts out of which the former action arose, that to submit to recovery on those facts, without interposing the set-off, amounts to an admission that there was no ground for such a set-off.[3]

Where it appears that the plaintiff presented, as a set-off in the former action, the claim now sued on and that it was disallowed, the burden is on him to show affirmatively that it could not legally have been allowed, to relieve himself from the effect of the former decision as a bar.[4] If the record shows that a set-off was interposed, parol evidence that it was withdrawn is not competent.[5]

16. Rebuttal: *Want of jurisdiction.*]—Want of jurisdiction is fatal.[6]

17. —*fraud.*]—A plaintiff against whom a former judgment is interposed as a defense, not as a counterclaim, may without replying prove that it was a fictitious suit.[7] So he may prove fraud in the recovery;[8] but for this purpose he must prove actual fraud known and intended by the defendant, and unknown at the time to the plaintiff.[9]

18. — *appeal: reversal.*]—Pendency of appeal does not necessarily impair the effect of the adjudication.[10] Reversal may be proved, though not alleged,[11] unless reply was required in the ordinary course of pleading.[12]

19. — *new title.*]—Plaintiff may, notwithstanding the adjudication, set up a new title acquired since then.[13]

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[1] Alison's Case, L. R. 9 Ch. App. 26; Sturtevant v. Randall, 53 Me. 149; Walker v. Chase, Id. 258.

[2] Moak's Van Santv. Pl. 636.

[3] Thus, suffering judgment at suit of a physician for the value of services is a bar to a subsequent action against him for malpractice in those services. Blair v. Bartlett, 75 N. Y. 150, and cases cited; questioned in 2 Whart. Ev. 790, and Big. on Est. 104, 108. Compare Davis v. Hedges, L. R. 6 Q. B. 687; De Wolf v. Crandall, 34 Super. Ct. (J. & S.) 14; Davenport v. Hubbard, 46 Vt. 200, s. c. 14 Am. R. 620.

[4] McGuinty v. Herrick, 5 Wend. 240; Hatch v. Benton, 6 Barb. 28.

[5] Davis v. Tallcott, 12 N. Y. 184. *Contra*, see Burnham v. Webster, 1 Woodb. & M. 172.

[6] Gage v. Hill, 43 Barb. 44. For the rules of proof, see Chap. XIX.

[7] See Gaines v. Relf, 12 How. (U. S.) 472, 537.

[8] Mandeville v. Reynolds, 68 N. Y. 528, 543, affi'g 5 Hun, 338; Verplanck v. Van Buren, 76 N. Y. 247, 258, rev'g 11 Hun, 328. *Contra*, Krekeler v. Ritter, 62 N. Y. 372, 375.

[9] Verplanck v. Van Buren (above).

[10] Paine v. Schenectady Ins. Co. 11 R. I. 411; and see p. 549 of this vol.

[11] Briggs v. Bowen, 60 N. Y. 454.

[12] Carpenter v. Goodwin, 4 Daly, 89.

[13] Barrows v. Kindred, 4 Wall. 402; Noonan v. Bradley, 9 Id. 394; Merryman v. Bourne, Id. 599.

CHAPTER LXIII.

COUNTERCLAIMS.

1. Pleading. 2. Mode of proof; admission.

1. *Pleading.*]—Facts proven do not avail as a counterclaim, unless pleaded.[1] In order to bring a counterclaim within the rule that its allegations are admitted by a failure to reply, it should be alleged in such form as to give plaintiff notice that defendant asks an affirmative judgment against him.[2] That which the answer only calls a defense is not admitted by failure to reply.[3] When the facts alleged in an answer might constitute a ground of counterclaim, but are such as always constituted a flat bar at law to the plaintiff's right to recover by showing, if true, that he never had any cause of action, they should be deemed to be set up as a defense merely, unless the answer expressly shows that they are set up by way of counterclaim.[4] But neither the word "counterclaim," nor any particular form is indispensable.[5] If the facts constituting a counterclaim are alleged, they may be proved; and if proved, the pleader's use of the term "recoupment," or "set-off" does not prevent the court from giving affirmative judgment.[6]

2. *Mode of proof; admission.*]—The mode of proof of the cause of action is the same as if stated in a complaint; and the

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[1] Star Fire Ins. Co. v. Palmer, 41 Super. Ct. (J. & S.) 267, 271.

[2] Bates v. Rosekrans, 87 N. Y. 409, s. c. 4 Abb. Pr. N. S. 276; N. Y. Code Civ. Pro. § 509.

[3] Bates v. Rosekrans (above); Simmons v. Kayser, 43 Super. Ct. (J. & S.) 131, 137.

[4] Equit. L. Ass. Soc. v. Cuyler, 12 Hun, 247, 251, affi'd in 75 N. Y. 511. But facts showing that the equities are with defendant will avail to defeat a recovery, though not pleaded as a counterclaim. Kingston Bank v. Eltinge, 66 N. Y. 625, affi'g 5 Hun, 653; Day v. Hammond, 57 N. Y. 479, 484. In an answer not purporting to be a counterclaim, demand for cancellation of the instrument sued on is only a defense, not a counterclaim. Eq. Life Ass. Soc. v. Cuyler, 75 N. Y. 511, affi'g 12 Hun, 247, 251; Barthet v. Elias, 2 Abb. New Cas. 364. But a claim to have further relief from another instrument is a counterclaim, and the allegations are admitted by failure to reply. Bernheimer v. Willis, 11 Hun, 16.

[5] Bates v. Rosekrans (above).

[6] Wilder v. Boynton, 63 Barb. 547, 549. But see Shute v. Hamilton, 3 Daly, 462, 475; Am. Dock, &c. Co. v. Staley, 40 Super. Ct. (J. & S.) 539. And to entitle defendant to rely on a failure of consideration or a recoupment of damages, it is enough that the facts are alleged, without stating which result he claims. Springer v. Dwyer, 50 N. Y. 19, rev'g 58 Barb. 189; Kelly v. Bernheimer, 3 Supm. Ct. (T. & C.) 140, s. c. 47 How. Pr. 62. Compare Dudley v. Scranton, 57 N. Y. 424, 427.

same rules as to allegation[1] and proof[2] of damages apply. The facts alleged, if they constitute a counterclaim as distinguished from a defense,[3] and are properly alleged, are admitted by a failure to reply,[4] if the benefit of this admission is claimed at the trial.[5] But it is only the facts alleged, not the conclusions of law, that are admitted.[6] Replying to a counterclaim is not a waiver of the objection that the claim is not the proper subject of counterclaim under the statute.[7]

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[1] Parsons v. Sutton, 66 N. Y. 92, 97, affi'g 39 Super. Ct. (J. & S.) 544.
[2] Isham v. Davidson, 52 N. Y. 237.
[3] Rogers v. King, 66 Barb. 495.
[4] Isham v. Davidson, 52 N. Y. 237, 241.
[5] Jordan v. Nat. Shoe & L. Bank, 74 N. Y. 467, 471.
[6] Id.
[7] Smith v. Hall, 67 N. Y. 48, 51.

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